

Age Concern England  
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Kuratorium Deutsche Altershilfe

## Addressing Age Barriers

An international comparison of legislation  
against age discrimination  
in the field of goods, facilities and services



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## **Imprint**

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## **Foreword to Addressing Age Barriers: An international comparison of legislation against age discrimination in the field of goods, facilities and services**

Since the introduction of article 13 of the Treaty of Amsterdam (1997), work to combat discrimination within Europe has been high on the political agenda. This Treaty was revolutionary for those interested in the opportunities and challenges of an ageing society, as age was mentioned explicitly for the first time as a ground of discrimination on which the EU is entitled to take action.

Action at European level has so far been limited to the introduction in November 2000 of Directive 2000/78, which obliges Member States to introduce legislation against age discrimination in the field of employment. However, employment is not the only field in which people experience age limits that limit their opportunities to make an active contribution to their communities, to participate in social life and to consume the same goods and services as other members of the community.

The expert group on discrimination of AGE, the European Older People's Platform has been gathering examples of these exclusions for some years now, and their recent report Age Barriers: Older people's experience of discrimination in access to goods, facilities and services of November 2004 identifies a depressing collection of fields in which older people encounter age barriers, including in health care, in insurance and financial services, in travel and in a range of other areas.

AGE is committed to ending this unjustified discrimination which leads to personal frustration and exclusion and which has wider social and economic costs. In some Member States signs that culture is changing and Government's are responding are beginning to emerge. In Belgium and Hungary, for example, the transposition of Directive 2000/78 has been used to legislate on age discrimination beyond employment and one Member State, Ireland, had already legislated on this topic before the Directive.

At the European level however, progress on this issue has yet to be made. In the recent Green Paper, the European Commission limited its ambition on age to the monitoring of the Employment Directive to seek to ensure that it is fully implemented in all Member States. They noted the concerns of civil society in the area of age discrimination beyond employment, but did not propose any steps to address it.

However, the issue is pressing. We live on a continent with an ageing society where older people are the only growing part of our population. They are increasingly active, diverse and powerful and as our population ages they will become more numerous. It is unjust that people face barriers to their active participation in society, just because of their age.

Beyond the issue of justice for individuals, it will become increasingly important for the economic and social development of Europe that these barriers are removed.

AGE and its members want to ensure that when European action happens – for it surely must – then it is based on a clear understanding of the issues and learns from the experience of those who have already understood the importance of age equality. This issue has already been addressed in states beyond the EU.

This report has been published to review the legislation currently existing in five countries – three outside Europe, the USA, Canada and Australia, and two within Europe – Ireland and Belgium. It highlights the context to the legislation, the scope and style of legislating and the effectiveness and results. The report shows that action is possible and that it can have a positive effect. It also highlights problems to avoid and issues to address.

It has been published by four organisations who are active members of AGE, to support the work of the Platform. It presents a narrative about the legislation in each of the five countries, looking at context, highlighting issues which are common to all of the laws, highlighting areas of difference in approach and looking at some of the early results. It also presents the five laws in a matrix form to enable easy comparison.

We would like to offer a word of thanks to those who have researched and written the report: Anouk Mulder managed the project for the partners and worked with her colleague Esther Verwijs of the LBL, expertise centre on age and society in the Netherlands to prepare the comparative matrices. Rachel Crasnow, Schona Jolly and Claire McCann of Cloisters Chambers in the UK researched and prepared the narrative section of the report.

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## Participating Organisations

This report has been commissioned and published by four organisations.

**AeldreSagen (DaneAge):** DaneAge Association is a national membership organisation founded in 1986. The association now has 470.000 members (out of a target population of approximately 1 million people in Denmark) organised in 16 regional committees and 211 local committees. One of our main objectives is to act on behalf of older people in relation to central and local government and other decision makers who influence older people's quality of life.

[www.aeldresagen.dk](http://www.aeldresagen.dk)

**Age Concern England (ACE):** ACE is the largest charitable federation working with older people and on the implications of ageing in the UK. It is a multi-functional agency which involves itself in policy, research, training and service delivery functions.

[www.ageconcern.org.uk](http://www.ageconcern.org.uk)

**Dutch Expertise Centre on Age and Society (LBL):** The LBL is an independent foundation that looks critically at the role of age in society. The LBL aims to raise awareness, foster opinions, advocate and influence decision-making in order to combat age discrimination. In this way the centre contributes to changing the way in which society thinks about age and life course-issues. Further information is available in English on its website.

[www.leeftijd.nl](http://www.leeftijd.nl)

**Kuratorium Deutsche Altershilfe (KDA):** The KDA has been developing and promoting up-to-date models for aid to older people since its inception in 1962, and has been contributing to their implementation in practice as well. It informs the public as to the situation of older people and in particular offers proposals on ways to improve the situation of those older people who as a result of ailments are challenged in conducting their everyday lives.

[www.kda.de](http://www.kda.de)

## List of used abbreviations

ADA	Age Discrimination Act (USA)
ADEA	Age Discrimination in Employment Act (USA)
ADFC	Aid to Families with Dependent Children (USA)
The Centre	Centre for Equal Opportunities and Opposition to Racism (Belgium)
CETA	Comprehensive Employment and Training Act (USA)
The Code	Ontario Human Rights Code 1990
DDA	Disability Discrimination Act (Australia)
DKV	Insurance Company (Belgium)
EA 2004	Equal Status Act 2004 (Ireland)
EC	European Commission
ECHR	European Convention on Human Rights
ESA 2000	Equal Status Act 2000 (Ireland)
EEA 1998	Employment Equality Act 1998 (Ireland)
FMCS	Federal Mediation and Conciliation Service (USA)
HEW	U.S. Department of Health, Education and Welfare (USA)
HHS	U.S. Department of Health and Human Services
HREOC	Human Rights and Equal Opportunity Commission (Australia)
NESF	National Economic and Social Forum (Ireland)
NGO	Non Governmental Organisation
OAA	Older Americans Act (USA)
OCR	Office for Civil Rights (USA)
RDA	Race Discrimination Act (Australia)
SDA	Sex Discrimination Act (Australia)
SSA	Social Security Act (USA)
WIN	Federal Work Incentive Programme (USA)



## 0 Summary

### 0.1 Introduction

The members of the AGE Platform are concerned about the way age limits in goods, facilities and services affect the lives of older people in Europe. Accordingly, we were asked to research legislation in five jurisdictions where age discrimination in these fields had been made unlawful. We were invited to consider the scope and context of such legislation, and to examine its content and impact.

Our findings are presented in chronological order, beginning with Australia, Belgium, Ireland, Ontario and finally the United States of America, which has the oldest law relating to age discrimination in this field.

Our findings were varied and interesting, both in respect of why the legislation came into force in the various jurisdictions, and indeed, in respect of the scope of the legislation. Readers will find the detail of the differences in the body of the actual paper. However, we have set out here some of the key areas which may be of interest to those considering action within Europe.

### 0.2 Context of the Legislation

It is hard to find a similar underlying rationale for introducing age discrimination legislation in the competing jurisdictions. It is probably fair to say that in most cases, concern about age discrimination in the field of goods and services arose following on from debate about age discrimination in the field of employment. The latter has seen the majority of cases, whilst age discrimination in the domain of goods and services has remained far less prevalent in terms of complaints and lobbying.

In **Australia**, the Australian Age Discrimination Act came into force on the 23rd June 2004. The Australian Government says Australia is the first country to propose and pass stand-alone age discrimination legislation that will cover, among other things, access to goods and services and education, as well as employment. It also claims that the present legislative provisions governing age discrimination are broader than those enshrined in the USA, New Zealand, Canada and Ireland. The proposal to introduce age discrimination legislation into Australia at a federal level has been on the table for many years. In 1999, Government identified age discrimination as a major barrier to the employment of mature and older workers and renewed its commitment to age discrimination legislation during the 2001 election. In May 2000 the Human Rights and Equality Commission (hereafter: HREOC) produced a report called “Age Matters: a report on age discrimina-

tion". The Government published a paper called "Information Paper Containing Proposals for Commonwealth Age Discrimination Legislation" in 2002 to which HREOC responded in December 2002.

In **Ireland**, age discrimination was first legislated under the employment provisions. It was expanded in the Equal Status Act 2000 to cover goods and services, where general provision was made for the protection of nine specific grounds, including age. As with the laws in both Belgium and Ontario, age inherently formed part of a wider movement towards a fairer, more inclusive society. In June 2002, the Equality Authority published a report, *Implementing Equality for Older People in Ireland. Age & Opportunity* and other ageing organisations were represented on the advisory committee to the report. This report examined and exposed the issue of ageism and put forward an "equality agenda" which recommended certain action that should be taken. The Authority specifically rejected the idea of a single piece of legislation in respect of age discrimination, since it considered that single issue legislation could lead to the marginalisation of certain groups. To some extent, however, the provisions in respect of age formed part of a wider arena to bring a large number of characteristics into the discrimination arena.

In both **Belgium** and **Ontario**, it is fair to say that age discrimination in goods and services formed part of a broader anti-discrimination drive, contained within a human rights context. Indeed, in Ontario, the provisions dealing with age discrimination (both for employment and goods and services) are found in the body of the Ontario Human Rights Code. Similarly, in Belgium, there has been broad discussion of a general anti-discrimination law, seeking to protect society of all ages, colours, gender and creed. The latter law has been framed in deliberately loose terminology, such that a recent challenge to the law has been brought by the political party Vlaams Blok, contesting the inclusion of age as well as the definition of indirect discrimination; this has been to some extent successful, although in general it can be considered as a defeat for the party since what they really sought was an annulment of the Act in total. Certain clauses have been overridden; others have been defined more broadly, but for the most part, it has been underlined that no form of discrimination, on any ground, can be tolerated in Belgium, without objective and reasonable justification. In neither jurisdiction was there any particular lobby specifically on behalf of age. It simply formed one part of a broader goal towards an inclusive society. In Belgium, the European Directives on Equal Treatment (EU Directive 2000/78/EC) (including specific inclusion of age and disability) formed an impetus for the movement to gather force, although Belgium has applied to delay transposing the provisions of the Directive until 2006. The movement for the anti-discrimination Act, however, was begun in 1999 and forced through by the largely French-speaking socialist members of the coalition government, then in power at the turn of the century, after almost 3 ½ years of consultation. Most of that consultation did not reflect on age as an individual issue. The EC Directive added force to the arguments that age and disability should be legislated upon as part of an anti-discrimination drive. However, age discrimi-

nation became unlawful generally as of 27th March 2003. As yet, the Centre for Equal Treatment has not set out specific strategies to combat age discrimination within society. Their role, for now, at least appears to be more limited to conciliation and information.

By contrast, however, the Ontario Human Rights Commission has been researching and creating both dialogue and policy in respect of the rights of senior Ontarian citizens. It has created a number of policy papers specifically setting out the needs of that segment of society, and been at pains to point out that age discrimination is embedded in culture and treated as a necessary and justified function in society, despite the fact that it affects so many people. The growing ageing population of Ontario, and indeed Canada as a whole, has been a particular concern and has spearheaded to drive towards inclusive policies and interpretations of the law.

The USA legislation in respect of age discrimination is the oldest, but perhaps the least expansive in scope. The Age Discrimination Act of 1975 (“ADA”) prohibits discrimination on the basis of age in programmes or activities receiving Federal financial assistance. It also contains certain exemptions that permit, under limited circumstances, use of age distinctions, or factors other than age that might have a disproportionate effect on the basis of age. The ADA applies to persons of all ages. Two sets of Regulations have been issued in connection with the ADA: Firstly, the General Age Discrimination Regulations, whose purpose is to state general, government-wide rules for the implementation of the ADA and to guide each agency in the preparation of agency-specific age discrimination regulations; and secondly, the Health and Human Services Age Discrimination Regulations (hereafter: HHS), whose purpose is to set out HHS’s policies and procedures under the ADA and under the General Age Discrimination Regulations. These Regulations also implement the General Age Discrimination Regulations. The HHS Age Discrimination Regulations are designed to guide the actions of recipients of financial assistance from the U.S. Department of Health and Human Services and incorporate the basic standards for determining the nature of age discrimination that were set forth in the General Regulations. They discuss the responsibilities of HHS recipients and the investigations, conciliation and enforcement procedures HHS will use to ensure compliance with the ADA.

### **0.3 Scope of the Laws**

#### **0.3.1 Australia**

Section 16 of the Act provides that if there is more than one reason for an act complained of, it is taken to be on grounds of age only if age is the dominant reason for the doing of the act. This “dominant purpose” test departs from other Federal Australian discrimination legislation (eg race, sex and disability) where one only need show that the ground for

the act in question is prohibited. There is no concept of age discrimination to include relatives and associates.

Goods and services are defined in a number of ways: Section 27 prohibits age discrimination in relation to access to premises. The definition of “premises” in section 5 includes buildings, aircraft, vehicles, vessels, places or parts of premises. Thus the premises need not be stationary and public places are covered as well as private. Section 28 covers discrimination by a provider of goods, services and facilities. Services is defined in section 5 to include banking, insurance, superannuation, grants, loans, credit or finance, entertainment, recreation or refreshment, transport, travel, telecommunications, services provided by a profession or trade, or services provided by a government, government authority or local government body. This is not an inclusive list but intended to indicate the broad range of services which are contained within the definition. Both direct and indirect discrimination are prohibited. The definition of indirect discrimination in section 15 includes a provision that the condition is not ‘reasonable in the circumstances’. The Bill and now the Act puts the onus of proof on the respondent to justify any indirect discrimination; this is described as logical as information concerning the reasonableness of the particular condition, requirement or practice would generally be in the possession of the respondent. It is unlawful to make a decision on the basis of a characteristic that is generally imputed or is generally ascertained to belong to those of a certain age. There is no specific offence of harassment.

Division 4 of the Act provides for a large number and range of exemptions. There are chiefly three kinds of exemptions: Firstly, clear-cut cases where certain acts are not unlawful (such as with reference to pensions and insurance); secondly, an inherent requirements defence – permitting age discrimination where a person is unable to carry out the inherent requirements of a particular employment or position (note these all come under Division 2 of the Act covering discrimination at work rather than in the goods and services field); thirdly, positive discrimination.

Some of the provisions within the Act are defined as being criminal in nature rather than simply illegal.

### **0.3.2 Belgium**

In Belgium, the Act pertaining to the foundation of a centre for equal opportunities and fight against racism forbids all direct and indirect discrimination on grounds of age in employment, goods and services and in the access to and participation in an economic, social, cultural or political activity accessible to the public. It also expressly prohibits harassment, instruction to discriminate and the absence of reasonable adjustments for people with disabilities. The right to bring cases is also extended to the Centre for Equal Opportunities and the Fight against Racism.

Belgium has adopted an open system for regulating direct and indirect age discrimination; in other words, both forms of discrimination are prohibited under the Act but can be justified objectively. Article 2(1) defines direct discrimination as occurring “if a difference in treatment that is not objectively or reasonably justified, is directly based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic”.

Article 2(2) defines indirect discrimination as occurring “when a seemingly neutral provision, measure or practice has harmful repercussions on persons for whom one of the grounds for discrimination set out in paragraph 2(1) applies, unless said provision, measure or practice is objectively and reasonably justified”. As with much of the rest of the Act, there is no detail setting out the permissible grounds of differential treatment beyond pleading an “objective and reasonable justification”. There is no specific definition of age nor of goods and services. In essence, the Belgian system requires interpretation by the Courts and scholars.

The loose definitions of the new law have attracted much criticism for this perceived lack of clarity, particularly from Insurers’ unions and organisations, as well as the political organisation Vlaams Blok. Since the Act has little definition in general, employers’ organisations have been particularly vocal in criticising the framework of the Act, and the fact that it was brought into force in one tranche, rather than a piecemeal approach which, they argued, would have allowed further time for debate and a fairer burden for society as a whole to bear. Unlike all the other jurisdictions examined, there are no specific exemptions to the prohibition except for a section permitting positive action to redress the balance.

### **0.3.3 Ireland**

Ireland’s laws in respect of equality have been legislated in a phased fashion. For the purposes of age discrimination in goods and services, the key Acts are the Equal Status Act 2000, and the Equal Status Act 2004, which set out a number of amendments to the 2000 law, and transposed the EC Directives into domestic law. The latter Act is particularly important in respect of age discrimination in the field of employment, but it also makes a number of changes in the relevant definitions, such as that for indirect discrimination. The EA 2004 also provides that claims which assert that discrimination has occurred on more than 1 of the nine protected grounds shall be investigated as a single case. There is no dominant purpose test. Therefore, discrimination can occur on any 1 or more of the nine protected grounds so long as the protected ground is the real or effective cause of the discrimination. In addition, the EA 2004 gives statutory basis to the new burden of proof provisions contained in the EU Directives. This burden of proof, in practice how-

ever, was applied both in claims under the EEA 1998 and under the ESA 2000 so the express statutory provision is unlikely to make much practical difference.

The ESA 2000 does not define “on grounds of age”. However, in a whole raft of legislation (from rules governing membership of state bodies, to jury service, driving licences and access to health insurance under the Health Insurance Act 1994), there are legally binding upper age limits which apply. The ESA 2000 cannot render such age limits unlawful because of the exemption by which all actions (or failures to act) which are discriminatory but which are done under statutory authority are permissible.

The definition of direct discrimination in the ESA 2000 encompasses less favourable treatment on the grounds of age where the complainant is perceived to be of a particular age (but, in fact, is not). This is because the definition of direct discrimination encompasses discrimination on any of the nine protected grounds, where the protected ground “exists at present”, “existed but no longer exists”, “may exist in the future” or “*which is imputed to the person concerned*”. Furthermore, the ESA 2000 encompasses discrimination by association. The original definition of indirect discrimination in the ESA 2000 was confusing and unhelpful. That definition has been amended by the EA 2004 to bring the definition of indirect discrimination into harmony with the employment provisions (in the EEA 1998) and to transpose the definition of indirect discrimination from the EU Framework Directive. Whilst, indirect discrimination is not referred to directly, it is clear that section 3(1)(c) defines indirect discrimination. The EA 2004 inserts a definition of “provision” into s.2 of the ESA 2000 (in connection with indirect discrimination claims) so that “provision” is defined to mean: “a term in a contract, or a requirement, criterion, practice, regime, policy or condition affecting a person”. There is a specific provision against harassment, subject to a reasonable steps defence.

There are a very large number of exemptions provided for by the ESA 2000, many of which are negative exemptions as opposed to positive exemptions. This was obtained as a result of successful lobbying on the part of concerned organisations.

The Act makes provision for both penal and civil sanction, including a provision that the court can order the cessation of any act of discrimination, even where it falls within the penal provisions.

### **0.3.4 Ontario (Canada)**

Age discrimination in Ontario is treated as a human rights matter, governed by the Ontario Human Rights Code 1990 (the “Code”). It was one of the first laws of its kind in Canada, and exists for the protection and promotion of equal opportunities and rights for everyone without discrimination in employment, housing, goods, services and facilities

(e.g. restaurants, shops, schools and hospitals), contracts and membership in trade and vocational associations (e.g. unions).

The Code currently prohibits age discrimination against those over 18 years of age (and over 16, in the case of housing under specific criterion). The exception to this is in employment, where those over age 64 are not protected against age discrimination. For the purposes of freedom from discrimination with respect to services, goods and facilities, parents or guardians can file a complaint on behalf of children under 18. There is no definition of goods, but a broad definition of services. Provision is made to combat both direct and indirect discrimination (called adverse effect discrimination), defined as where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member. This is subject to a reasonable and bona fide justification, which itself is subject to an undue hardship qualification. Harassment, including a so-called, poisoned environment, are defined and legislated upon, as is discrimination by association.

There are a range of exemptions, in particular in relation to positive action and specific programmes aimed at redressing disadvantage. Similarly, preferential treatment for those over 65 years and above is allowed. Special interest organisations, recreational clubs, benefit plans, restrictions for insurance contracts and tobacco and alcohol restrictions all fall within the exemptions listed.

Remedies are by way of complaint to the Ontario Human Rights Commission, who are able to pursue the matter to a Board of Inquiry/Human Rights Tribunal. There are a broad range of sanctions applicable, and a further definition which appears to criminalise certain offences, yet is described as falling outside penal law. This is very unclear.

### **0.3.5 United States of America**

The ADA can be said to have a limited effect in that (like other U.S. civil rights statutes) it applies only to programmes or activities in which there is an intermediary (recipient) standing between the Federal financial assistance and the ultimate beneficiary of that assistance. “Recipient” is defined in the General and HHS Regulations as “any State or its political sub-division, any public or private agency, institution, organisation, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary or the assistance”. The ADA, therefore, does not apply to programmes of direct assistance (such as the Social Security programme) in which Federal funds flow directly and unconditionally from the Federal government to the individual beneficiary of those funds.

The prohibited discrimination is across programmes and activities receiving Federal financial assistance, applying to anyone involved in a programme that is funded with Federal money, within both the private and the public sectors. The principle of non-discrimination is not neatly divided into direct discrimination (i.e., less favourable treatment on grounds of age) and indirect discrimination (i.e., a neutral policy which has a disproportionate impact on a particular age group). The prohibition against age discrimination does not include an absolute prohibition against separate treatment on the basis of age. As a general rule, separate or different treatment in relation to age which denies or limits services from, or participation in, a programme receiving financial assistance from HHS would be prohibited by the ADA and its Regulations. Separate or different treatment which does not deny or limit services is allowable. Separate or different treatment may be necessary for the “normal operation” of the programme or activity or for the achievement of the “statutory objective” of the programme/activity by the recipient and may, therefore, qualify as an exemption under the Regulations.

The ADA is rather limited in that it does not outlaw discrimination (on the grounds of age) in respect of public or private bodies who provide goods and services, except where that public or private body provides programmes or activities which are Federally-funded.

The scope of civil suits is limited considerably by the lengthy pre-process requirements of mediation: Complaints of age discrimination involving HHS recipients and beneficiaries may be filed by an individual, a class, or by a third party, within 180 days from the date of the alleged discriminatory act. This 180-day period may be extended if good cause is shown. Once the ADA complaint is filed, it is screened and transferred to the Federal Mediation and Conciliation Service (FMCS). Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint. Unless extended, the FMCS mediation process will last no more than 60 days from the date a complaint is filed with HHS. HHS will take no further action on a complaint that has been successfully mediated. However, HHS will investigate complaints that are unresolved by the FMCS through mediation, or when cases are reopened because the mediation agreement is violated.

A complainant may file a civil action (for injunctive relief, only) 180 days from the date the complaint was filed with HHS if no action has been taken, or 180 days from the date that HHS makes a determination in favour of the recipient, whichever comes first.



## **0.4 Impact / Effect**

### **0.4.1 Australia, Belgium & Ireland**

The 3 “new” laws are in Australia (2004), Belgium (2003) and Ireland (2000). In all 3 jurisdictions, there has been little case law and, therefore, the impact of the anti-discrimination legislation (on the grounds of age) is difficult, if not impossible to assess. Interestingly, as is clear from the conclusions on the scope of the age discrimination legislation (above), the laws in Australia, Ireland and Belgium are not wholly dissimilar. Particularly in relation to Ireland and Belgium, the lead (triggering the legislation) has been taken from the European Directives on non-discrimination in employment and vocational training. The least expansively defined and drafted legislation in these 3 jurisdictions is Belgium. All 3 jurisdictions have equality commissions (in Australia, the Human Rights and Equal Opportunities Commission; in Belgium, the Centre for Equal Opportunities and Opposition to Racism; and, in Ireland, the Equality Authority). All 3 “Commissions” are tasked with promoting equal opportunities and eliminating discrimination. Complaints can be made to the Commissions.

The “oldest” legislation in relation to these 3 jurisdictions is Ireland. In the case law under the Equal Status Act 2000, the majority of cases to date brought under the “age ground” have concerned denial of access to services in bars (i.e., licensed premises), restaurants and nightclubs and denial of insurance cover. In 2003, one-third of all claims based on the “age ground” concerned non-employment fields. Of the 5 cases determined by the Equality Tribunal in 2003, 1 concerned the refusal to provide motor insurance cover and the others concerned refusal of access or service in bars, pubs or nightclubs. This mirrors the previous years since the ESA 2000 came into force.

In Belgium, claims based on age discrimination in 2003 constituted 7.5% of the complaints (20 in total) made to the Centre for Equal Opportunities etc with half of those cases (i.e., 10) concerning complaints in the non-employment fields. Again, the single area in which there was most litigation in relation to the “age ground” related to the refusal to provide insurance or to higher premiums being charged for insurance cover.

In Australia, the Age Discrimination Act 2004 only came into force on 23 June 2004. We have not been able to find any details of specific complaints made in relation to age discrimination in the field of goods and services. If a complainant is dissatisfied with the outcome of the investigation by the HREOC, then s/he can take his/her case to the Federal Court of Australia. A search of cases decided by the Federal Court shows that there have been no decided cases yet in relation to age discrimination in the non-employment fields.

### **0.4.2 Ontario (Canada) & USA**

In USA, the Age Discrimination Act 1975 is much less broad than the other 4 jurisdictions under consideration. It only applies to age discrimination in programmes/activities receiving federal financial assistance. The mechanism for enforcement is such that there is a requirement, first, for any complaint to go through mediation. Therefore, all complaints made to the Office of Civil Rights (which enforces the ADA 1975) are referred to the Federal Mediation and Conciliation Service. If mediation is unsuccessful, the complaint is then investigated by the Office for Civil Rights. It is only where the OCR takes no action, or a determination is made in relation to the recipient of federal financial assistance (and, therefore, against the individual beneficiary) that the complainant can file a civil action. Even then, the complainant must wait 180 days from the date of first complaining to the OCR (or the date of the decision made against the individual beneficiary). Civil actions can only trigger injunctive relief. Therefore, because the only remedy is an injunction (against the recipient to stop the discrimination) and because of the 180 day period before injunction relief can be granted, this creates a real disincentive to individual complainants. We have searched the various internet resources to ascertain how many complaints are made in the civil courts but could find no reported cases. Because the ADA 1975 is “old”, it may be that decisions exist in hard copy format, which are not referred to on the internet. However, commentary on the subject suggests that the ADA 1975 can only have limited effect, in any event, because it only applies to programmes/activities which are in receipt of federal financial assistance. Therefore, age discrimination in relation to the other areas which are not covered by the ADA 1975 can only be remedied at State level.

In Ontario, complaints of age discrimination in the areas covered by the Ontario Human Rights Code 1990 are made to the Ontario Human Rights Commission. Where the Commission decides that a complaint has some merit, it refers the case to the tribunal, called the Board of Enquiry, an independent decision-maker. In past years, between 5% and 10% of complaints made to the Commission concerned age discrimination. In 2003/2004, 2450 new complaints were made to the Commission. Out of those, 232 concerned age discrimination (179 in the field of employment or vocational training/associations) and 12 in the field of Services (i.e., 0.5% of the total number of complaints and 5% of all complaints relating to age discrimination). In relation to the complaints concerning age discrimination, 15 cases were referred to the Tribunal<sup>1</sup>, the majority of these concerned age discrimination the field of employment. In 2003/2004, demonstrating the wider impact of legislation, the Commission succeeded in achieving one of its set goals which was to implement an age discrimination public awareness campaign and related public education activities in partnership with Shoppers Drug Mart and CARP. It issued a brochure on age discrimination against Older Ontarians.

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<sup>1</sup> 16 were dismissed by the Commission, 12 were withdrawn, 49 were settled, 18 were resolved and 60 were not dealt with because of lack of jurisdiction.

It is clear that where legislation provides a mandatory requirement that the enforcing authority screens/filters complaints, this will decrease the incidence of complaints actually being made to a judicial body (eg, specialised tribunal or civil court). In Ontario, although a number of complaints were made to the Commission on the age ground, very few cases are ever determined by the Tribunal. This also appears to be the case in the USA where there is a mandatory mediation and investigation stage which must be undertaken before an individual can have recourse to the civil courts. In Ireland, however, complainants have direct access to the Equality Tribunal, where the Director must delegate a hearing of the complaint to an Equality Officer, unless there is obviously no jurisdiction. Such a hearing follows a judicial decision-making model where evidence is collected, oral evidence is heard, there is a chance for cross-examination and submissions and, finally, a Decision is given. This model, clearly, has the benefit of empowering individuals who wish to complain of age discrimination.

### 0.5 Conclusion

The age discrimination legislation in Australia, Belgium, Ireland, Ontario and the USA provides a wide range of legislative models. The Australian and Irish models, and, to a certain extent, (so far as it is possible to ascertain from the rather vague drafting), the Belgian model are not dissimilar to the legislative frameworks for equal treatment in the field of employment triggered by the EU Directives in the area of employment. Age discrimination is defined in all its forms (eg, direct, indirect, harassment, victimisation), the areas covered are defined (i.e., goods and services; education; housing etc) and the exemptions are clearly set out. Further, there is a clear route for redress by individuals, particularly in the Irish model.

The key issue across all jurisdictions considered is the issue of exemptions. In all the legislation, howsoever drafted, the exemptions (whether by way of allowable positive/ affirmative action or by way of allowable (negative) discrimination) provide an important “brake” or limit on the anti-discrimination provisions. This is as a result of lobbying at NGO and parliamentary level by special interest groups, both those who speak on behalf of older (or younger) people and those who lobby for specific industries (eg, insurance). The clear compromise adopted by all jurisdictions, therefore, is to create exemptions which give with one hand to the cause of promoting equality in relation to age (eg, allowing for preferential treatment in relation to age) and which take away with the other (eg, allowing certain treatment if there are relevant factors, statistical or actuarial evidence to justify what would otherwise be discrimination).

What is clear, however, is that without a clear route for redress by individual complainants, the judicial authorities (whether by way of specialist tribunals or the ordinary civil

courts) will not be able to grapple with the specific legislative provisions and the impact of the age discrimination legislation will be more difficult to monitor.

# 1 Belgium

## 1.1 Introduction and Context

*The Act of February 25<sup>th</sup> 2003 pertaining to the combat of discrimination and to the amendment of the Act of February 15<sup>th</sup> 1993 pertaining to the foundation of a centre for equal opportunities and opposition to racism* was published on March 17<sup>th</sup> 2003<sup>2</sup> and came into force on the 27<sup>th</sup> March 2003.

The Act forbids all direct and indirect discrimination on grounds of age in employment, goods and services and in the access to and participation in an economic, social, cultural or political activity accessible to the public. It also expressly prohibits harassment, instruction to discriminate and the absence of reasonable adjustments for people with disabilities. The right to bring cases is also extended to the Centre for Equal Opportunities and the Fight against Racism (Centre pour l'égalité des chances et pour la lutte contre le racisme/Centrum voor gelijkheid van kansen en voor racismebestrijding).

### 1.1.1 Background to the Anti-Discrimination Law

The EU Directive 2000/78/EC was adopted in November 2000<sup>3</sup>. It established a general framework for equal treatment, and to combat discrimination, in employment and occupation on grounds of age, religion or belief, disability and sexual orientation. It had to be implemented by 2<sup>nd</sup> December 2003, although it was possible to extend this deadline by three years in relation to the age and disability provisions. Belgium has notified the EC that it intends to use the additional time to transpose the age requirements. However, in the interim period, the generalised age discrimination provisions are running. This has caused much consternation amongst employers groups, insurance and pension companies etc.

At the same time in November 2000, a Community Action Programme to combat discrimination was adopted<sup>4</sup>, which supported activities aiming to combat discrimination on grounds of age, sexual orientation, racial or ethnic origin, religion or belief and disability. The goals of this Programme were stated to be analysis and evaluation, developing the capacity to combat and prevent discrimination, as well as raising awareness.

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<sup>2</sup> The law aimed at fighting discrimination (BE0212304F) was adopted on 25 February 2003 and published in the official journal (Belgisch Staatsblad/Moniteur Belge) on 17 March 2003.

<sup>3</sup> EU102295F

<sup>4</sup> EU9912218F

In December 2000, Belgium had piecemeal legislation in respect of age discrimination: This was principally in relation to employment law. There was no legislation which dealt with age discrimination in the field of goods and services however. The National Collective Agreement No.38<sup>5</sup> banned all forms of discrimination by the employer during recruitment and selection on the grounds of personal characteristics that were not linked to the position or nature of the company concerned, thereby preventing employers from discriminating on grounds of age. Similarly, any maximum age limit imposed on prospective employees who sought to apply for a job (or be recruited for a position) was prohibited. Plainly, this ban covered both explicit and implicit references to any age limit.

However, even before the Framework Equal Treatment Directive was adopted in 2000, the Belgian federal parliament was in the process of preparing and drafting a general anti-discrimination law<sup>6</sup>, which was finally passed on 25<sup>th</sup> February 2003. The then-coalition government of socialists, liberals and environmentalists, led by Prime Minister Guy Verhofstadt, was the driving force behind the anti-discrimination law, and primarily its French-speaking socialist members<sup>7</sup>. The law was intended to create a general legislative framework for the fight<sup>8</sup> against discrimination in all sectors.<sup>9</sup> Although the Belgian Constitution provided some elements of protection (as did assorted pieces of legislation)<sup>10</sup>, most of these provisions protected the citizen only against discriminatory conduct by the State. This new law was intended to provide civil and penal sanctions for discriminatory conduct in both the private and public sphere. Ultimately, it intended not only to effect the transposition of the Directive into Belgian national law, but to go further in the fight against discrimination generally. This led to the further and partial amendment of the original text, and the end result has been criticised for a perceived lack of clarity.

The National Labour Council (representing both trade unions and employers' representatives) was involved in the implementation of the framework Directive at institutional level. In respect of the law of 25<sup>th</sup> February 2003, both employers and unions stated unanimously that the employment context was only one area where discrimination needed to be addressed. There was general concern about the vagueness of the definitions and concepts of discrimination within the new law. There was also a consensus on a gradual phasing in of the age discrimination provisions. However, these concerns were not heeded. In respect of the burden of proof provisions, employers' organisations

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<sup>5</sup> Agreed by the social partners in the bipartite National Labour Council in 1983, and updated in 1998.

<sup>6</sup> BE0212304F

<sup>7</sup> The Minister for Employment and Equal Opportunities, Laurette Onkelinx and Senator Philippe Mahoux were instrumental in the drive to advance the anti-discrimination law.

<sup>8</sup> *La lutte contre la discrimination*

<sup>9</sup> *Doc. Parl. Sénat* 2001-2002, n°. 2-12/15,6

<sup>10</sup> Arts.10, 11, 11bis of the Constitution, Article 14 ECHR: See further la loi du 30 juillet 1981 réprimant certains actes inspirés par le racisme et la, M.B. 8 août 1981, La loi du 7 mai 1999 relatif à l'égalité entre les hommes et les femmes dans le cadre des relations de travail, l'accès au procédures de sélections et aux chances de promotion, (...) M.B. 19 juin 1999, CCTn°. 38 du 6 décembre 1983, M.B. 28 juillet 1984, Décret de la

strenuously opposed the reversal of the burden of proof, which was placed upon the employer.

In terms of rationale for inclusion within the Act, age discrimination was not a significant issue in the Belgian political forum. It was included in the act as part of a wider policy on inclusion within society as opposed to any concerted efforts on the part of NGOs or lobbyists. A trawl through the extensive Senate readings, which chart the progress of the Act during the consultation period, (which began in 1999) is notable for its lack of discussion over age discrimination in general. There is some limited discussion over voting age, and liquor licensing laws, but there is very little consideration of the impact and effect of an anti-age discrimination law within society as a whole.

M Philippe Mahoux led a series of French-speaking socialists in the demand for a law which legislated for a contemporary democracy based on values of equality and dignity: It was noted that these very characteristics formed the basis of anti-discrimination laws internationally. In setting out the key areas in which legal protection was lacking (including age), it was stated simply that discrimination as a result of these inherent characteristics was particularly intolerable in society.<sup>11</sup> This paved the way for a further 3 years of discussion, during which various amendments were proposed and dropped. There was extensive concern about the relationship between the new law and general fundamental rights provisions, such as freedom of expression and freedom of association, as well as freedom to contract. There was also concern raised about potential abuse and misuse of such a broadly rights-based law. Much of the debate centred around the role of discrimination based on sex (and also race) within such a broad law<sup>12</sup>. Age's profile in debates is much lower.

An overview of that consultation period may lead to the conclusion that although the law was desired in broad terms, there was no political will to tie courts and law-makers down with precise terms of drafting. Part of the reason why the legislation contains no exemption clauses (bar an article promoting positive action) is partly attributable to a political desire to pass the law, and leave interpretation open to the courts. It was perhaps inevitable that ultimately, the anti-discrimination law that was passed remained very loosely drafted indeed.

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Communauté flamande relatif à la participation proportionnée sur le marché de l'emploi du 8 mai 2002, M.B. 26 juillet 2002.

<sup>11</sup> www.senat.be; Session Extraordinaire de 14 Juillet 1999, développements déposée par M Philippe Mahoux et consorts.

<sup>12</sup> In fact, the greatest concern raised in the Senate appears to be in relation to the propriety or otherwise of whether sex should be included in the new Act, when there was existing legislation on point. In the end, the compromise that was reached was the new Article 2(5) which states that "*With the exception of Chapter III and of Article 19 (3) and (4), which shall remain in force, discrimination on the grounds of sex and with respect to the subjects referred to in Article s(4), 2<sup>nd</sup> and 3<sup>rd</sup> indents shall be subject exclusively to the Act of May 7<sup>th</sup> 1999 on the equal treatment of men and women with respect to working conditions, access to the employment process and promotion opportunities, access to self-employment and the supplementary regulations for social security.*"

Unfortunately, it is simply too early to assess the impact of the new legislation, either in terms of legal consequence or in terms of impact upon individuals. Very little has been written on the Act itself, and until now, most of the commentary is in Flemish<sup>13</sup>. Nor has there been any significant jurisprudence, fleshing out the legal skeleton<sup>14</sup>. There has been sustained criticism, however, of the vague definitions, and the difficulties in application.

There is one important post-script that should be added before any detailed examination of the provisions relating to goods and services: In 2003, a procedure was launched in the *Cour d'Arbitrage* in order to annul the 2003 anti-discrimination law. It was instigated by some members of the “*Vlaams Blok*” (a right wing political party based in Flanders), and Matthias Storme, a professor in law. The major reason for dispute was that the act protects against discrimination on behalf of age, health, religion etc but not political conviction and language (difficult in a country where there are three official languages). They also protested about the definition of indirect discrimination, as well as the penal provisions.

The judgement on this action was delivered by the *Cour d'Arbitrage* on the 6<sup>th</sup> October 2004<sup>15</sup>. The Court decided, importantly, that the prohibition of discrimination could not be limited to certain grounds and should be general; therefore the specific grounds of discrimination as set out in the original act are now worded as “l'ensemble des différences de traitement qui manquent de justification objective et raisonnable” – in other words, all differences of treatment which lack objective and reasonable justification. The Act has been allowed to continue, and the concept of protection on the grounds set out underlined. The Court has refused to interfere with the essentials of the Act: The concepts of direct and indirect discrimination, conscious or unconscious, are confirmed; further authority has been given to the principle of judicial cessation (see further below), the sanctions (both penal and civil) are also confirmed. However, the clause which made it unlawful to discriminate, directly or indirectly, on any of the prohibited grounds in the dissemination, publication or disclosure of a text, report, sign or other medium of discriminating remarks has been overridden on the ground that it is too severe. Similarly, the Court has overruled the clause which made it unlawful to announce publicly an intention to discriminate, although it was pointed out that the expression of incitement to discriminate, or cause hatred remains punishable. The Clause which made it unlawful for public servants to discriminate in the course of their duties has also been annulled. There has also been a global overview of the interpretation to be given to certain clauses within the judgment.

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<sup>13</sup> Sadly, we do not speak Flemish and therefore was unable to access any of this material.

<sup>14</sup> However, in August 2004, “Test-Achats” (a consumer organisation) sued “DKV” (a major insurance company) on the basis of age discrimination. The circumstances of the case was that DKV had noticed that the medical costs of their hospitalisation insurance had been increasing significantly, and that this was mostly attributable to elderly patients. Accordingly, DKV unilaterally raised the premium for their elderly policyholders. There has been no decision at the time of writing this report.

<sup>15</sup> [www.arbitrage.be](http://www.arbitrage.be)



## **1.2 Commentary on the Act as it relates to Goods and Services**

The Act is very thin, comprising just 31 Articles. It provides few definitions, no exemptions and very little explanation. In comparison to, for example, the Canadian, Irish and Australian legislation dealing with age discrimination, the Belgian Act is vague, and adopts an extremely broad-brush approach.

Chapter I is a single line which states that the act governs a matter pursuant to Article 77 of the Constitution. Chapter II contains the general provisions dealing with the substance of the anti-discrimination provisions. Chapter III contains the penal provisions, whilst Chapter IV provides for civil sanctions. Chapter V contains amendments in respect of the role of the Centre for Equal Opportunities and Opposition to Racism (“the Centre”), and Chapter VI makes the final provision relating to who may bring a complaint under the act. The right to bring cases is also extended to the Centre.

There are no statutory guidance notes or Codes or Practice. Nor is there any Explanatory Memorandum at the outset of the law. Since the discussions during the consultation period did not explicitly deal with age, very little assistance is provided in terms of interpretation. The law does not apply retrospectively<sup>16</sup>.

## **1.3 Definitions**

### **1.3.1 Definition of “Age” for the Purposes of the Act**

The law does not define in any way the limitations and scope of “age” for the purposes of discrimination. Age discrimination legislation generally is assumed to be relevant for older members of society. However, other jurisdictions have made provision for younger persons in certain situations also<sup>17</sup>, and it is unclear how the Belgian courts will address that issue.

There is no provision made for “imputed” discrimination; however, one of the protected grounds is “physical characteristic”<sup>18</sup>. Although there is no guidance on the issue, it is potentially arguable that this may cover a situation where maltreatment is imputed to

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<sup>16</sup> Art.2 of the Code Civile

<sup>17</sup> The Ontario Human Rights Code, for example, defines age, for the purposes of discrimination, as being 18+, except in the case of accommodation where 16 and 17 year olds have removed themselves from parental control. In that particular situation, the provisions of the age laws apply equally to them.

<sup>18</sup> Art.2(1).

“age” on the basis of physical characteristics, such as wrinkles or grey hair. Admittedly, it seems likely that this ground was included primarily to encompass characteristics such as disfigurements (e.g. scarring) which do not constitute a disability, but may lead to discriminatory conduct against that individual.

### 1.3.2 Definition of Goods and Services

Put shortly, there is none. Nor are there provisions within the Act for further regulations to set the scope for the anti-discrimination rights. Article 2(4) simply states that *any and all forms of direct and indirect discrimination are prohibited with respect to the provision or availment of goods and services to the public*<sup>19</sup>.

It is therefore not possible to know whether this is intended to apply to recreational clubs<sup>20</sup>, schools<sup>21</sup> the insurance industry, health resource allocations, pensions etc. It is assumed that the provisions are intended to apply broadly and the impact on insurance companies is discussed further below. It remains most unclear at this stage what implications this will have on many service providers. Although there are a number of labour laws dealing with issues of age as a condition within the provisions of employment practice, the immediate ban of age discrimination, as opposed to the gradual phasing-in as allowed by the EU Directive has meant that there is confusion about where, and upon whom, the burden of the new prohibition will fall.

One assumes that the prohibition of discrimination in the area of goods and services would encompass, naturally, access to premises. But, again, this is not spelled out in the Act (either in respect of age or disability – although the latter raises the need for reasonable adjustments to be made<sup>22</sup>.) Neither is “premises” defined.

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<sup>19</sup> The prohibition in Article 2(4) applies equally to:

- The conditions for access to gainful, unpaid or self-employment, including the selection and appointment criteria, irrespective of the branch of activity, on all levels of the occupational hierarchy, including promotion opportunities, as well as employment and working conditions, including dismissal and pay, in both the private and public sector;
- The appointment and promotion of an official or the assignment of an official for a service;
- The mention in an official document or report;
- The dissemination, publication or disclosure of a text, report, sign or other medium of discriminating remarks;
- The access to and participation in, as well as any and all other exercise of an economic, social cultural or political activity accessible to the public.

<sup>20</sup> However, given that discrimination is prohibited in the access to and participation in, as well as any and all other exercise of an economic, social, cultural or political activity accessible to the public, it can be assumed that clubs, schools and stationary premises in general do fall within the scope of the Act.

<sup>21</sup> This was included in an earlier draft of the text, but was dropped.

<sup>22</sup> Article 2(3); Reasonable adjustments are defined as entailing no unreasonable burden, or one where the burden is sufficiently offset by existing measures.

### 1.3.2.1 Direct and Indirect Discrimination

Belgium has adopted an open system for regulating direct and indirect age discrimination<sup>23</sup>; in other words, both forms of discrimination are prohibited under the Act but can be justified objectively. In such a system, it is vitally important that clear grounds are set out which establish where and when differential treatment on the basis of age will be treated as clearly and objectively justified. As with much of the rest of the Act, there is no text setting out the permissible grounds of differential treatment beyond pleading an “objective and reasonable justification”.<sup>24</sup>

Article 2(1) defines direct discrimination as occurring

*“if a difference in treatment that is not objectively or reasonably justified, is directly based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic”.*

Article 2(2) defines indirect discrimination as occurring

*“when a seemingly neutral provision, measure or practice has harmful repercussions on persons on whom one of the grounds for discrimination set out in paragraph. 2(1) applies, unless said provision, measure or practice is objectively and reasonably justified”.*

Both forms of discrimination are prohibited with respect to the provision or availment of goods or services to the public, and in a measure which goes considerably beyond the scope of the Equal Treatment Directive, also prohibits such discrimination in the access to and participation in, as well as any and all other exercise of an economic, social, cultural or political activity accessible to the public.

There is no assistance provided in defining the scope, or criteria to be considered, within the objective and reasonable justification defence open to defendants/respondents in claims of direct and indirect discrimination. Nor are any factors listed that may or may not be relevant when considering what constitutes reasonable. One must assume that the courts will be asked to develop a common sense, objective rationale for the justifications.

Proposed amendments to these articles during the consultation phase included more detailed definition of reasonable and objective justification, in line with definitions contained generally within the ECHR. There were calls for the clauses to define justification

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<sup>23</sup> In a ‘closed’ system, such as the UK’s existing race and sex legislation, direct distinction is prohibited unless there is a legal exception for genuine occupational requirements. However, unlike indirect discrimination, there is no objective justification defence.

<sup>24</sup> Other jurisdictions have tried to permit exceptions to the age discrimination prohibition with varying degrees of specificity. Canada, for example, relies on the Bona Fide Occupational Qualifications test, so that a case-by-case analysis is required. Finland (which confines the age discrimination prohibition to employment) permits exceptions “for an appropriate reason”. Ireland permits the use of reasonable and rationale age distinctions in order to achieve legitimate goals which are stated explicitly in the legislation.

as being proportionate, necessary and strictly corresponding with the goal sought to be achieved. There were also calls for the definition of direct discrimination to adopt the “less favourable treatment” comparator test familiar to UK lawyers<sup>25</sup>. These amendments were not incorporated in the final form<sup>26</sup>.

Nor is there any further assistance or explanation for the term “harmful repercussions” within an indirect discrimination claim<sup>27</sup>. There is no equivalent of the Canadian bona fide requirement contained either explicitly or implicitly within the text of the Act.

The Centre has provided some informal guidance on its website about the new law<sup>28</sup>, but it is unable to give detailed assistance on what constitutes reasonable or objective, beyond a common sense approach. It gives the example of an older person who is not allowed to join a youth club on grounds of age as a justification which could be considered reasonable and objective.

Marc de Vos of Ghent University makes the following assessment of the new definitions:

*“The crucial question of what exactly constitutes 'discrimination' is, according to legal experts, rather hard to establish in the combined light of the Belgian law and the EU Directives. The Belgian law uses definitions that are difficult to understand in the light of the EU provisions, which nevertheless apply compulsorily as the minimum level of protection. The legal definition of 'permissible' discrimination is seen as equally problematic. With specific regard to employment, the Belgian law provides that a difference in treatment is regarded as being objectively and reasonably justified if, because of the nature of an occupational activity or the conditions of its performance, the characteristic in question constitutes 'an essential and decisive occupational requirement', as long as the aim is legitimate and the requirement is appropriate. This appears to be a noteworthy departure from the Directives' approach. The Directives allow 'objectively justified' differences in treatment only in the case of indirect discrimination, when there is a 'legitimate aim and the means of achieving that aim are appropriate and necessary'. The Belgian law allows both direct and indirect discrimination at work where objectively (and reasonably) justified, but under the more re-*

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<sup>25</sup> Sen Doc , session 200-2001, 2-12/8

<sup>26</sup> Although there was little discussion on the topic, there are clear statements during the readings in Parliament which suggest opposition to the concept of closed discrimination. In the 6<sup>th</sup> June 2001 session, amendment no.67 from Mme Staveaux-Van Steenberge notes that direct discrimination as proposed, without any concept of objective justification has absurd consequences. She states that where direct discrimination is prohibited on grounds of age, without any recourse to justification or proportionality or legitimate aims, the result would be that the minimum voting age of 18 would be illegal, or would have to be changed. Sen doc 2000-2001, 2-12/8.

<sup>27</sup> Although Article 2(5) does specify that with regards to labour relations that where, owing to the nature of an occupational activity or the context in which it is carried out, such an identification constitutes an essential and decisive occupational requirement, providing the aim is legitimate and the requirement is proportional to that aim, an objective and reasonable justification shall be made out.

<sup>28</sup> [www.antiracisme.be](http://www.antiracisme.be) see Service Discriminations Non Raciales.

*strictive condition that there must be 'an essential and decisive occupational requirement'.*

*As Belgian legislation has to respect the EU Directives, there is thus a pressing problem, according to the critics: the anti-discrimination law's definition of the fundamental issue of banned discrimination is difficult to reconcile with EU obligations in this area."*

The Centre has attempted to define the objective and reasonable justification<sup>29</sup>. It states that determining whether a goal is objective and reasonable in a complaint received is a crucial task not only for the Centre, but also for the Tribunal seized of the complaint. What is objective and reasonable in one situation may not be in another, quite naturally. For each case, it is a matter of examining the reality of the situation in a precise manner. Faced with the application of the principle of equal treatment, the jurisprudence generally poses the following questions: Are the differing situations comparable? Does the distinction pursue a legitimate goal? Are the means employed adequate and proportionate to the objective that is sought to be achieved?<sup>30</sup>

### **1.3.2.2 Harassment**

Harassment on grounds of age is considered to be discriminatory *"in cases of undesired behaviour connected to the discrimination grounds ... aimed at or affecting the dignity of a person and creating a threatening, hostile, insulting, demeaning or offensive environment"*.<sup>31</sup>

### **1.3.2.3 Incitement to Discriminate**

Article 2(7) reads:

*"Any and all practices which consist of inciting discrimination against a person, a group, a community or members of it pursuant to one of the grounds referred to in [sub-paragraph] 1, shall be considered as discrimination pursuant to this act.*

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<sup>29</sup> See [www.antiracisme.be](http://www.antiracisme.be); La Loi anti-discrimination, para.2.5

<sup>30</sup> These are criteria applied by international tribunals, the Court of Arbitration, la Cour de Cassation and the Council of State. The translation is Schona Jolly 's own. The exact text for this extract reads:

*"Déterminer ce qui est objectif et raisonnable dans un dossier concret est une tâche qui s'avère cruciale pour le Centre, mais plus encore pour tribunal saisi d'une plainte en matière de discrimination. Ce qui est objectif et raisonnable dans une situation ne l'est naturellement pas dans l'autre. Pour chaque dossier, il convient donc d'examiner de manière précise la situation concrète.*

*Confrontée avec l'application du principe d'égalité de traitement, la jurisprudence va généralement s'interroger sur les points suivants: les différentes situations sont-elles comparables, la distinction opérée répond-elle à un but légitime ; les moyens utilisés sont-ils adéquats et proportionnés par rapport à l'objectif que l'on cherche à atteindre?"*

<sup>31</sup> Article 2(6) of the 25<sup>th</sup> February 2003 Act.

### 1.3.3 Agency/Discrimination by Association

No provisions are made within the Act specifically dealing with these issues.

### 1.3.4 Age and Disability

Article 2(3) of the Act reads:

*“The lack of reasonable adaptations for a person with a disability constitutes discrimination under this act.*

*Reasonable adaptation shall be considered an adaptation that entails no unreasonable burden, or one where the burden is sufficiently offset by existing measures”.*

In comparison with disability provisions in other jurisdictions (for example the Disability Discrimination Act 1995, as amended, in the UK, or the Ontario Human Rights Code), the provisions of the Belgian law are loose and undefined. There is no assistance in the definition of “reasonable”. Nor is there an indication as to whether the provisions are static, or forward-looking. In other words, do organisations and service-providers have to wait until they are faced with a disabled person needing the change to be made, or does the provision place businesses, services providers and others under an obligation to ensure their premises are accessible to disabled users? Some Belgian commentators prefer the latter interpretation, but without clear guidance, either from legislators or the courts, the situation remains unclear.

## 1.4 Exemptions

Unlike almost every other piece of anti-discrimination legislation in respect of age that we have considered in this study, there are no exemptions made at all in respect of the provisions. There is a clause permitting positive action intended to redress disadvantage, although there appear to be no guidelines as to how any such special programmes may be implemented.

Article 4 states that *“the provisions of this act shall constitute no obstacle to the taking of or using of measures geared to guaranteeing full equality in practice, or preventing or offsetting the disadvantages entailed by one of the grounds referred to in Article 2.”*

## **1.5 Procedure**

Procedure is set out in Article 22. Any civil claim should be filed and treated as in summary proceedings.

### **1.5.1 Burden of proof**

The burden of proof is reversed so that where the victim of a discriminatory act can produce facts (such as statistical data or field trials) that lead to the supposition of either direct or indirect discrimination, the burden of proving that no discrimination has been committed then falls on the defendant<sup>32</sup>.

Proof of discrimination can be provided by means of a field trial which can be carried out by a bailiff. There is provision for further rules for the performance of these field trials<sup>33</sup>.

### **1.5.2 Who can bring a Complaint?**

Article 31 sets out the following groups that can take legal action in disputes (although see the text of the Article for exact definitions):

- The Centre for Equal Opportunities and Opposition to Racism;
- public utility institutions and all associations which on the date of the facts have enjoyed legal personality for at least 5 years and have defined, as their object in their articles of association, to defend human rights and fight discrimination;
- representative employers' organisations and trade unions relating to collective bargaining agreements and joint committees, and those governing the relations between government and unions of its personnel;
- representative organisations of the self-employed.

When the victim of a violation of the act or of the discrimination is a natural person or a body corporate, the claim of the groups referred to above in bullet points 1 and 2, shall be admissible only if they can prove that they are acting with the approval of the victim.

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<sup>32</sup> Article 19(3)

<sup>33</sup> Article 19(4).

## 1.6 Sanctions

The Act makes provision for both penal and civil sanction.

Incitement to discrimination, hatred or violence on any of the grounds enunciated by Article 2, or an open announcement of intention to discriminate, hate or be violent towards a group, community or members on any of the grounds so set out “*shall be punished by a prison sentence of one month to a year and by a fine of fifty to one thousand euros, or by one of these punishments alone*”.<sup>34</sup>

Articles 7-17 insert provisions into the Penal Code, increasing minimum sentences for various crimes where those crimes were motivated by hatred, contempt for or hostility towards a person on any of the enunciated grounds, including age.

### 1.6.1 Penal Sanctions for Holders of Public Office

Specific criminal sentences are set out for civil servants or public officials, any bearer or agent of public authority or public power who in the exercise of their duties commits discrimination against a person, group, community or members of it on any of the enunciated grounds.<sup>35</sup> Where the accused can show that he acted on orders from his superiors in matters that fell under their authority and to whom he or she was subordinate, then any punishment shall be applied only to those superiors who gave the order.<sup>36</sup>

Article 6(2) continues:

*“If the civil servants or public officials are accused of having ordered, allowed or facilitated the above-mentioned act of discrimination, and if they claim that their signature was obtained unawares, they shall be required in such a case to stop the act and to denounce the guilty party, otherwise proceedings shall be taken against them personally.*

*If one of the aforementioned discriminating acts is committed by means of the false signature of a public official, the perpetrators of the forgery and those who made fraudulent or malicious use of it, shall be punished by ten to fifteen years of incarceration”.*

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<sup>34</sup> See Article 6(1)

<sup>35</sup> Article 6(2) provides a prison sentence of 2 months to 1 year for such an offence.

<sup>36</sup> Article 6(2)



### 1.6.2 Civil Sanctions

Courts are permitted to order fines, at the request of the victim or one of the groups referred to in Article 31, if the discrimination is not stopped. Although the text of the Act does not make any provision for payment of general damages, or damages for injury to feelings, the ordinary principles of Belgian civil law would apply and therefore such damages are claimable.

Discriminatory agreements, and any contracts which purport to relinquish any rights guaranteed by the act, are invalidated by Article 18<sup>37</sup>.

#### Action en cessation/Cessation of the discriminatory act

Article 19 provides that a court can order the cessation of any act of discrimination, even where it falls within the penal provisions, at the request of the victim of the discrimination or any one of the groups set out in Article 31. The President of the court or tribunal can order the lifting of the cessation as soon as proof is provided that the violation of this act has been terminated.

The president of the court can also order that his decision, or summary of his decision, should be affixed for a specified period inside and outside the institutions of the transgressor or the premises belonging to the latter, and that his ruling or summary be published in newspapers or in any manner, at the expense of the transgressor. These publicising measures may only be imposed if they can contribute towards putting a stop to the challenged act or effect of such act<sup>38</sup>. The court may also order the payment of damages and interest<sup>39</sup>.

This solution was proposed in recognition of the fact that a victim of discrimination often requires a speedy solution or resolution of the problem. Where, for example, a doctor refuses to treat an older patient at his surgery, that individual needs instantaneous results rather than to engage in protracted legal action. It is also a useful solution in situations where there remains a risk that the discriminatory conduct might be repeated.

In such a case where the Centre was acting as a civil party to the complaint, the judge made the following decision, which exemplifies the scope of the remedy, even where it appears that the act of discrimination has come to an apparent end<sup>40</sup>:

*“La circonstance que l'action en cessation a pour objectif de faire cesser un comportement qui est définitivement terminé ne conduit pas à l'irrecevabilité de l'action*

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<sup>37</sup> Terms and conditions of an agreement which run contrary to the provisions of this act and terms and conditions that stipulate that one or more contracting parties are to relinquish in advance any rights guaranteed to them by this act, shall be null and void.”

<sup>38</sup> Article 19(2).

<sup>39</sup> Article 20.

<sup>40</sup> Trib. 1<sup>ère</sup> instance de Gand, 31 décembre 2003, Inédit.

*pour cause de perte d'intérêt à agir lorsqu'il ne peut être exclu que ce comportement sera répété. L'ordre de cessation sert plutôt à interdire la pratique illégale qu'un comportement déterminé. Il peut seulement être question de perte d'intérêt à agir si le danger de répétition peut objectivement être exclu, à savoir, lorsque les circonstances sont telles que, indépendamment de la volonté et de l'attitude des intéressés, une répétition des violations prétendues est impossible.*

*Le fait que l'appartement fut immédiatement loué à un tiers et que la violation alléguée ait pris fin, ne peut en l'espèce faire perdre l'intérêt à agir des requérants. Il ne peut être exclu que l'appartement soit à nouveau disponible dans le futur et soit proposé en location au public. Le danger de répétition de la violation invoquée ne peut dès lors pas être objectivement exclu. Les requérants disposent donc de la possibilité de faire ordonner la cessation afin de ne plus être confrontés à cette pratique dans le futur”.*

The essence of this passage is that wherever there is any danger that the discriminatory conduct be repeated, even at some undefined point in the future, the *action en cessation* is a useful tool. The example is given whereby the claimants had been refused rental of a particular apartment by the landlord, on the basis of discriminatory motive. Although by the time the matter came before the court the apartment had been rented out to a third party, the judge concluded that the *action en cessation* remained pertinent since it could not be ruled out that the property might come back onto the market, and therefore the danger of repeat discrimination remained.

## **1.7 The Centre for Equal Opportunities and Opposition to Racism**

Chapter V inserts various clauses into the Act of 15<sup>th</sup> February 1993. In particular, it amends Article 2 of that Act to read:

*“The Centre’s task is to promote equal opportunities and to oppose any and all forms of distinction, exclusion, limitation or preference on the grounds of:*

- 1. a so-called race, colour, descent, origin or nationality;*
- 2. sexual orientation, marital status, birth, fortune, AGE, religion or belief, current and future state of health, a disability or physical characteristic.*

*The Centre shall carry out its task in a spirit of dialogue and cooperation with associations, institutes, bodies or services which carry out, fully or partially, the same task, or are directly involved in the performance of the said task.”*

Various other amendments are made in respect of the Centre’s role at Articles 24-30.

Since September 2003, the Centre has set up a specific service dealing with the enforcement and application of the new law, pursuant to its new role. One of its key functions is to liaise with other relevant organisations as well as to appraise the public, employers, organisations etc of the new rights and obligations contained within the law. The interventions of the Centre are based mainly on consciousness-raising and making recommendations to the government about proposed and necessary changes in law.

### **Nature of complaints received by the Centre**

The Centre is receiving complaints based on the rights provided in the new Act<sup>41</sup>, although only three complaints to date have resulted in the Centre initiating formal court procedures. In the majority of cases, the Centre adopts a conciliatory approach, attempting to mediate between parties, seeking solutions, such as recommendations, for the discriminatory behaviour (if it can be established, and where there is no clear justification based on the objective and reasonable test). It tends to intervene in cases where the discrimination can be prevented in advance, or where reparatory action can be taken. Where this is not possible, but the complaint appears to be actionable, the Centre may direct potential claimants towards the services of lawyers. Each complaint becomes the subject of new file (“dossier”). Each file is then examined and analysed, and a swift response provided. In 2003, the Centre received 267 complaints based on the new 2003 Act<sup>42</sup>.

In 2003 claims based on age discrimination constituted 7.5% of its caseload (20 complaints). Half of these concerned employment complaints. 20% of the age complaints, however, concerned problems of insurance (motor or others forms of insurance) where the individual was either charged a high premium, or was excluded from cover.

Disability claims made up 30.5% of the caseload in the same period (81 cases). 16% of these concerned problems relating to accessibility within recreational activities, transportation and public or community buildings. The same proportion of complaints were attributable to employment. 11% of complaints arose out of rules governing taxation of allowances/benefits<sup>43</sup> in relation to disabled persons. A further 9% of complaints were based on failures to make adjustments in accommodation, particularly in the sphere of co-owned properties. There were also several complaints (7.5%) dealing with insurance, banking and other services open to the public.

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<sup>41</sup> Source. [www.antiracisme.be](http://www.antiracisme.be), see Services Discriminations Non Raciales, para.1.2

<sup>42</sup> Out of this 267, 52 were immediately identified as being outside the scope of the Act; a further 24 were excluded since the acts concerned took place before the Act came into force. In 33 cases, following examination and analysis, it was decided that no complaint of discrimination could be made out in law. The Centre estimates that discrimination can be established, in the legal sense, in less than 20% of the complaints made to it.

<sup>43</sup> The French word used in the text is *allocations*, which can be translated as allowances, grants and/or benefits.

There were 51 complaints in 2003 made to the Commission based on the state of health (actual or future), 37% of which were associated with insurance problems (hospital treatment, holiday cancellation etc). In these cases, as with those noted with age directly, the complaints arose out of refusal to provide cover or high premiums in cases of chronic illness or invalidity. A significant proportion of complaints in this sector arose from hospital administration and regulation settings.

## 1.8 Human Rights and the Anti-Discrimination Law

The traditional view is that fundamental human rights/civil liberties apply vertically, between the State and citizens rather than take horizontal effect. The new anti-discrimination law forms part of an ongoing process that “horizontalises” fundamental rights, although it remains applicable only where individuals are acting in the public domain. The possibility therefore arises for a conflict between fundamental rights, such as freedom of expression<sup>44</sup>, right to a private life etc, and the rights and obligations enacted by this anti-discrimination law. Typical of the concerns raised during consultation, one dissenter suggested that criminal sanctions could be imposed upon someone who could be accused of inciting hatred against older people suggesting that driving license be revoked at age 100. Conscious of this potential clash of rights, the legislators introduced Article 3 into the Act, which states:

*“This act shall not prejudice the protection and exercise of fundamental rights and liberties guaranteed by the Constitution and international conventions on human rights”.*

There is not further guidance as to how any potential disputes might be resolved; taking into account that there is no hierarchy between the constitutional rights, it would appear that judges will need to decide matters on a case-by-case basis.

### 1.8.1 Freedom of Expression

Art. 2(4) of the new law makes it unlawful to discriminate, directly or indirectly, on any of the prohibited grounds in the dissemination, publication or disclosure of a text, report, sign or other medium of discriminating remarks. Art. 6 punishes incitement and the fact of publicly announcing an intention to discriminate. Art.12 applies an aggravated penalty where the motives for any such conduct include hate, hostility etc.

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<sup>44</sup> Arts.19 and 25 of the Constitution, Art.10 ECHR

An analysis of the complaints received by the Centre in 2003 reveals that a large number of them could be associated with freedom of expression. 7.5% of complaints related to insults in respect of disability, for example.

### 1.8.2 Freedom to Contract

Although freedom to contract is not recognised as a fundamental right either within the Belgian Constitution or within any international conventions, it is traditionally accepted that respect for this freedom constitutes a general principle of law. It comprises a number of aspects including freedom to enter into contract with a person of one's choice, freedom not to contract, freedom to determine the scope and content of any contract etc. It is essentially a freedom of consensus. The provision or avilment of goods and services is regulated by contract. As a result, it is evident that in a number of situations, the principle of freedom to enter into contract and the prohibition on discrimination will come into conflict. Examples could include an insurance company who refuses to cover in patient treatment for an older diabetic or a landlord who refuses to rent a house to young people.

Freedom to contract, as a general principle, is not absolute and is limited by a number of different principles such as good faith and public order. The anti-discrimination law is absolute (if only by its lack of definition) that any motive which is sparked by discrimination is unlawful. Accordingly, it will not constitute an objective and reasonable justification.

The Centre's on-line guidance states that the anti-discrimination law is not an absolute obstacle to the liberty to contract with whomever one wants, in the sense that it does not determine the individual with whom one must enter into contract. Rather, the law stipulates that from the moment that human dignity is affected, any arbitrary difference in treatment is unacceptable<sup>45</sup>. Given that a central function of this legislation, as perceived by the Centre, is to bring about a change in mental attitudes towards discrimination, any restriction on the freedom to contract can be wholly justified by the desire to get rid of discriminatory motivation as a whole.

A rather interesting example is given in the Centre's guidance: A landlord is prohibited from refusing to rent an apartment to a Moroccan couple, or a homosexual couple without objective and reasonable justification. On the other hand, his refusal to rent will be permissible if the apartment is too cramped for a family with children. It is pointed out

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<sup>45</sup> Taken from the online guidance – [www.antiracisme.be](http://www.antiracisme.be): "En matière de liberté contractuelle, il appartient en effet au Centre d'indiquer aux co-contractants que, dorénavant, l'étendue de leur liberté d'appréciation quant à l'opportunité de contracter avec une personne déterminée, est circonscrite par le principe de non-discrimination. Dans cette perspective, ils seront amenés à exclure de leur jugement, les éléments d'appréciation qui s'appuient sur des motifs de discrimination et pour lesquels ils ne peuvent apporter de justifications objectives et raisonnables."

that this could constitute indirect discrimination, but in the view of this author, it could constitute discrimination on grounds of age in some jurisdictions such as Canada. It therefore seems that the failure to set out any definition of age, and any detailed consideration of purpose within either the framework of the Act or within any explanatory notes (which do not exist) the new legislation may end up failing to protect whom it was designed to assist in the first place.

### 1.8.3 Insurance Contracts

However, the most acute issue in respect of definition in this Act and freedom to contract is likely to arise in the field of insurance, where discrimination could be described (perhaps cynically) as being custom and practice within the industry<sup>46</sup>. The industry thrives on the principle of transfer of risk. In short, the higher the risk, the higher the premium charged. Classification of individuals is determined according to their objective groupings and statistics. The elderly and sick are viewed as high risk, and therefore find themselves either excluded from cover, or forced to pay high premiums.

The new Act introduces a prohibition against discrimination not only in respect of age, but for present purposes, also in respect of sex, state of health (actual and future) and disability. All of these areas intertwine, since criteria for assessment are based on all of these statistical factors. In addition, insurance companies (especially for health provision) often factor in whether there is family history of illness, or hereditary conditions. Immediately, the conflict between the anti-discrimination provisions and the contractual rights and practices of the insurance industry become apparent.

Article 6 of the EC Directive 2000/78/CE of 27<sup>th</sup> November 2000 permits States to make arrangements for businesses or certain sectors within social security to set age limits in respect of retirement or disability benefits. Similarly, insurance companies are permitted to use age calculations within actuarial calculations. Insurance companies (notably Asuralia who represent a number of insurance companies) have complained that the Belgian 2003 law goes much further than the Directive intended, since the latter permits a wide margin of appreciation to states in this sphere.

Although no guidance is provided in the Act itself, the Centre has attempted to provide some clarification about the role of the law for the insurance companies<sup>47</sup>. The Centre states that the anti-discrimination law does not intend to prevent insurance companies

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<sup>46</sup> See further *Bates v Zurich* <sup>46</sup> [1992] 2 S.C.R. 321 where the Canadian Supreme Court held that a discriminatory practice in the insurance industry is "reasonable" if it is based on a sound and accepted insurance practice and there is no practical alternative.

<sup>47</sup> [www.antiracisme.be](http://www.antiracisme.be), see Service Discriminations Non Raciales. See also: "La Loi Luttant Contre La Discrimination: Application en assurances, Note établie par la Commission d'études juridiques de l'UEPA", CV30017

from using those criteria which assess potential risk. Rather, the Centre says, the law imposes the need for the criteria to be used in an appropriate manner, taking full account of the type of insurance to be provided, and the individual circumstances of the person to be insured. By way of explanation, it is said that it is obvious that, in order to determine risk, criteria based on the current state of health of the person requiring insurance will not play the same role, and therefore cannot be justified in the same way, in assessment of fire insurance, hospitalisation insurance or general health insurance policies. In other words, the discussion centres on necessity and adequacy of criteria in assessment of the risk.

Those criteria relating to future state of health must be considered more circumspectly. In particular, questions which deal with family tendency/history/hereditary illness (such as cause of death of parents or state of health of parents) are unlikely to comply with the anti-discrimination provisions.

Perhaps the most significant consequence for insurance companies, as a result of the new law, is the need for the insurance policy makers to examine their motivation. Unless they can argue objectively in favour of the differential treatment, they are likely to be caught by the new law. The Centre has pointed out that this means they will be compelled to provide relevant statistics, produced on a national scale rather than the more general worldwide/international statistics that many insurance companies use, especially where those companies are corporate multinational firms.

The Centre has reflected upon the impact of the law on insurance companies and concludes that, ideally, it will force insurers to assess risk on a more individual basis, rather than confront clients seeking insurance with a broad-brush assessment, based on crude and perhaps irrelevant figures. Such an individualised approach could be realised by having regular re-evaluations of the illness or disability in question, and where the evaluation returns negative, there could be a need to refer to a college of doctors, prescribed by law. It would also mean that in the large proportion of illnesses where treatment has a significant effect (such as Type II diabetes) certain medications could exclude risks (such as hypoglycaemia). Furthermore, the lifestyle choices of an individual with a particular illness would be important (regular exercise, diet etc). Such an approach would comply with the spirit of the legislation, and avoid the general discriminations which are inherent as part of the insurance process. It should avoid the often total refusal to provide health or hospital cover to those individuals with certain types of illness. Under the anti-discrimination law, such a refusal would be simply disproportionate. Rather than refusal to cover, regular periodic re-evaluations should be possible.

It should be noted that the Belgian government passed the law of 28<sup>th</sup> April 2003 in respect of pensions, which contains detailed provisions on permissible age differentiation within various kinds of pension arrangements<sup>48</sup>.

### **1.9 Federal Law and the States**

Belgium is a federal state and hence the states (Communities and Regions) also have the obligation to transpose the Directives. This has been done now by most of the Communities and Regions. However, confusion exists about the exact division of competences between the federal state and the states. The end result is that only the French Community has adopted legislation that applies to their (public) goods and services (education included)<sup>49</sup>. Age discrimination is included.

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<sup>48</sup> See "La loi tendant à lutter contre la discrimination: pensions complémentaires (assurances de groupe): Assuralia 15.1.2004

<sup>49</sup> Décret 18/05/2004 de la communauté française relatif à la mise en œuvre du principe d'égalité de traitement.



## 2 Ontario (Canada)

### 2.1 Introduction and Context

#### 2.1.1 The Ontario Human Rights Code

Age discrimination in Ontario is treated as a human rights matter, governed by the *Ontario Human Rights Code 1990* (the “Code”). It was one of the first laws of its kind in Canada, and exists for the protection and promotion of equal opportunities and rights for everyone without discrimination in employment, housing, goods, services and facilities (e.g. restaurants, shops, schools and hospitals), contracts and membership of trade and vocational associations (e.g. unions).

The aim of the *Code* is to prevent discrimination and harassment because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (includes pregnancy), sexual orientation, disability (includes perceived disability), age, marital status, same-sex partnership status, family status, record of offences (in employment only) and receipt of public assistance (in housing only).

The *Code* was enacted in 1962. Prior to that date, there were various laws dealing with various different types of discrimination. However, protection against age discrimination was not included until an amendment to the *Code* in 1972. Initially the term “age” was limited to “any age of forty years or more and less than 65 years”. This meant that only those between the ages of forty and 64 were protected. In 1981, the lower limit for protection from age discrimination was extended to age 18 and pursuant to a 1987 amendment, persons aged sixteen or seventeen are also protected from age discrimination in the areas of housing, as long as such persons have withdrawn from parental control.

The *Code* currently prohibits age discrimination against those over 18 years of age (and over 16, in the case of housing as explained above). The exception to this is in employment, where those over age 64 are not protected against age discrimination.<sup>50</sup> For the purposes of freedom from discrimination with respect to services, goods and facilities, parents or guardians can file a complaint on behalf of children under 18.

The *Code* is structured as follows: Part I sets out basic rights and responsibilities. Part II deals with interpretation and application of the *Code*. Part III explains the role and struc-

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<sup>50</sup> Mandatory retirement policies are currently legal in Ontario. The Ontario Human Rights Commission has requested that this be changed and the Ontario government has committed to introducing legislation to end mandatory retirement after a period of public consultation (see the Ministry of Labour’s consultation paper: <http://www.gov.on.ca/lab/english/news/2004/04-92cp.html>).

ture of the Ontario Human Rights Commission and Part IV deals with enforcement provisions. Part V contains general matters.

### 2.1.2 The Ontario Human Rights Commission

The Ontario Human Rights Commission (the “Commission”) is an independent agency, responsible for the administration and enforcement of the Code. Its responsibilities include preventing discrimination and harassment through enforcement of the Code, promoting and advancing human rights through public education, policy development and public information about human rights, investigating and settling discrimination and harassment complaints, and inquiring into situations of indirect or discreet discrimination<sup>51</sup>. Its key function, however, is to promote the “*dignity and worth of every person*” and to protect everyone’s right to equal opportunity without discrimination.

Although the Commission receives complaints, its role is limited to settling or investigating such complaints. If the complaints are investigated, the Commission decides whether the case should go before a Tribunal (formerly known as a “board of enquiry”). This is an independent decision-maker, separate from the Commission<sup>52</sup>.

The Commission produces a Guide to the Human Rights Code (the “Guide”), which gives a basic overview of the Code, using explanations and examples to show how the Code would apply in different situations. It is not a legal document.

### 2.1.3 Policy and Context of Concerns

The Preamble to the Code, influenced and inspired by the 1948 Universal Declaration of Human Rights, reflects the rationale for the inclusion of age within the provincial human rights structure:

*“WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;*

*AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law; and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each*

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<sup>51</sup> See s.29 of the Code for further detail about the function of the Commission.

<sup>52</sup> See Part IV of the Code for further detail about enforcement.

*person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;*

*AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario.”*

In researching this paper, the following policy papers were extremely useful: Firstly, the Commission’s Discussion Paper *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*<sup>53</sup>; Secondly, the Commission’s Consultation Report *Time for Action: Advancing Human Rights for Older Ontarians*<sup>54</sup> and finally, the Commission’s *Policy on Discrimination Against Older Persons because of Age*<sup>55</sup>. These papers were produced by the Commission following extensive consultations with NGOs, age organisations and the local community.

Age discrimination has become an increasingly significant concern in Ontario, amongst law-makers and NGOs as well as the Commission. One of the key reasons is the recognition that the Ontarian population is ageing. It is estimated that by 2021, Ontario will host 3 million senior citizens, which is double the number in 1998<sup>56</sup>. Data from Statistics Canada suggests that in 1999, 22.75% of the Canadian population was between the ages of 45 and 64<sup>57</sup>. Government fiscal policy needs to take account of what is termed the “senior dependency ratio”, which is projected to rise steeply in the next decade, as the baby-boomer generation begins to reach 65. Plainly, this has significant implications in terms of fiscal policy, since the majority of taxes will be paid by those of working age.

*“As the population ages, the ability of service providers to meet the needs of older persons as well as access to appropriate facilities and housing become increasingly important. ..the dignity and worth of older persons are infringed by stereotypes about ageing, and neglect and abuse of seniors in services and facilities have been reported in several parts of the country ...*

*Case law and social commentary suggest that age discrimination is approached differently from other forms of discrimination. Ageing is something that all individuals who do not die prematurely will eventually experience. This distinguishes age from other “traditional” grounds that reflect characteristics that do not change throughout a person’s lifetime, such as race, colour or ancestry. More important is the fact that,*

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<sup>53</sup> <http://www.ohrc.on.ca/english/consultations/age-discussion-paper.pdf>

<sup>54</sup> <http://www.ohrc.on.ca/english/consultations/age-consultation-report.pdf>

<sup>55</sup> <http://www.ohrc.on.ca/english/publications/age-policy.pdf>

<sup>56</sup> From the Province of Ontario’s International Year of older Persons Web site, as cited at fn 2 in the Discussion paper at fn 4 above.

<sup>57</sup> [www.statcan.ca](http://www.statcan.ca)

*in many cases, age discrimination is treated as permissible on the basis that it has social utility.”<sup>58</sup>*

Over the last 5 years, through the series of reports and discussion papers referred to above, the Commission has been taking note of the particular difficulties faced by older people, caused by stereotypes and negative attitudes. It has campaigned actively for the age barrier in respect of employment to be lifted, since at present employees over 65 do not have the right to bring a claim of age discrimination. The Commission is of the view that the age barrier in employment is a major contributory factor towards the prevailing view that it is acceptable to discriminate against age.

The Commission has noted that<sup>59</sup>:

*“Age cases tend to be treated differently than other discrimination cases, particularly where the case involves retirement issues. The most noticeable difference from a human rights perspective is the lack of a sense of moral opprobrium linked to age discrimination which, in comparable circumstances would generate outrage if the ground of discrimination were, say race, sex or disability.*

*Stereotypes about older persons are used to justify age discrimination, stereotypes which the courts themselves, in some cases, appear to be supporting.<sup>60</sup> This may be contrasted with the approach taken by the Supreme Court of Canada in the recent BC Fire-fighters case<sup>61</sup>, where the court indicated that impressionistic evidence about what individuals can and cannot do, which is based on gender, will likely be struck down as discriminatory.”*

In the Commission’s Policy Document on *Discrimination Against Older Persons because of Age*<sup>62</sup>, a number of conclusions are set out, resulting from extensive research and consultation. These include:

- Society has accepted age-based criteria as a way to structure policies and programs and to make decisions about people in areas such as employment and services.
- Despite the fact that the population is ageing, many aspects of society have been designed in a way that is not inclusive of older persons.
- Age often works in “intersection” or combination with other grounds of discrimination to produce unique forms of disadvantage. For example, women often experi-

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<sup>58</sup> See *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4), Introduction at pp.4-5.

<sup>59</sup> See conclusions at pp.39/40 of *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4).

<sup>60</sup> The Paper refers the reader to the dissents in *McKinney* [1990] 3 S.C.R 229 and *Stoffman* [1990] 3 S.C.R 483, for criticism of the Supreme Court’s approach and the alleged reliance on stereotypes about aging.

<sup>61</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 S.C.R 3

<sup>62</sup> See fn 6 above.

ence ageing differently than men and older persons with disabilities face compounded disadvantage.

- Employers, service providers and others with responsibilities under the Code are looking for more information and guidance on meeting their human rights obligations vis-à-vis older persons.

They distinguish between ageism (a socially constructed way of thinking about older persons based on negative stereotypes plus a tendency to structure society as though everyone is young) and age discrimination arguing that the latter encompasses actions, which include treating someone unequally. Discrimination is a legal concept, as defined by the Code and the courts. Whilst not every manifestation of ageism constitutes age discrimination within human rights law and policy, ageism is often the cause of age discrimination.

#### **2.1.4 Protection against Age Discrimination in other Canadian Jurisdictions**

The Ontario Code prohibits age discrimination (and harassment) in all social areas covered by the Code (with the exception of employment for persons over 65 years of age). All other Canadian provinces provide protection against age discrimination in employment also<sup>63</sup>. Similarly, protection is provided in relation to age discrimination in the fields of accommodation, facilities and services (except in Alberta, British Columbia and Newfoundland<sup>64</sup>). Most jurisdictions also provide protection in respect of commercial and residential tenancies, and in respect of sale and purchase of property.<sup>65</sup>

#### **Incidence of Complaints**

The Commission noted that in 1997/98<sup>66</sup>, age was cited as a ground of discrimination and/or harassment in 5% of complaints received by them (105 cases). The majority of these complaints arose in the employment field (81), with 21 cases relating to goods, services and facilities. Only 2 of those went to the Board of Inquiry.

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<sup>63</sup> In most jurisdictions within Canada, an upper age limit of 65 years is set within the employment context.

<sup>64</sup> Note also that in Saskatchewan, the maximum age limit of 65 years also applies within the fields of goods and services.

<sup>65</sup> Source: *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4)

<sup>66</sup> See *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4)

## 2.2 Commentary on the Sections in the Code relating to Goods and Service

### 2.2.1 Freedom from Discrimination

Part 1, s.1 reads:

*“Every person has a right to equal treatment with respect to services, goods and facilities without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap”.*

The scope of this anti-discrimination provision refers to services provided in:

- Stores, restaurants and bars;
- Hospitals and health services;
- Schools, universities and colleges;
- Public parks, amenities and utilities such as recreation centres, public washrooms, malls and parks;
- Services and programs provided by municipal and provincial governments, including social assistance and benefits, and public transit;
- Services provided by insurance companies;
- Classified advertising space in a newspaper.

This section applies to businesses, government, community agencies and other organisations in Ontario. There is no definition of “goods”.

“Services” does not include a levy, fee, tax or periodical payment imposed by law (s.10(1)).

Public service providers must take positive steps to ensure that disadvantaged persons benefit equally from services<sup>67</sup>.

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<sup>67</sup> See Supreme Court decision *Eldridge v British Columbia (A.G)* [1997] 3 S.C.R 624, where the Supreme Court found that hospitals must provide sign language interpreters for deaf patients in order for them to access health care services equally.

### 2.2.2 Freedom from Discrimination more generally

The Code also lists a number of specific areas in which discrimination is prohibited which impact upon older and younger people.

Sections 2 and 4 provide for a right to equal treatment in accommodation (see below for further discussion).

Section 3 of the Code provides that every person with legal capacity has the right to contract on equal terms without discrimination because of age (amongst other grounds).

Section 6 of the Code provides every person with the right to equal treatment in respect of membership in any trade union, trade or occupational association or self-governing profession without discrimination because of age (amongst other grounds).

Section 8 of the Code reads:

*“Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing”.*

## 2.3 Direct/Indirect Discrimination

Section 9 of the Code reads:

*“No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part”.*

Direct discrimination cannot be justified.

Section 11 deals with *adverse effect or constructive discrimination* (known as indirect discrimination in the European context). It reads:

*“11.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,*

*(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances;*

*or*

*(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.*

*(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”*

*(3) The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship”.*

The following steps must be met by a Claimant attempting to bring an adverse effect claim:

- a neutral rule or practice, that is seen as fair, has the result that it treats a group of people (listed together in the Code) differently;
- that the differential treatment has an unequal or discriminatory outcome on this particular group.

The rule or practice can be justified if it is reasonable and genuine, and, it will only be allowed if a change or exception to the rule or practice would be too costly, or would create a health or safety danger.

Whether the discrimination is direct or by adverse effect, the Supreme Court of Canada has set out an identical 3-step test to determine whether the discriminatory standard, factor, requirement or rule can be justified as being bona fide and reasonable. The respondent must establish, on the balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed,
2. was adopted in good faith in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

The Code prescribes only three considerations in assessing whether an accommodation would cause undue hardship: Cost, outside sources of funding and health and safety risks. The test set out by the code, and as defined in the courts, is a high one. Costs will amount to an undue hardship if they are quantifiable, related to the adjustment and so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

Other considerations such as business inconvenience, morale, third party preference and collective agreements etc cannot form the basis for a finding of undue hardship unless



they can be brought within the three reasons set out in the Code. Further, actual evidence of hardship must be provided.

### 2.3.1 Further Definitions within the Code

“*Age*” means an age that is 18 years or more, except in subsection 5(1) (re: employment) where age means an age that is 18 years or more and less than 65 years.

“*Equal*” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination.

“*Harassment*” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome

“*Disability*” means:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device;
- (b) a condition of mental impairment or a developmental disability;
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
- (d) a mental disorder; or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act 1997*.

“*Group insurance*” means insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person.

#### Section 10(1)

Note also that the right to equal treatment because of disability includes the right to equal treatment because a person has or has had or is believed to have to have had a disability (s.10(3)).

### **2.3.2 Harassment or poisoned Environment in respect of Discrimination in Accommodation**

The Code prohibits harassment on the basis of age in respect of accommodation. Harassment is defined as a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

The Code also prohibits the creation of a poisoned environment, which is a form of discrimination and can arise from just one incident. The comments or actions of any person do not have to be targeted or directed at a particular individual, such as ongoing jokes or comments.

### **2.3.3 Discrimination by Association**

A right under Part I of the Code can be infringed where the discrimination is because of a relationship, association or dealings with another person identified by a ground in the Code, irrespective of whether the person bringing the claim is identifiable by a specific ground in the Code.<sup>68</sup>

An example would be where a landlord refuses to rent an apartment to an individual because her co-tenant has a very young child.

### **2.3.4 Publication or Display of Offensive Material**

Section 13 of the Code makes it illegal to display or publish any notice, sign, symbol, emblem or other similar representation, such as a cartoon, that shows intent to discriminate or harass, or intent to provoke others to discriminate or harass. However, section 13 makes it explicit that there is no intention to interfere with freedom of expression.

### **2.3.5 Specific Areas dealt with by the Code in Respect of Age Discrimination**

#### **2.3.5.1 Housing**

Safe, affordable, accessible and adaptable housing is a vital issue for elderly persons, particularly in relation to their independence as well as mobility and financial concerns. The Code provides for the right to equal treatment when buying, selling, renting or being

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<sup>68</sup> S.12 of the Code

evicted. Eviction covers apartments, houses, condominiums, retirement homes, commercial property and hotel rooms<sup>69</sup>. Section 2(1) of the Code reads:

*“Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of ... age.”*

There is often an overlap between housing and services, for example, seniors’ residences in which services such as housekeeping, meals or medical assistance are provided.

The Code applies to terms and conditions in contracts<sup>70</sup> and leases, including tenant approval, rent amounts, security deposits, occupants’ rules and regulations, lease termination and eviction.<sup>71</sup> The right to housing without discrimination includes suitable access to doors, laundry rooms, swimming pools, repairs etc.

The Code will not apply where housing is in a home where the bathroom or kitchen facilities are shared with the owner or his/her family.

There is a specific prohibition on harassment in housing<sup>72</sup>, which includes a prohibition on the so-called “poisoned environment”. In respect of this latter, the Guide states:

*“You might feel that your housing is hostile or unwelcoming to you because of insulting or degrading comments or actions that have been made about others based on a ground in the Code. When comments or conduct of this kind have an influence on others, and how they are treated, this is known as a “poisoned environment”. A poisoned environment cannot, however, be based only upon your personal views. You must have facts to show that most people would see the comments or conduct resulting in unequal or unfair terms and conditions”.*<sup>73</sup>

Harassment is defined in the Code as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known as unwelcome”.<sup>74</sup>

The law on housing contains one key difference from the usual principle of minimum age (18): Section 4 provides a right to equal treatment in housing for 16 and 17 years olds if they have legally withdrawn from parental authority. In such a case, legal contracts can be entered into by 16 or 17 year old persons, and are enforceable against them. This is important, since younger people may be seen as less desirable tenants than middle aged or older persons, and thus may be excluded from housing access.

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<sup>69</sup> Taken from the Guide, p4.

<sup>70</sup> See s.3 of the Code, which reads: “Every person having legal capacity has a right to contract on equal terms without discrimination because of ... age.” The right to enter into a contract in equal terms covers all aspects of the contract; for example, a car manufacturer cannot refuse to enter into a contract with the owner of a car dealership because he considers him too old or young.

<sup>71</sup> See p.4 and 6 of the Guide for further detail.

<sup>72</sup> See s.2(2) of the Code, which reads “Every person who occupies accommodation has a right to freedom from harassment by the landlord or by an occupant of the same building because of ... age.”

<sup>73</sup> at p.5 of the Guide.

<sup>74</sup> See Definitions in the Code at s.10.

Similarly, older persons who may be paying lower rents due to longer tenure in their rental accommodation should not be targeted for eviction by landlords who wish to attract new younger tenants paying higher rents.

Refusal to sell or lease living accommodation to families with children under 18 years is not allowed.<sup>75</sup>

The right to equal treatment with respect to occupancy of residential accommodation without discrimination is not infringed if a landlord uses income information, credit reference, rental history, guarantees or other similar business practices (as prescribed in the regulations made under the Act) in order to select prospective tenants.

#### **2.3.5.2 Age and Healthcare**

Anti-discrimination in healthcare services is covered by the Code. It is another critical issue for older persons, from a number of perspectives. Negative attitudes and stereotypes about the fragility and dependency of elderly people lead to concerns about the impact on the healthcare system. Discrimination in this field can occur in a number of ways, including:

- Assumptions that mental illness in older people is somehow less worthy of intervention;
- Reluctance of doctors to include senior citizens in their practices;
- Limited benefits coverage within a private health care system<sup>76</sup>;
- Nursing Homes and community care systems

#### **2.3.5.3 Age and Intersectionality**

The Code addresses discrimination based on a number of grounds. The Commission has been developing new policy work on intersectionality, since it recognises that people often experience discrimination, which cannot be compartmentalised into categories<sup>77</sup>.

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<sup>75</sup> See p.17 of the Guide. See also *York Condominium v Dudnik* (1991) 14 C.H.R.R. D/406 (Ont Div Ct): a condominium corporation was found to be in breach of the Code because of by-laws which barred families with younger children (under 14 or 16) from occupying the condominium units).

<sup>76</sup> In Canada, Medicare does not cover all medically-related and dental services which must be paid for by individuals or by private insurance plans, which themselves may contain restricted coverage.

<sup>77</sup> For a full discussion on age and intersectionality, see *Time for Action: Advancing Human Rights for Older Ontarians, June 2001* (cited at fn.5 above).

#### 2.3.5.4 Older Women

Elderly women are at a particular disadvantage in society, for reasons relating both to their longevity, labour force participation and (often consequently) their socio-economic status.<sup>78</sup> In particular, women still tend to work in lower-paying jobs, often part time or for a shorter period of time than their male counterparts, and will therefore receive significantly less pension plan benefits than men. Women also often work in sectors where employer pension plans are not available. Although these are plainly federal issues, the Commission has recognised that there are provincial implications, for example, in the area of accessibility to affordable housing.

#### 2.3.5.5 Older People with Disabilities

In 1991, about half of all Canadians aged 65 and over had a disability<sup>79</sup>. The projected increase in the elderly population has meant that policy work in respect of age and disability has taken on increasing importance. The Commission has been conducting further work:

*“First, transportation has been characterised as the “passport to independent living” for many older persons. This is especially true for those with disabilities. The review of mass transit accessibility that was recently conducted by the Commission is therefore especially relevant to older persons who require barrier free design to get to public transit, to stand on public vehicles when moving and to get on and off.*

*In addition, some older persons may have disabilities that arise from respiratory problems and related stamina insufficiencies, but may not qualify for para-transit services because those services may not recognise these types of non-visible disabilities.*

*Second, planned revisions to the Guidelines on Assessing Accommodation Requirements for Persons with Disabilities and other policy work in the area of disability will have significant implications for older persons. For these reasons, the importance*

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<sup>78</sup> Note the following paragraph in the *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4), at p.14:

*"With respect to their socio-economic status, levels of income and labour force participation indicate that older women may face unique human rights issues. For example, many social programs which were designed at a time when the workforce was primarily male and which are neutral on their face may adversely impact on women. Old Age Security (OAS) provides a universal indexed grant to all seniors over 65 and may be supplemented by the Guaranteed Income Supplement (GIS). Full OAS and GIS benefits may assist married seniors to approach the poverty line, but for single seniors, the benefits are well below the poverty line. Since women make up a disproportionate share of senior singles, especially in the oldest groups, these programs have been unable to lift older women out of the structural poverty caused by these factors."*

<sup>79</sup> [www.statcan.ca](http://www.statcan.ca)

*of maintaining a high standard of undue hardship that is supported by the legislation should be restated in any policy statement on age.”<sup>80</sup>*

Section 10(3) of the Code provides that the “*right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have had a disability*”.

Older persons may need adjustments to their accommodation in order to enjoy full access to their housing on an equal footing with other residents. The Landlord has a duty to accommodate such needs of older residents, subject to the undue hardship standard.

## 2.4 Exemptions

### 2.4.1 Special Programmes

Section 14 of the Code allows organisations and employers to implement special programmes which are “*designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I*”.

The Commission is authorised to compel an organisation to create a special program as a result of a human rights complaint<sup>81</sup>. The Commission also can launch an inquiry into existing special programs, except those instituted by the government.

An important decision in the health care context is *Ontario (Human Rights Commission) v Ontario (Ministry of Health)*<sup>82</sup>. The Ontario Ministry of Health Assistive Directives Program provided close circuit television magnifiers only to persons under 25 years old. The complainant was a 71 year old man who was refused this visual aid. The Board of Inquiry found that this was a special program protected by s.14(1) of the Code<sup>83</sup>, but this was rejected by the majority in the Court of Appeal. The Court noted that the purpose of s.14(1) was to promote substantive equality. Special programs, they said, aim aimed at achieving substantive equality by assisting disadvantaged people to compete on an equal footing with those who do not have such a disadvantage. They should be designed so that any restrictions on the program are rationally connected to the objective of the program. In this case, the Court found that there was no such connection since the program was

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<sup>80</sup> *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (cited above at fn 4), pp.15 and 16.

<sup>81</sup> See further the Commission’s *Guidelines on Special Programs* for details about the rationale and development of such programmes.

<sup>82</sup> (1989) 10 C.H.R.R D/6353 (Ont.Bd.Inq), affd 14 C.H.R.R. D/1 (Ont.Div Ct) revd 21 C.H.R.R D/259 (C.A.)

<sup>83</sup> See below

restrictive on age in order to have a small pool of clients, thereby conserving scarce financial resources. The aim of the program was not because younger people with disabilities had a greater need of aids and less access to them than older people.

#### **2.4.2 Preferential Treatment for Persons of 65 or over<sup>84</sup>**

Examples of this include special seniors' discounts, reduced senior rates for public transport, "golden age" passes, senior-only housing and other benefits aimed at those of 65+..

In *Bradley v Steel Co of Canada Inc*<sup>85</sup>, a Board of Inquiry considered the implementation of a special program which was aimed at older persons who had not reached the age of 65. A provision in a collective agreement granted employees with 25 years of service extended holiday, beginning at age 61. This was challenged on the basis that it discriminated against those under 61. The respondent employer argued that the benefit was designed to relieve hardship, and therefore qualified as a special program under s.14 of the Code. The Board applied a broad definition of "hardship", spanning something "more than mere inconvenience" to "adversity, suffering or humiliation" to "extreme privation or difficulty". The Board found that the transition from a life time of full time work, through to retirement which meant a complete absence of work, was a major life change bearing financial, psychological and social implications. Accordingly, it found that the hardship which the program tried to alleviate was the difficulty in that transition. It therefore qualified as a special program.

The Supreme Court case of *Law v Canada (Minister of Employment and Immigration)*<sup>86</sup> is a key case. The Court considered the constitutionality of age distinctions for determining entitlement to survivor pensions under the Canada Pension Plan. The appellant was not entitled to a survivor's pension when her husband dies because she was 30 years old and the minimum age was 45 years old. The Court set out basic principles relating to the purpose of s.15(1) of the Code, and provided a set of guidelines courts to follow in discrimination claims.

The Court stated that the purpose of s.15(1) of the Charter was to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping or prejudice (social or political). Accordingly, in analysing whether an act was discriminatory, it was necessary to examine whether the law had the effect of demeaning a claimant's dignity. The Court framed three broad inquiries which a court must examine, when analysing a discrimination complaint against legislation:

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<sup>84</sup> See s.15 of the Code: "A right under Part I to non-discrimination because of age is not infringed where an age of 65 or over is a requirement, qualification or consideration for preferential treatment".

<sup>85</sup> (1991) 15 C.H.R.R. D/408 (Ont.Bd.Inq).

<sup>86</sup> [1999]1 S.C.R. 497

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within society resulting in substantively differential treatment?
2. Is the Claimant subject to differential treatment based on one or more enumerated and/or analogous grounds?
3. Does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, the claimant in a manner which reflects upon the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.

In the instant case, it was plain that the legislation in issue distinguished on the basis of personal characteristics, subjecting the claimant to differential treatment. The key question, however, was whether such age distinction constituted age discrimination under s.15(1) of the Charter. The Court examined the purpose of the provisions, finding that it was to assist older widows and widowers to meet their basic needs over a long term basis. The Court found that in general, persons under the age of 45 were not subject to consistent and routine discrimination, that there were fewer obstacles to their employment. It further found that the legislation did not stereotype, exclude or devalue adults under age 45. Since the law intended to improve the needs of a more disadvantaged group, the legislation did not demean the claimant's dignity, and therefore there was no discrimination.

### 2.4.3 Special Interest Organisations<sup>87</sup>

Although there is a generalised right to equal treatment with respect to services and facilities, s.18 of the Code permits an exception where *"membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified"*.

The Guide adds that this exemption must be construed narrowly, so that "only organisations that clearly qualify as religious, charitable etc, can use this section"<sup>88</sup>.

For example, a charitable organisation that is primarily engaged in serving the interests of women over the age of 55 through researching issues of interest to this group and lobby-

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<sup>87</sup> See s.18 of the Code.

<sup>88</sup> P.39 of the Guide.



ing government to make changes to law and policy can limit its membership to persons similarly identified.

#### **2.4.3.1 Recreational Clubs<sup>89</sup>**

Such clubs, such as sports or social clubs, are permitted to levy different charges, membership dues and fees because of age, sex, marital status or family status. For example, older members may be benefited by reduced subscription rates.

#### **2.4.3.2 Benefit Plans<sup>90</sup>**

Employment may not be denied or made conditional upon enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and employer that makes a distinction, preference or exclusion on a prohibited ground of discrimination. However, this general rule on non-discrimination is subject to an exemption where reasonable and genuine distinction or exclusion is based on age, marital status, family status or sex.

Employers are compelled by the Code<sup>91</sup> to pay compensation to an employee who is excluded because of a disability from an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and the employer. Compensation must be equivalent to the contribution that the employer would make thereto in behalf of an employee who does not have a disability. This provision is important for older employees, since disability may affect them more significantly than younger employees.

#### **2.4.4 Restrictions for Insurance Contracts<sup>92</sup>**

The right to non-discrimination in services and to contracting on equal terms is not infringed where a contract for automobile, life, accident or sickness or disability insurance, or a contract of group insurance, between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of age, sex, marital status, same-sex partnership status, family status or disability.

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<sup>89</sup> S.20(3) of the Code.

<sup>90</sup> See s.25 of the Code

<sup>91</sup> S.25(4) of the Code

<sup>92</sup> See s.22 of the Code

See further *Bates v Zurich*<sup>93</sup> where the Supreme Court held that a discriminatory practice in the insurance industry is “reasonable” if it is based on a sound and accepted insurance practice and there is no practical alternative.

#### **2.4.4.1 Tobacco and Alcohol**

Tobacco and alcohol may only be sold to persons aged 19 and over<sup>94</sup>.

## **2.5 Enforcement Procedure**

Where a person believes that his/her rights under the Act have been infringed, they may file a complaint with the Commission. The Commission may initiate a complaint either by itself or at the request of any person. Where two or more complaints either bring into question a practice of infringement engaged in by the same person, or have questions of law or fact in common, the Commission may combine the complaints and deal with them in the same proceedings<sup>95</sup>.

The Commission is authorised by the Code to investigate complaints in the prescribed manner<sup>96</sup>. It must endeavour to effect a settlement.

The Commission may, at its discretion, decide not to deal with a complaint where it appears that <sup>97</sup>.

1. the complaint is one that could or should be more appropriately dealt with under an Act other than the Code;
2. the subject matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
3. the complaint is outside the jurisdiction of the Commission; or
4. the facts upon which the complaint is based occurred more than 6 months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

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<sup>93</sup> [1992] 2 S.C.R. 321

<sup>94</sup> Re alcohol: See s.20(2) of the Code, which refers to the provisions of the Liquor Licence Act and the regulations under it providing for and enforcing a minimum drinking age of 19 years. Re tobacco: See s.20(4) of the Code which refers to the provisions of the Tobacco Control Act 1994 and the regulations under it relating to selling and supplying tobacco to persons who are, or who appear to be under the age of 19 years.

<sup>95</sup> s.32 of the Code.

<sup>96</sup> Ss.33 and 34 of the Code.

<sup>97</sup> S.34(1)

### 2.5.1 Burden of Proof

Although the burden of proof requirements are not set out within the Code, the Commission states that a complainant in any human rights claim bears the burden of proof.<sup>98</sup> He or she must make out a *prima facie* case of discrimination, which in the absence of response from the party complained about is sufficient to justify a finding of discrimination. Inferences of discrimination may be drawn where the evidence offered in support renders such inference more probable than other inferences or hypotheses<sup>99</sup>. Once established, the burden shifts to the respondent to justify that its actions were either non-discriminatory (direct discrimination) or to justify that its actions were reasonable and bona fide in the circumstances (indirect discrimination/adverse effect).

Where the Commission does not effect settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer the subject matter of the complaint to the Human Rights Tribunal of Ontario.<sup>100</sup> More details guidance can be found in the Code at ss.36-40.

### 2.5.2 Sanctions

Where the Tribunal finds in favour of a complainant, it may, by order:

1. direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with the Act, both in respect of the complaint and future practices;
2. direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000 for mental anguish.

In respect of complaints of harassment (for age this applies in respect of harassment in accommodation), where the Tribunal upholds the complaint, and finds that a person who is a party to the proceeding,

1. knew or was in possession of knowledge from which the person ought to have known of the infringement; and
2. had the authority by reasonably available means to penalise or prevent the conduct and failed to use it,

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<sup>98</sup> "A Complainant's Guide", publication of the Ontario Human Rights Commission

<sup>99</sup> *Singh v Statistics Canada* (1998) 34 C.H.R.R. D/203

<sup>100</sup> S.36(1).

the Tribunal shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right of the Commission may investigate the complaint and request the Tribunal to re-convene. If the Tribunal finds that a person who is a party to the proceeding,

1. knew or was in possession of knowledge from which the person ought to have known of the infringement; and
2. had the authority by reasonably available means to penalise or prevent the conduct and failed to use it,

the Tribunal may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.<sup>101</sup>

Decisions of the Tribunal are to be made within 30 days of the conclusion of its hearing<sup>102</sup>. Appeals can be made to the Divisional Court as set out in s.42 of the Code.

Where a complaint is dismissed and the Tribunal finds that it was

1. trivial, frivolous, vexatious or made in bad faith;
2. in the particular circumstances undue hardship was caused to the person complained against,

the Tribunal may order the Commission to pay costs as fixed by the Tribunal.<sup>103</sup>

### 2.5.3 Offences

Every person who contravenes s.9 of the Code (in other words “*No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part*”), ss33(11)<sup>104</sup> or an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than \$25,000. This is not described as being a criminal offence, so it is unclear what the status of this provision actually is.

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<sup>101</sup> Ss.41(1) and (2).

<sup>102</sup> S.41(5)

<sup>103</sup> S.41(4)

<sup>104</sup> “*No person shall hinder, obstruct or interfere with a person in the execution of a warrant or otherwise impede an investigation under this Act*”

## 3 Ireland

### 3.1 Introduction and Context

In the field of discrimination, Ireland has legislated in different phases. The principle of equality in Irish legislation derives from Article 40.1 of the Constitution of Ireland<sup>105</sup>.

The relevant statutory legislation is:

1. The Employment Equality Act 1998 (“EEA 1998”) – this prohibits discrimination on nine protected grounds<sup>106</sup> in the field of employment and related areas (i.e., vocational training, membership of trade and professional bodies). It came into force on 19 October 1999;
2. The Equal Status Act 2000 (“ESA 2000”) – this prohibits discrimination on the nine protected grounds in the field of the provision of goods and services (including specific provisions in relation to discriminating clubs), education, the provision of accommodation, premises and, in respect of disability discrimination, transport and public spaces. The ESA 2000 was enacted on 26 April 2000 and came into force on 25 October 2000;
3. The Pensions Acts 1990 – 2004 which give the Equality Tribunal jurisdiction to decide claims of gender discrimination in access to occupational pensions or benefit schemes;
4. The Social Welfare (Miscellaneous Provisions) Act 2004 – this provides for the expansion of the Tribunal’s “pensions” jurisdiction to include claims of discrimination in occupational pension schemes based on any of the nine protected grounds;
5. The Equality Act 2004 (“EA 2004”) – this makes a number of changes to the EEA 1998, the ESA 2000 and the Pensions Acts 1990 – 2004. Its main purpose is to transpose the EU Race and Framework Directives into Irish law. The EA 2004 is important in relation to age discrimination because it:

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<sup>105</sup> “All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and out of social function”. In 1996, the Constitutional Review Group reviewed Article 40.1 and recommended that a further section should be added to Article 40.1 as follows: “No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, race, age, disability, sexual orientation, colour, language, religion, political or other opinion, national, social or ethnic origin, membership of the Travelling community, property, birth or other status”

<sup>106</sup> Gender, marital status, family status, race (including nationality), religious belief, age, disability, sexual orientation & membership of the Traveller Community

- i. extends the age provisions in the EEA 1998 to people who are 16 and over (although employers may set a minimum age of not more than 18 for recruitment to particular posts);
- ii. extends the age provisions in the EEA 1998 to people who are over 65 (so removing the previous upper age limit of 65);
- iii. extends the provisions about positive action in the EEA 1998 beyond the gender ground, to include all nine protected grounds (including age);
- iv. inserts a definition of “provision” into s.2 of the ESA 2000 (in connection with indirect discrimination claims) so that “provision” is defined to mean: *“a term in a contract, or a requirement, criterion, practice, regime, policy or condition affecting a person”*;
- v. retains the lower age limit of 18 for unlawful discrimination under the ESA 2000, except in the case of motor vehicle insurance to licensed drivers who are under 18. Therefore, the age provisions in the ESA 2000 do not extend to people who are under 18 except in relation to the provision of motor vehicle insurance.

The EA 2004 also provides that claims which assert that discrimination has occurred on more than 1 of the nine protected grounds shall be investigated as a single case. There is no dominant purpose test. Therefore, discrimination can occur on any 1 or more of the nine protected grounds so long as the protected ground is the real or effective cause of the discrimination. In addition, the EA 2004 gives statutory basis to the new burden of proof provisions contained in the EU Directives. This burden of proof, in practice however, was applied both in claims under the EEA 1998 and under the ESA 2000 so the express statutory provision is unlikely to make much practical difference<sup>107</sup>.

The EA 2004 came into force on 18 July 2004.

The EEA 1998 and the ESA 2000 (as amended) confer power on the Equality Authority. In the ESA 2000, the Authority has the following general functions:

1. To work towards the elimination of prohibited discrimination;
2. To promote equality of opportunity;
3. To provide information to the public;
4. To keep the ESA 2000 under review and make any proposals for amendment

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<sup>107</sup> See Michael McDonagh v. The Castle Inn, Birr [2002] ELR 355

In June 2002, the Equality Authority published a report, *Implementing Equality for Older People in Ireland*. Age & Opportunity and other ageing organisations were represented on the advisory committee to the report. This report examined and exposed the issue of ageism and put forward an “equality agenda” which recommended certain action that should be taken. Amongst its 72 recommendations, the Authority recommended that:

1. The changed wording to the equality clause in the Constitution which was proposed by the Constitution Review Group in 1996 should be adopted – this proposal has not yet been implemented;
2. The upper age limit in the EEA 1998 should be removed. This has been achieved by the enactment of the EA 2004;
3. A new public authority duty should be imposed (via the EEA 1998 and the ESA 2000) so that public bodies, government departments, local and regional public authorities should have a general duty to promote age equality – again, this has yet to be legislated for;
4. A number of the existing statutory exclusions should be removed – in fact, certain “positive” exemptions have been added to the EEA 1998 (eg, extending the positive action provisions to all nine protected grounds, not just gender). However, the Authority was advocating the removal of certain of the “negative” statutory exemptions. This has yet to be achieved.

The Authority specifically rejected the idea of a single piece of legislation in respect of age discrimination. It considered the Older Americans Act in the US as an example of specific legislation dealing with the rights of older people. However, such legislation has the possibility of marginalising a specific age group (i.e., older people). The Authority believed that age discrimination (extending across all possible age groups) should be dealt with in mainstream legislation<sup>108</sup>.

The Authority’s report was examined by the National Economic and Social Forum (“NESF”) which published a report in July 2003, *Equality Policies for Older People: Implementation Issues*. This Report highlighted the fact that very few of the 72 Recommendations made by the Equality Authority in its Report had, in fact, been implemented. The NESF went on to conclude that, in the absence of a statement of political support from the Minister of Justice, Equality and Law Reform, the Recommendations would not be actioned.

In the Second Stage reading of the Equal Status Bill 1997<sup>109</sup>, the then Minister for Justice and Equality conceded that anti-discrimination legislation in non-employment fields had existed in other countries for years. The Minister stated that he had drawn on provisions

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<sup>108</sup> See the Equality Authority Report “*Implementing Equality for Older People*” – section 3.10, page 19

<sup>109</sup> On 27 February 1997 by the then Minister for Justice and Equality (Mr Taylor)

of other jurisdictions – in particular, the UK, Northern Ireland, Canada, Australia and New Zealand. The Minister went on to state that:

*“It is interesting to note that when similar legislation was introduced in other countries there were fears of damage to business or fraudulent claims, similar to those which have been expressed about the present Bill. Such fears were not realised, and anti-discrimination legislation works well and is accepted as a normal feature of life in other jurisdictions”.*

The implementation of the ESA 2000 is rather too recent for there to have been any formal review of its effectiveness to date. However, the Equality Tribunal (the investigatory body tasked with mediating or determining complaints made under the ESA 2000) carries out an annual Legal Review of claims made to the Tribunal. Whilst this is useful in order to determine where litigation has been concentrated, the Legal Reviews cannot provide any definitive conclusions about the impact of the ESA 2000 to the daily experiences of individuals who had experienced age discrimination prior to the legislation coming into force.

However, there was an extensive consultation period in relation to the ESA 2000. The ESA 2000 was first published in Bill format as the Equal Status Bill 1990<sup>110</sup>. Therefore, there was 10 years of consultation, drafting, re-drafting, debating and amending before the Bill was enacted. The Employment Equality Bill 1996 was struck down as unconstitutional by the Supreme Court on 3 separate grounds (2 of which were essentially technical in nature). The Supreme Court held that to require an employer to bear what could be significant costs in providing facilities for disabled persons was an unjust attack on the employer’s constitutionally protected property rights<sup>111</sup>. Because of the Supreme Court’s decision in relation to the Employment Equality Bill 1996, the passage through Parliament of the Equal Status Bill was delayed. In the second stage reading of the Equal Status Bill 1999<sup>112</sup>, the new Minister for Justice, Equality and Law Reform referred to the Supreme Court judgment and stated that:

*“The implications of this judgment were carefully examined before the revised Equal Status Bill was developed. The redrafted version follows the approach taken in the Employment Equality Act 1998, that is, the obligation to make reasonable accommodation is subject to a “nominal cost” threshold. This approach has been taken following extensive legal advice on the matter.*

*As required by the Supreme Court judgment, vicarious liability of employers for acts of employees now applies in respect of civil proceedings only”.*

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<sup>110</sup> On 10 April 1990 (by Deputy Spring in the Dail Eireann, the equivalent in the Irish Parliament to the House of Commons in the UK)

<sup>111</sup> See Re: Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 321

<sup>112</sup> On 20 May 1999 by the new Minister for Justice, Equality and Law Reform (Mr O’Donoghue)



The impetus for the ESA 2000 was given added incentive after what became known as the abortion controversy in Ireland in March 1992 when the Supreme Court ruled that travel to the UK for an abortion was unlawful, even in relation to a 14 year old girl who became pregnant after being raped. The then Minister for Justice and Equality moved that the Equal Status Bill 1990, which had been left rather in abeyance, be read for a Second Time and, in that Debate, the Minister stated that:

*“It may seem fanciful to some to describe the abortion controversy as an issue of equality but, in essence, that is what it is. The restriction on the right to travel within the European Community for purposes which are perfectly legal throughout the Community is something which a largely patriarchal society has imposed on some women. Could you imagine the furore there would be if a court decided that a man wishing to secure a foreign divorce, for example, should be restrained from leaving Ireland? The effect of the travel restriction is that we are telling Irish women that we simply do not trust them. Why should we trust them? We do not pay them, we do not promote them, we do not encourage them towards education and we do not even let them run something as complex and as difficult as a golf club. Of course, we talk eloquently about apartheid or about injustice anywhere in the world, but when are we going to recognise the injustices we see every day here at home? It is not just women who are the targets of inequality; within the last year, for example, there was a great deal of media coverage of the fact that many Dublin pubs had a policy of preventing travellers from entering simply because they were travellers. How many physically handicapped people could testify to the difficulties they have had in securing jobs not because of any lack of ability but simply because of the nature of their handicap? The background of inequality against which this Bill has been published is real and substantial.*

From its inception, there were calls for Parliament to legislate a single comprehensive equality statute dealing with all fields from employment, to education to goods and services etc. However, because of forceful lobbying from special interest groups, the Equal Status Bill was delayed. There was greater impetus to enact the employment equality legislation, at the expense of either the Equal Status Bill (which was delayed) or a single comprehensive equality statute.

We now consider the areas of the ESA 2000 which gave rise to the greatest concerns and pre-Act debate. We will then consider what sorts of legal challenges have been brought by individuals under the ESA 2000. All the areas that we refer to are relevant to age discrimination in the field of goods and services.

## 3.2 Definitions

### 3.2.1 “Age” and the Differences of Age

The ESA 2000 does not define “on grounds of age” and the ESA 2000 (section 3) refers to the complainant and the comparator being “*of different ages*”. Age discrimination is usually understood as being targeted against older people. The majority of decided cases in the Equality Tribunal have concerned individuals aged 40 – 60. However, the first Irish decision on age-based harassment concerned a young female manager who was consistently ridiculed before other staff by an older male colleague as a “young, fooling girl”<sup>113</sup>.

An early issue was whether it is discriminatory on the age ground to favour (eg, in advertisements) qualities such as youth (which could, in principle, be present at any chronological age). In *Equality Authority v. Ryanair*<sup>114</sup>, the Company advertised for a manager seeking a “young, dynamic professional”. The Equality Authority claimed that this indicated an intention to discriminate based on age and amounted to a discriminatory advert. The Company argued that the Act must be read as referring to chronological age. The Equality Officer observed both in its dictionary and commonsense meaning “young” referred to a chronological age group and would reasonably be understood to exclude older applicants. The Officer also noted that none of the 28 candidates who stated their age was over 40 years of age. The case was decided against the airline and the advert was held to be discriminatory.

The other big question was how large a difference of age there must be between the complainant and the comparator. In *Perry v. Garda Commissioner*<sup>115</sup>, 2 days’ difference was accepted as significant. The case concerned a voluntary early retirement scheme. The key issue was whether the scheme incentivised retirement for employees under 60, so discriminating on the age ground. The 64 year old complainant argued that the severance gratuity payable to her under the scheme was substantially less than that payable to her comparator colleague who was 59. The Respondent argued that the differences were not due to age but were designed to compensate the comparator for losing more years’ paid employment. The Equality Officer investigated the issue by considering the example of 2 workers taking early retirement with identical service records, one aged 60 plus 1 day and the other aged 60 minus 1 day. The scheme would result in the anomaly of the younger worker gaining almost £6000 more by way of the severance gratuity, which clearly was not proportionate to the 2 day difference between the 2 workers’ loss of future earnings. The Equality Officer held that no clear actuarial or other evidence had been presented to

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<sup>113</sup> See *A Named Female v. A Company* DEC-D2002-014

<sup>114</sup> *Equality Authority v. Ryan Air* DEC-E2000-014

<sup>115</sup> *Perry v. Garda Commissioner* DEC-E2001-029

bring the scheme within the statutory exemption (section 34(3) of the EEA 1998) and the scheme, therefore, did discriminate on the age ground.

However, in *Superquinn v. Freeman*<sup>116</sup>, the Labour Court held that an age difference of 3 years (between 28 and 31) was not sufficient to evidence age discrimination (in a case of 2 candidates applying for a promotion).

### **3.2.2 Concept of Discrimination includes Discrimination by Association and by Perception**

The definition of direct discrimination in the ESA 2000 encompasses less favourable treatment on the grounds of age where the complainant is perceived to be of a particular age (but, in fact, is not). This is because the definition of direct discrimination encompasses discrimination on any of the nine protected grounds, where the protected ground “*exists at present*”, “*existed but no longer exists*”, “*may exist in the future*” or “*which is imputed to the person concerned*”. Therefore, if one of the protected grounds (eg, a particular age, perhaps because of grey hair or wrinkles) is imputed to the complainant and s/he is treated less favourably than someone in a comparable situation because of the age imputed to him/her, then this will be unlawful under the ESA 2000<sup>117</sup>.

Furthermore, the ESA 2000 encompasses discrimination by association. Therefore, where the complainant is discriminated against because of his/her association with someone whose age is the effective cause of the discriminatory conduct, then this will be prohibited by the ESA 2000<sup>118</sup>.

### **3.2.3 Discrimination of Organisations/Groups**

There was some parliamentary debate during the Committee Stage of the Equal Status Bill 2000 in the Seanad Éireann<sup>119</sup> in April 2000 where it was proposed that the definition of discrimination in section 3 should be amended so as to extend beyond “person” to organisations or groups (the examples given were of groups of refugees, groups of migrants and groups of travellers). Presumably, also groups who are defined by their particular age might also suffer “group” or “organisational” discrimination.

The amendment was not adopted – firstly, because of the increased delay that it would cause to the passage of the Bill (now in its 10<sup>th</sup> year) and, secondly, because it would still

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<sup>116</sup> *Superquinn v. Freeman*, Labour Court, 14.11.02 DEE0211

<sup>117</sup> Section 3 of the ESA 2000, as amended by section 48 of the EA 2004

<sup>118</sup> Section 3 of the ESA 2000, as amended

<sup>119</sup> The Senate or the equivalent to the House of Lords in the UK

be possible for an individual who encounters discrimination as a member of an organisation to bring a claim of discrimination on an individual basis (particularly because of the possibility of claiming discrimination by association).

### 3.2.4 Indirect Discrimination

The original definition of indirect discrimination in the ESA 2000 was confusing and unhelpful. That definition has been amended by the EA 2004 to bring the definition of indirect discrimination into harmony with the employment provisions (in the EEA 1998) and to transpose the definition of indirect discrimination from the EU Framework Directive. Whilst, indirect discrimination is not referred to directly, it is clear that section 3(1)(c) defines indirect discrimination<sup>120</sup>. The same definition appears in the EEA 1998.

### 3.2.5 Harassment

The definition of harassment is contained within section 11 of the ESA 2000. This has been recently amended by section 51 of the EA 2004. Harassment is separately defined between sexual harassment on the one hand and harassment on any of the other 8 grounds (including age) on the other hand. In both cases, harassment is defined in accordance with the definition in the EU Framework Directive and mirrors the definition of harassment in the EEA 1998<sup>121</sup>.

As in legislation elsewhere, harassment is subject to a reasonable steps defence by the person who would otherwise be responsible for the environment in which the harassment took place (section 11(2) and (3) of the ESA 2000). Harassment is confined to the following fields:

1. provision of services;
2. purchase of goods;
3. provision of accommodation (or services/amenities related to that accommodation);
4. provision of any service offered by any educational establishment.

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<sup>120</sup> Section 3(1)(c) [as amended by section 48 of the EA 2004]: "*where an apparently neutral provision puts a person....at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieved that aim are appropriate and necessary*"

<sup>121</sup> Section 11(5) of the ESA 2000, as amended, provides that harassment is "*unwanted conduct*" which has "*the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person*".

Harassment, therefore, does not expressly extend to “clubs”, although where the club provides a service, the purchase of goods, the provision of accommodation and related services and facilities or education, it will be covered.

### **3.2.6 Upper Age Limits**

In a whole raft of legislation (from rules governing membership of state bodies, to jury service, driving licences and access to health insurance under the Health Insurance Act 1994), there are legally binding upper age limits which apply. The ESA 2000 cannot render such age limits unlawful because of the exemption by which all actions (or failures to act) which are discriminatory, but which are done under statutory authority, are permissible.

When the Equal Status Bill was passing through the Dail in October 1996, an objection was made to the continuing age discrimination in relation to entry into public service (Eg, an upper age limit of 50). In answer to this objection, the then Minister for Justice and Equality stated that age limits for recruitment to the public sector are not enshrined in legislation. He pointed out that legislation governing recruitment to the Civil Service is silent on the question of age limits. He undertook that after enactment of the EEA 1998, public and private sector employers would have to comply with its terms in relation to age limits in recruitment.

The Equality Authority in its report *“Implementing Equality for Older People”*, recommended that, as a general principle, upper age limits should not apply unless there is an objective justification. In relation to jury service, the Authority recommended that the upper age limit be abolished, although everyone over 65 should be excusable as of right. In relation to driving licences, the Authority recommended that those aged between 60 and 70 should be charged the same per annum rate for their driving licence as those under 60 who opt for 10 year licences. These recommendations have yet to be actioned.

## **3.3 Exemptions**

Right from the beginning, it was envisaged that the ESA 2000 would contain exemptions. However, those exemptions were expressly intended to permit positive discrimination in order to encourage greater equality (i.e., rendering lawful what would otherwise be positive discrimination). Much less emphasis was put on negative exemptions (eg, rendering lawful what would otherwise be negative discrimination). However, in its final form, the ESA 2000 contains more negative exemptions than positive exemptions – this is largely due to successful lobbying on the part of special interest groups.

There are a large number of exemptions provided for by the ESA 2000. In its report, *“Implementing Equality for Older People”*, the Equality Authority recommended that a number of existing statutory exclusions should be removed in order to bring the ESA 2000 into line with the EEA 1998 (and the EU Race and Framework Directives on racial equality and employment equality). However, this recommendation has not yet been acted upon. Although the exemptions in the ESA 2000 are not contrary to EU law (because there is no Directive outlawing age discrimination in relation to the provision of goods and services, education etc), the Equality Authority believes that equality legislation in Ireland should be harmonised so that a similar degree of protection is afforded both in the employment field and across other fields<sup>122</sup>.

The exemptions which do exist in general contain a requirement to “justify” the treatment (which would otherwise be discriminatory) as either “reasonable” or “reasonably necessary”. However, whilst there is a “reasonableness” limitation to many of the exemptions, there is no requirement to audit the various types of treatment to ensure that they go no further than their justified purpose. This is similar to the position in Australia.

### 3.3.1 General Exemptions

The *general* exceptions are contained in sections 14 to 16 of the ESA 2000 and include (insofar as they may be relevant to age discrimination):

1. action taken under statutory authority;
2. positive measures which are intended to promote equality of opportunity for those disadvantaged by their protected characteristic (eg, age) or which cater for the special needs of persons who may require particular facilities or arrangements etc because of their circumstances;
3. action taken in good faith in relation to the provision of services, goods or accommodation where such provision would produce a substantial risk of criminal or disorderly conduct;
4. action taken by license holders for the sole purpose of ensuring compliance with the provisions of the Licensing Acts;
5. the imposition of a preferential fee, charge or rate in respect of services, goods, accommodation or club facilities to families, married couples, people from specific age groups and the disabled (eg, preferential rate travel cards);
6. differential treatment of an individual solely because of the exercise of a clinical judgment in connection with the diagnosis of illness or medical treatment;

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<sup>122</sup> See the Equality Authority Report *“Implementing Equality for Older People”* – page 17

7. differential treatment on the ground that the individual lacks “capacity” (in the legal sense) – this is subject to an objective “reasonableness” test.

### 3.3.2 Specific Exemptions

There are also *specific* exemptions which apply to the particular fields covered by the ESA 2000. Those which may be relevant to age discrimination are as follows:

1. disposal of goods or provision of services not done in the course of a business or trade. “In the course of a business” has yet to be defined but does not require payment by the “customer” or “user” [see definition in section 5(1) of the ESA 2000];
2. differences of treatment in relation to insurance policies, pension & annuities (and other matters related to the assessment of risk) which are based on actuarial or similar data, other relevant underwriting or commercial factors and which are reasonable having regard to the data and other relevant factors;
3. differential treatment (on grounds of, amongst others, age) in relation to sporting facilities and events (this extends to differential treatment by educational establishments of students) – any difference in treatment must be justified as being “reasonably necessary”;
4. age requirements for fostering and adopting children – again the requirement must be shown to be “reasonable” having regard to the needs of the child(ren);
5. differential treatment (on grounds of, amongst others, age) for reasons of authenticity, aesthetics, tradition or custom in connection with entertainment (eg, a dramatic performance) – again, the difference in treatment must be justified as being “reasonably necessary”;
6. differential treatment occasioned by way of the disposal of goods by will or gift (eg, requiring assets to be held in trust for individuals until they reach a certain age);
7. differential treatment in relation to the provision of goods or services which can be reasonably regarded as suitable only to the needs of certain persons;
8. differential treatment of persons in a particular age group in respect of services that are provided for the principal purpose of promoting the special interests of persons of that age group – the difference in treatment must be justified as being reasonably necessary to promote those special interests [section 5(2)(h) of the ESA 2000];
9. refusal of accommodation to persons who are not in a specified category where the premises or accommodation are reserved for specific purposes (eg, nursing home, retirement home);

10. differential treatment by housing authorities in relation to housing accommodation based on age;
11. differential treatment in relation to the allocation of places to mature students at institutions of further and higher education
12. differential treatment by clubs in relation to the refusal of membership if the principal purpose of the club is to cater only for the needs of persons of a particular age;
13. differential treatment by clubs in relation to confining benefits or privileges to particular age groups where it is not practicable for those outside the age group to enjoy the benefit or privilege at the same times as members of that particular age group and the club has made arrangements which offer the same or a reasonably equivalent benefit or privilege to all members;
14. positive action by a club (including the reservation of places on its management board/committee for persons of a particular age group) in order to promote equality and/or obtain equal involvement in club matters of members of a particular age group

### **3.3.3 Discriminating Clubs**

The purpose of the various exemptions in relation to discriminating clubs is not to outlaw the discrimination outright. A complainant is empowered under the ESA 2000 to make a complaint to the District Court which can decide to remove the Club's certificate of registration. This, of course, would not prevent the Club from continuing as an unregistered private club. Originally, there was another sanction against a discriminating club which was to prevent that club from being entitled to grants from public funds or from using public facilities. That sanction was debated at length during the course of the Bill's Second Reading. The sanction was removed because of issues of proportionality. The sanction would mean that registered clubs would be significantly worse off than private clubs.

Many of the provisions in relation to clubs related to lobbying by golf clubs, and in particular female members of the golf clubs. This was the focus of an inordinate amount of parliamentary debate, both in the Dail and the Seanad (i.e., the Senate).

### **3.3.4 Insurance**

There are exemptions within the ESA 2000 which came about as a result of intensive lobbying by the insurance industry. The exemption (in section 5(2)(d)) provides that discrimination on any of the protected grounds will be permitted so long as the difference in treatment is by reason of actuarial or statistical data obtained from a source "*on which it*



*is reasonable to rely*". Alternatively, the difference in treatment will be permissible if it is based upon "*other relevant underwriting or commercial factors*". This will require the Equality Tribunal to look at whether a source is a reasonable one or whether the factors relied upon are "relevant"<sup>123</sup>. In both cases, the insurance company would also have to show that the difference of treatment "*is reasonable having regard to the data or other relevant factors*".

The inclusion of this provision was objected to when the Equal Status Bill passed through the Senate in April 1997. The objection was based on the fact that it gave insurance companies huge power and undermines the protection that the Bill should have been conferring. However, the final version of the ESA 2000 contains the full exemption. In fact, the "reasonableness" test arguably imposes a further hurdle upon insurance companies because not only do they have to point to a reasonable source for the data or to how the factors relied upon are relevant, they also have to show that the differential treatment is *reasonable* having regard to that data or relevant factors. This was pointed out to the Senate by the then Minister for Justice and Equality who argued that the "reasonableness" test was an important safeguard for the customer and this was accepted. However, in a later reading of the Equal Status Bill<sup>124</sup>, the same Minister who had advocated the "reasonableness" test as an important safeguard for the customer, used the same exemption to give an example of where it would be "reasonable" (and, therefore, not discriminatory) to treat people differently on the age ground - in relation to motor insurance for the under 25s and life insurance in respect of older people!

### 3.3.5 Access to Health Insurance

At present, under the Health Insurance Act 1994, all health insurers must offer "Community Rating". This means that all adults pay the same for the same benefits so that the price charged for health insurance is not affected by age (gender, health, past record of claims etc), unlike motor or life insurance. However, it is legally possible to refuse to provide cover for new members over 65. In practice in Ireland, the main insurers take advantage of this.

The Health Insurance (Amendment) Act 2001 provides for significant changes. It will provide that insurance may not be refused to new members over 65 (other than in circumstances which may be prescribed). The Amendment Act 2001 also provides for changes in the application of community rating (though these sections have yet to come into force, by way of regulations). Under the Amendment Act 2001, new young people will be encouraged to take out health insurance by the introduction of lifetime commu-

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<sup>123</sup> As it did in the *Ross v Royal & Sun Alliance Insurance plc* case [see below]

<sup>124</sup> On 27 February 1997 in the Dail

nity rating. This will allow insurance companies to apply late entry premium loadings to people over 35. These late entry premium loadings will not apply to people who already have health insurance cover when this legislation comes into effect.

The Authority, in its “*Implementing Equality for Older People*” report recommended that the proposed changes in the health insurance legislation should be the subject of a major information campaign to ensure that people will be aware of the potential problems if they do not join a health insurance scheme before age 35.

### 3.3.6 Access to Motor Insurance

Many insurance companies apply loadings to older people (generally, at age 70 and over) and some refuse cover altogether.

There has been a Declined Cases Agreement between the Minister for Enterprise, Trade and Employment and motor insurers under which a quotation cannot be refused on the grounds of age alone. However, this Agreement only has informal status so cannot render unlawful the refusal of cover on grounds of age.

One of the first cases brought under the ESA 2000 on the age ground was brought by a 77 year old man who was refused car insurance because of his age<sup>125</sup>. The Tribunal found that because the insurance company was unable to provide full details of the actuarial or statistical data that had guided its “over-70s” policy, it had not been able to satisfy the “exemption” contained in section 5(2)(d) of the ESA 2000. The Equality Officer held that he had not been satisfied that the data had come “*from a source on which it is reasonable to rely*” and that the “over-70s” policy was not “*reasonable having regard to the data or other relevant factors*” as the company had not taken all relevant factors into account in considering individual requests but had simply applied an “across the board” policy of refusing quotations to all persons over 70.

In 2002, the Motor Insurance Advisory Board (which had been established to provide advice to the Minister for Enterprise, Trade and Employment on factors affecting the cost of motor insurance) published its report. It recommended that insurers undertake to comply with the provisions of the ESA 2000, particularly in respect of drivers aged 65 and over, including advising them of their rights to freedom of contract and to improve procedures for retirees who have a record on employers’ fleet policies but are now seeking private motor insurance. The Board also recommended that a regulation be introduced requiring insurers who refuse to quote for any particular risk to state their reasons in writing upon request. The Board recommended that the Declined Cases Agreement should be formalised by legislation. Finally, the Board recommended that the Irish Finan-

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<sup>125</sup> See *Jim Ross v. Royal & Sun Alliance Insurance plc* DEC-S2003-116

cial Services Regulatory Authority (when established) should supply regular market wide statistics on motor premium differentials to the Equality Authority to assist in assessing insurers' compliance with the ESA 2000. Whilst it is clear that the IFSRA is now established, it is not clear from an examination of its website that it is required to provide insurance industry statistics to the Equality Authority.

### **3.3.7 Transport**

One of the ESA 2000's positive exemptions relates to concessionary rates. Section 16(1) of the ESA 2000 provides that the imposition of a reasonable preferential fee, charge or rate in respect of anything offered or provided to (or in relation to) persons in a specific age group will not be unlawful. This is potentially an extremely wide exemption and could extend to transport provision. Concessions for public utilities such as public transport could also be a special measure which would be permitted under the exemption contained in section 14(b) of the ESA 2000 (i.e., positive measures which are intended to promote equality of opportunity for those disadvantaged by their age or which cater for the special needs of persons who may require particular facilities or arrangements etc because of their age).

In its report, *"Implementing Equality for Older People"* the Equality Authority recommended that a review should be carried out by the Department of Social, Community and Family Affairs of all relevant transport schemes so that a comprehensive package of transport and other arrangements should be devised to ensure mobility for older people in the community<sup>126</sup>.

### **3.3.8 Licensed Premises**

The majority of parliamentary debate (and media coverage) as the Equal Status Bill went through Parliament concerned the rights of publicans to exclude or eject individuals from their premises. The debate focussed, in particular, on this issue in connection with members of the Traveller Community. The Licensed Vintners' Association published and submitted proposals concerning their members' rights to refuse admission and service in their licensed premises. As a result, 2 wide exemptions were included in section 15 of the ESA 2000.

The first allows discrimination in the provision of goods and services and accommodation in circumstances which would lead a reasonable person to believe that such provision would produce a substantial risk of criminal or disorderly conduct. This "defence" to

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<sup>126</sup> See the Equality Authority Report *"Implementing Equality for Older People"* – page 53

discrimination has been used, in the main, to refuse service to members of the Traveller Community.

The second exemption permits discrimination where the refusal of the provision of the goods, service or accommodation was in good faith for the sole purpose of ensuring compliance with provisions of the Licensing Acts. This latter “defence” could be used against individuals who are not under-age but are perceived to be and are refused service as a result. Indeed, just such a defence was used in a case before the Equality Tribunal in 2001 where 2 young men complained that they had been refused admission to a function at a hotel on the grounds of age. The Hotel Management used the defence in sections 15(1) and (2) (i.e., risk of disorderly conduct and action taken in good faith under the licensing legislation). It stated that some of the individuals in the complainants’ group were unable to produce valid proof of age cards. However, the Tribunal rejected the defence because it was not satisfied that sufficient evidence had been provided to show that the Management had acted in good faith<sup>127</sup>.

### 3.3.9 Education

In general, an educational establishment may not discriminate in relation to admission, expulsion (or any other sanction), access to any course, facility or benefit provided by the establishment or in relation to any other term or condition of participation in the establishment by a student. However, there are many exemptions to the general principle of non-discrimination (most of which are not relevant to the age ground).

In relation to age discrimination, there is an interesting specific exemption in connection with education of mature students. Section 7(3)(e) provides that differences in treatment on the age ground by universities or third-level institutions is permissible where it concerns the allocation of places at the establishment to mature students. Mature students are defined in the Local Authorities (Higher Education Grants) Acts 1968 to 1992. However, this legislation does not specifically allow or require further or higher education institutions to discriminate in the allocation of places in favour of mature students. Therefore, the statutory authority exemption would not apply. That is the reason for the specific inclusion of this provision.

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<sup>127</sup> See *Greg Scanlon & Kevin Ryan v. The Russell Court Hotle* DEC-S2001-013

### **3.3.10 Accommodation**

The exemption in relation to the prohibition on discrimination in the provision of accommodation (section 6 of the ESA 2000) has been amended by the EA 2004 in an interesting way. The original exemption provided that any difference in treatment would not be unlawful where it occurs in cases where the discriminator or a near relatives intends to continue to reside in the premises and the premises in question are “small premises” (i.e., up to 6 people, including the discriminator). This exemption has been removed and replaced with a differently worded exemption – namely, there will be no discrimination where the discriminator is providing the accommodation in his/her own home (or a part thereof) or where the provision of accommodation affects the private or family life of any other person residing in the home (see section 49 of the EA 2004, amending section 6 of the ESA 2000). The original exemption was similar to that in other jurisdictions (notably, Australia). On the one hand, it is wider (because there is now no need to show that the home is a “small home”). On the other hand, it is narrower because there is now a need to show (where the discriminator does not reside in the home) that the provision of the accommodation would affect the family or private life of another living in the home.

The justification for the exemption is to reflect the distinction between public life (where age discrimination is prohibited) and private life where a greater degree of individual choice is recognised.

### **3.3.11 Land/Estate**

The exemption to the prohibition of age discrimination in relation to the disposal of an estate is where that disposal is effected by virtue of a will or gift. Presumably, again, this is to recognise the need to individuals in their private lives to have a greater degree of personal choice.

## **3.4 Complaints made to the Equality Tribunal**

In 2003, there were 5 Decisions by the Tribunal in relation to the age ground (under the ESA 2000). On average, since the ESA 2000 came into operation, 10% of all complaints made to the Equality Authority have related to the age ground, with one third of those cases being brought by older people. The main category of complaint by older people is in relation to access to insurance (but also transport, medical insurance and access to pubs or nightclubs)<sup>128</sup>.

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<sup>128</sup> See the Equality Authority Report *“Implementing Equality for Older People”* – section 3.4.6, page 16

Overall, the majority of complaints made to the Equality Tribunal under the ESA 2000 were by members of the Traveller Community for being barred or refused service at public houses.

An interesting case on the age ground concerned a dispute where the complainant claimed that he had been discriminated against on the ground of age when he sought access to a refuse collection service at a reduced rate (because of the smaller size wheelie bin available to over 65s, in particular) from Limerick County Council in 2002<sup>129</sup>. He was refused the service because it was only available to those who had the smaller size bin and were over 65 years of age and living alone or were in a 2 person household where one person, at least, was over 65 or to where they had the particular size wheelie bin at the time that the reduced rate charging policy came into force. The complainant alleged that he was not being provided with a service which is generally available to the public and that this was on the ground of his age (i.e., under 65). The Council's defence was that the reduced rate was available to certain categories of people who may have had difficulty in meeting the full charge. The Tribunal found that:

1. the complainant could show that he was potentially covered by the age ground (because those who could avail themselves of the smaller wheelie bin and at the reduced rate were over 65);
2. the complainant could show that he was subject to the specific less favourable treatment (i.e., he was refused the reduced rate);
3. the complainant could not, however, show that this was less favourable treatment by reference to someone in comparable circumstances on the ground of his age. This is because the Council was acting within the definition of the exemption relating to preferential fees (section 16(1) of the ESA 2000).

Most of the other cases relying on the age ground concerned refusal of access or service in bars, pubs or nightclubs. In the 4 cases found in this area, the Tribunal upheld each complaint that the refusal of access/service was on the ground of age. Interestingly, 2 of the cases concerned refusal where the barman thought the complainants were under-age<sup>130</sup>, and 2 concerned complaints by individuals who were refused service because they were perceived to be "too old" for the atmosphere and style of the establishment. In one case, the complainant was 72 years old<sup>131</sup>. In the other case, the complainants were 29 and 36!<sup>132</sup> These cases well illustrate that age discrimination is not just about the elderly but potentially affects all individuals.

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<sup>129</sup> See *Patrick Dalton v. Limerick County Council* DEC-S2004-042

<sup>130</sup> See the *Scanlon & Ryan* case and *Peter Duggan v. The Castle Inn, Rathfarnham* DEC-S2003-142

<sup>131</sup> See *Mr J O'Reilly v. Q Bar* DEC-S2002-013

### 3.5 Points to note

There is no Age Commissioner in Ireland. Action, review, monitoring etc in relation to all of the nine protected grounds is carried out by the “one stop shop” Equality Authority.

No specific examples are given in the ESA 2000 of what might constitute discrimination or, more helpfully perhaps, what might not constitute discrimination because of the application of 1 or more of the exemptions. There is also no statutory Code of Practice or Guidance Notes. Interpretation, therefore, will be left to the Equality Authority (not binding) or to the Equality Tribunal and appellate courts.

There is nothing within the exemption provisions to limit the application of the “special measures” / “positive action” type exemptions to the period of time necessary to achieve the permitted purpose. In UK law, for example, positive action must stop once the purpose for which they were implemented is achieved.

There is a 2 year review requirement in the ESA 2000 requiring the Minister for Justice, Equality and Law Reform to review the effectiveness of the Act and consider any amendments. This was achieved, in part, with the enactment of the EA 2004 which made various changes to the ESA 2000.

There is a provision on incitement/procurement (section 13). This provides that any person guilty of procuring or attempting to procure another person to engage in discriminatory conduct shall be guilty of an offence. Therefore, procurement or incitement does not amount to discrimination but does carry sanctions as an “offence” under the ESA 2000 (section 43).

Section 43 deals with all offences under the ESA 2000 (eg, procuring discrimination, obstructing the Director of the Equality Tribunal, disclosure of information in contravention of section 36(2) etc). Where a person is guilty of an offence, s/he will be liable to summary conviction (and to a fine not exceeding 1500 Euros and/or up to 1 year’s imprisonment) or to conviction on indictment (and to a fine not exceeding 25,000 Euros and/or up to 2 years’ imprisonment).

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<sup>132</sup> See *Suzanne & Margaret Crawford v. The Bootlegger Bar* DEC-S2003-146 & 147

## 4 Australia

### 4.1 Introduction and Context

On 23 June 2004 the Australian Age Discrimination Act came into force. As with other anti-discrimination legislation, it confers powers on the Human Rights and Equal Opportunity Commission (HREOC). The Australian Government says Australia is the first country to propose and pass stand-alone age discrimination legislation that will cover, among other things, access to goods and services and education, as well as employment<sup>133</sup>.

Australia states that their present legislative provisions governing age discrimination are broader than those enshrined in the USA, New Zealand, Canada and Ireland.

The passing of the legislation is too recent for there to have been any review of its effectiveness to date, but thanks to the extensive consultation period it is possible to analyse key parts of the Act which were discussed at length and in particular those parts which groups and individuals around Australia found contentious.

It is important to note that prior to the Age Discrimination Bill 2003 all Australian States and Territories had prohibited age discrimination and Federal law provided far less protection against age discrimination than State and Territory law. However HREOC could not provide enforceable legal remedies following their inquiry into and conciliation of age discrimination complaints in employment.

The proposal to introduce age discrimination legislation into Australia at a federal level has been on the table for many years<sup>134</sup>. In 1995 within a 'National Action Plan' the Government raised the concept of an examination of possible age discrimination legislation including the idea of the abolition of compulsory retirement ages in the Commonwealth public sector. This latter provision came into effect through the Public Service Act 1999.

The federal Government also committed itself to allowing persons over 65 to continue contributing to a regulated superannuation fund when they maintain a bona fide link with the workforce.

In 1999, Government identified age discrimination as a major barrier to the employment of mature and older workers and renewed its commitment to age discrimination legislation during the 2001 election.

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<sup>133</sup> The Act also prohibits age discrimination on grounds of health and medical services, accommodation, transfer of land and requests for information, and the administration of Commonwealth laws and programs. It provides for a number of exemptions in the areas of superannuation, insurance and credit; pensions, allowances and benefits; and for acts done in compliance with particular laws, awards and agreements.

<sup>134</sup> For fuller background see the Digest of the Bill at [www.apf.gov.au/library/pubs/bd/2003-04/04bd029.htm](http://www.apf.gov.au/library/pubs/bd/2003-04/04bd029.htm)



Interest groups and the press had complained about the unreasonable length of time being taken to come up with proposals for age discrimination legislation.

In May 2000 HREOC produced a report called “*Age Matters: a report on age discrimination*”. The Government published a paper called “*Information Paper Containing Proposals for Commonwealth Age Discrimination Legislation*” in 2002 to which HREOC responded in December 2002.

Following the publication of the Bill by the Commonwealth Government in 2003, HREOC made a Submission to the Senate Legal and Constitutional Legislation Committee in September 2003.

It is worth noting that the Senate unsuccessfully sought a number of amendments to the Bill, including the extension of the laws to cover voluntary work and the establishment of an age discrimination commissioner. The Council on Ageing was also concerned about the failure to appoint an Age Discrimination Commissioner. However there is currently a Bill before Parliament proposing the abolition of all specifically focussed Commissioners: the Australian Human Rights Commission Legislation Bill 2003.

Reliance was placed on relevant international instruments relevant to age discrimination: those relevant to the field of goods and services are described in the HREOC paper *Age Matters*.<sup>135</sup>

We now consider the areas of the Bill (now Act) which gave rise to the greatest concerns and pre-Act debate. Many of these points were raised from 1999 onwards. All the areas we mention are relevant to age discrimination in the field of goods and services.

## **4.2 Commentary on Aspects of the Bill/Act which are relevant to Goods and Services**

### **Dominant Purpose Test:**

Clause 16 of the Bill (now section 16 of the Act) provides that if there is more than one reason for an act complained of, it is taken to be on grounds of age only if age is the dominant reason for the doing of the act. The test first appeared in the Bill and was not part of previous consultative discussions. This “dominant purpose” test departs from other Federal Australian discrimination legislation (eg race, sex and disability) where one

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<sup>135</sup> It includes: The ILO Recommendation No.162 concerning older workers (adopted by the General Conference of the ILO in 1980). The endorsement in 1982 of the International Plan of Action on Ageing by the UN General Assembly, and its adoption in December 1991 of the UN Principles for Older Persons. In 1992, leading up to the 10th anniversary of the International Plan of Action on Ageing in, the UN General Assembly adopted the Proclamation on Ageing, and it declared 1999 the International Year of Older Persons.

only need show that the ground for the act in question is prohibited. (Whilst the Australian Race Discrimination Act used to include a dominant purpose test, this was removed in 1990 following concerns about its practical application and the lack of uniformity between it and the test under the sex discrimination legislation.) None of the pieces of State and Territory anti-discrimination legislation contain this test, although three jurisdictions require that the prescribed ground is a substantial reason for the discrimination. HREOC cast doubt on the reasons given by the Explanatory Memorandum for the test: see paragraphs 2.9-2.11 of the September 2003 submission:

*“2.9 The Commission also notes the statement in the Explanatory Memorandum that “...the primary solution to most aspects of age discrimination is based on education and attitudinal change. In doing so, it is critical that the legislation not establish barriers to such positive developments, for example, by restricting employment opportunities for older Australians by imposing unnecessary costs and inflexibility on employers acting in good faith.”*

*2.10 It appears that the Explanatory Memorandum is suggesting that the dominant reason test will enhance the employment opportunities of older workers. The Commission, in its administration of the RDA, SDA and DDA, is not aware of any evidence that the 'one or more reasons' test contained in those pieces of legislation has led to a restriction of employment opportunities for people for whom the legislation provides protection against discrimination and it is not clear why the ground of age would be any different. Rather than reducing discrimination against older people in the workforce, the adoption of the dominant reason test could have the effect of restricting the ability of a person to assert their right to be treated on a non-discriminatory basis under the new legislation and would potentially undermine the positive benefits that the legislation otherwise introduces. The Commission also considers that the concerns in relation to imposing 'unnecessary costs and inflexibility' on employers would seem to be addressed by the broad range of exemptions and exceptions contained in the Bill.*

*2.11 The Commission agrees that educational and attitudinal changes are important benefits that will flow from having enforceable federal age discrimination legislation. However, adoption of the stricter dominant reason test may undermine these important objectives if in fact the test has the effect of conveying a message that issues of age discrimination are not considered as important as issues of race, sex or disability discrimination. The Commission also considers that this test will undermine one of the primary objects of the Bill [23] which is to eliminate, as far as possible, discrimination against people on the ground of age in specified areas of public life. The practical effect of this test will be that service providers and employers will be able to make distinctions on the basis of age as long as the age of the person is not the dominant reason for the less favourable treatment.”*

The Senate's Legal and Constitutional Legislation Committee also called for a less stringent test, making the point that the test had been proposed without broad consultation<sup>136</sup>.

Despite these powerful submissions, the dominant purpose test made its way into the Act. Given that all the Australian States and Territories already have some form of age discrimination legislation, the inclusion of the dominant purpose test within this section may mean that this new Commonwealth legislation might not be used as the preferred vehicle of complaints of discrimination.

#### **4.2.1 Age and Disability Discrimination**

Clause/section 6 provides that *"a reference to discrimination against a person on the ground of the person's age is taken not to include a reference to discrimination against a person on the ground of a disability of the person"*. This provision goes further than any other Australian federal state or territory legislation and may result in individuals being unable to complain under both grounds even when age and disability may be two distinct reasons for less favourable treatment.

HREOC makes the point that the provision is unnecessary and states it is used to receiving complaints alleging multiple grounds of discrimination under the different federal anti-discrimination legislation. The current Australian legislative scheme and existing HREOC complaint handling processes ensure these complaints are effectively dealt with.

However, it seems right that whilst a complaint of age discrimination which arises out of or could result in a complaint of disability discrimination must be dealt with under the DDA, section 6 does not preclude a further complaint of discrimination on the basis of age arising out of the same fact situation if there are in fact two different and distinct forms of discrimination occurring.

#### **4.2.2 Concept of Age Discrimination to include Relatives and Associates**

Much other Australian federal and state anti-discrimination legislation includes the concept of age discrimination including relatives and associates. Yet the possibility of a provision covering discrimination on the basis of the age of a person's relative or associate has been raised but is not included in this Bill (clause 14).

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<sup>136</sup> See the Federal Senate Legal and Constitutional Committee's report on its inquiry into the provisions of the Act of September 2003.

A number of interest groups argued for a specific prohibition on discriminatory conduct because of the age of a person's relative or associate. The Council on Ageing submitted:

*"...for example, to refuse employment to a person on the grounds that she/he has a spouse whom the prospective employer considers will require care because of his/her age...A person should not be denied an opportunity because of the age of her/his associate or relative"*

This provision could have an impact outside the employment arena, for example where a single mother is seeking to rent premises and is discriminated against as she has a child, or where an individual trying to find accommodation is refused as the older parents who will be living with him or her are not perceived as desirable tenants. Despite even the Federal Senate Legal and Constitutional Committee arguing for a provision in the above terms being inserted, no such changes made their way into section 14 of the Act.

### **4.3 Definitions**

Section 27 prohibits age discrimination in relation to access to premises. The definition of "premises" in section 5 includes buildings, aircraft, vehicles, vessels, places or parts of premises. Thus the premises need not be stationary and public places are covered as well as private.

Section 28 covers discrimination by a provider of goods, services and facilities. Services is defined in section 5 to include banking, insurance, superannuation, grants, loans, credit or finance, entertainment, recreation or refreshment, transport, travel, telecommunications, services provided by a profession or trade, or services provided by a government, government authority or local government body. It should be noted that this is not an inclusive list but intended to indicate the broad range of services which are contained within the definition.

HREOC had submitted during the consultation process (in a response to the Attorney-General's information paper) that unlike other anti-discrimination legislation there is no coverage of 'clubs', 'incorporated associations' and 'sport'. These areas are significant. It stated that any difficulties at the level of constitutionality could be overcome. Such provisions would need to be drafted in such a way as to preserve good sporting practices, with exceptions similar to those governing sport in the Australian 1984 Sex Discrimination Act (SDA).

### 4.3.1 Definitions of Direct and Indirect Discrimination

Clauses 14 and 15 define direct and indirect discrimination. The definition of indirect discrimination in section 15 includes a provision that the condition is not 'reasonable in the circumstances'. The Bill and now the Act puts the onus of proof on the respondent to justify any indirect discrimination; this is described as logical as information concerning the reasonableness of the particular condition, requirement or practice would generally be in the possession of the respondent. However concerns were raised by HREOC about the lack of reference in clause 15 to the matters to be taken into account when determining whether a condition requirement or practice is reasonable in the circumstances. The Australian SDA includes such a provision in section 7B(2)<sup>137</sup>.

Under section 14 it is unlawful to make a decision on the basis of a characteristic that is generally imputed or is generally ascertained to belong to those of a certain age - such as due to a person having grey hair or wrinkles. Such treatment may also amount to direct discrimination.

### 4.3.2 Harrassment

The Bill did not specifically prohibit harassment based on age unlike other Australian Commonwealth anti-discrimination legislation (eg sexual harassment). Unsurprisingly interest groups were split on the topic, with business groups arguing the concept was vague and could give rise to spurious complaints. Others argued that it was not appropriate to leave harassment to be treated as less favourable conduct within the general prohibition of discrimination. Eventually no offence of harassment was included in the Act.

## 4.4 Exemptions

### 4.4.1 Stated Purpose

The general exemptions to the prohibitions are set out in Division 4 of the Act. There are a large number and range of exemptions provided for. The Age Discrimination Act has a

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<sup>137</sup> This subsection provides "*The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include: (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.*"

far broader range of exemptions than other Australian Federal discrimination legislation. There are chiefly three kinds of exemptions:

- Clear-cut cases where certain acts are not unlawful (such as with reference to pensions and insurance)
- An inherent requirements defence – permitting age discrimination where a person is unable to carry out the inherent requirements of a particular employment or position (note these all come under Division 2 of the Act covering discrimination at work rather than in the goods and services field)
- Positive discrimination: HREOC's view is that this goes far beyond the exemption for special measures existing in other Federal discrimination Acts.<sup>138</sup>

HREOC is also given a power to grant exemptions from those parts of the Act making discrimination unlawful; in common with its power in sex and disability discrimination legislation (see section 44, discussed below).

The purpose of the exemptions in the Explanatory Memorandum is

*“to provide a balance protecting the general right of people of a particular age to have the same rights as other citizens whilst also acknowledging that there are a number of circumstances where treating people differently according to their age is appropriate, for example, where there is broad community agreement (such as for limits on children's access to alcohol, tobacco, or adult-themed films), or where there are other strong policy needs (such as targeting migration places in the national interest), or where different stages of life are properly treated differently (such as matters relating to retirement income) ”* (page 44)

Interested parties have been keen on keeping exceptions to a minimum. The Council on Ageing quoted from Age Concern England's Age Discrimination Policy Position Paper, September 2002, p. 9. on this topic:

*“The action of government departments in tackling age discrimination themselves will be an important part of the tone and approach of Government. If government departments are perceived to be reluctant in their approach, and/or arguing for exemptions, this is likely to impede the effectiveness of measures designed to combat discrimination in employment and health and social care. The government will need to be seen as leading by example.”*

Other bodies argued the Act should provide defences permitting justification rather than the range of general exceptions within the Act<sup>139</sup>.

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<sup>138</sup> See page 3 of HREOC's supplement to its Federal Discrimination Law 2004 publication at [www.humanrights.gov.au/legal](http://www.humanrights.gov.au/legal)

Many bodies, such as the Council on Ageing, were concerned about the width of the exemptions given to the Commonwealth. No consensus was reached by the various parties as to whether age-based distinctions were legitimate and the Act was passed with the exemptions intact.

We now consider the key exemptions within the Act.

#### **4.4.2 Positive Action**

Positive discrimination aims to redress the effects of previous discrimination or benefit a particular group.

There are 3 types of beneficial age-based treatment permitted in this Act: the provision of benefits to people of a particular age; measures intended to meet age-related needs and measures intended to reduce disadvantage.

Section 33 gives examples of when discrimination would be legitimate on these grounds, such as discounts for card holders (the criteria for which is age) or programmes designed to assist people from certain age groups who need assistance more than people from other ages.

Various groups suggested that clause (and now section) 33 went further than necessary and tended to undermine the objective of eliminating age discrimination. In the Australian Race and Sex Discrimination Acts special measures stop being authorised once the purpose for which they were implemented is achieved. In the Australian Disability Discrimination Act there is a requirement that an act be 'reasonably intended' to address a special need or disadvantage<sup>140</sup>. Despite these concerns no limitation, auditing requirement or reasonableness clause was inserted into clause 33.

The Special Measures considered in *Age Matters* were firstly age distinctions to benefit or protect children and secondly concessions (see sections 9.1-9.2). The array of age thresholds and limits upon young people included purchasing cigarettes, medical treatment, education, voting, sexual capacity, marriage and litigation. Some key reasons for such bars were described as being for:

1. the child's need for special protection – linked to the welfare and advancement of children;
2. the fact of a lower income than adults;
3. the need for a reasonable age criteria in areas such as competitive sport.

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<sup>139</sup> See para 3.84 of the Federal Senate Legal and Constitutional Committee's report.

<sup>140</sup> See section 45 Disability Discrimination Act 1992; also similar wording in section 7D Sex Discrimination Act 1984.

HREOC raised the issue of whether age distinctions required a review in light of a contemporary understanding of young people's capacity and responsibility, to prevent a level of arbitrary distinction creeping in.

The concessions for public utilities such as travel are seen as being aimed at addressing financial disadvantage faced by older and younger people. HREOC noted that this "positive" discrimination was exempt from the anti-discrimination legislation in most Australian jurisdictions and raised the question of whether they serve their primary purpose since they often assist everyone of a particular age regardless of disadvantage.

It should be noted that the precise ages to which the provision refers are not fixed; any set of circumstances must be considered on its merits.

#### **4.4.3 Healthcare**

HREOC raised concerns about the impact of using age as a sole criterion in areas including healthcare. In section 8.2 of *Age Matters* it submitted:

*"In areas of superannuation and insurance, discrimination is not unlawful if supported by statistical evidence. In the case of health however, this evidence can have life or death implications....Health services are not exempt from State and Territory anti-discrimination legislation except in the case of a general exemption for "an act that is reasonably necessary to protect public health" (Northern Territory and Queensland)"*

#### **4.5 Exemption relating to direct Compliance with Law**

Clause 39(1) addresses an exemption relating to direct compliance with other laws and orders.

HREOC did not contend that no specific exemptions could ever be appropriate, but supported the approach taken in the Bill that the exemptions mentioned in what became section 39 be reviewed two years after the commencement of the Bill. Further it welcomed the inclusion of a provision enabling the Federal Parliament to prescribe exemptions if appropriate to do so, given the impact that State and Territory laws have on public life (such as laws in relation to alcohol licensing, driving licences and tobacco).

With respect to exemptions linked to the defence forces, HREOC submitted that there was no reason for such an exemption, save for a minimum age for enlistment and cadet schemes. It argued that legislation relating to defence forces was in quite a different position to that of other Commonwealth laws such as social security legislation, which deal



primarily with the provision of, and access to, public services. Therefore it recommended that:

1. All age-based requirements for recruitment into the defence forces should be abolished and alternative non-discriminatory tests of applicant suitability should be substituted.
2. All defence force regulations that specify age limits for positions and/or training or promotional opportunities should be amended to ensure that selection is based on the inherent requirements of the position or opportunity rather than age.
3. Defence force legislation and regulations that specify compulsory retirement should be amended to abolish age based retirement<sup>141</sup>.

The exemption given in section 39 for otherwise unlawful acts which are in direct compliance with laws and orders is explained by the policy reasons for age-based criteria existing in legislation. Such targeting may be for purposes of assistance or for appropriate restrictions, states the Explanatory Memoranda.

A check on this exemption is a two year limit on acts done in accordance with federal laws (after which an assessment must be carried out) save with exemptions relating to superannuation, pensions allowances and benefits, health, migration and citizenship. [Taxation is specifically exempted in section 40 and pensions in section 41.]

#### **4.5.1 Superannuation and Insurance Policies**

Australian State and Territory anti-discrimination legislation exempts age distinctions in insurance provided reliable actuarial or statistical data support the differentiation.

Section 37 of the Act provides that as long as the supporting actuarial or statistical data is reasonable, conditions that discriminate on grounds of age are permitted in respect of policies' terms and conditions. Where there is no data, (and it cannot be easily obtained) reasonable discriminatory terms and conditions may be offered "*having regard to any other relevant factors*". It is not at once apparent what these factors are to be.

If a person relying upon such justifying data fails to provide it when so required, without a reasonable excuse, section 52 provides that the person is guilty of a criminal offence. Such a failure does not amount to an act of age discrimination in itself

HREOC responded to the Attorney-General's information paper making the point that the exemption given to providers of credit (see the Main Provisions for more details) is uncalled for. To concerns that complaints of indirect discrimination could undermine

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<sup>141</sup> See para 5.4.4 of the September 2003 HREOC submissions.

good business practice they point out that the defence of reasonableness would be available to a respondent

Section 37 also permits age discrimination in the provision of, or the conditions attached to the provision of, credit when it is based on reasonable use of actuarial or statistical data. HREOC can require the actuarial or statistical data to be shown to them (section 54).

Groups involved in the consultative process raised concerns with regard to the automatic exemption of superannuation legislation and requirements concerning the restrictions in making superannuation contributions, compulsory cash-outs and treatment of superannuation on the basis of a person's age. In response the Commonwealth Government maintained:

*"Such age-based restrictions are essential to ensure that superannuation is appropriately used for retirement purposes, and that the taxation concessions provided to superannuation are not abused. While it is inevitable that these arrangements will not suit all individual circumstances, the Government considers that age restrictions are essential to ensure the proper operation of the superannuation system."*

It was also argued that the exemption should be limited to the setting of premiums. The Government's response was that this approach would increase costs by requiring the insurance company to incur costs setting premiums on a case by case basis.

When considering the question of insurance, HREOC made the point that whilst the age of the insured is relevant to the calculation of the risk to be insured, the data in existence to support the differentiation made can easily become outdated since average life expectancies have increased with medical advances and lifestyle changes (section 8.4 of *Age Matters*)

HREOC recommended the removal of age criteria from various legal provisions relating to superannuation and that all age distinctions in superannuation and related legislation should be evaluated for their necessity in achieving the objective of superannuation. (see page 113 of the 2000 *Age Matters* report). This recommendation was not accepted by Government.

#### **4.5.2 Superannuation**

Section 38 provides that acts done in compliance with Commonwealth Acts or Regulations regarding superannuation cannot constitute a prohibited form of age discrimination.

The Explanatory Memorandum gave these reasons for superannuation policy (called an age-based system at page 12 of the Memorandum) as a justification for the exemption:

- promoting better incomes in retirement;
- ensuring superannuation is appropriately used for retirement purposes
- ensuring that taxation concessions provided to superannuation are not abused

These reasons underlie requirements about the minimum age at which superannuation can be accessed and the maximum age at which superannuation contributions can continue to be made.

### 4.5.3 Health

Section 42 deals with exemptions for health programs which make distinctions between people on an age basis where those distinctions are based on evidence about the '*safety, effectiveness, risks, benefits and health needs*' of particular age groups. The exemptions apply to health programs and individual decisions about the provision of medical goods or services. So, for instance, a decision not to provide access to a liver transplant on the grounds of a person's age would probably not constitute age discrimination under this legislation. During consultation the Council on Ageing raised concerns about who was to make the decision about a person of a certain age benefiting from health services, submitting that evidence about people of the same "old" age has to be carefully examined to ensure that age rather than some common but not universal condition is the underlying cause. If many people over 80 are too frail to benefit from heart surgery, this should not mean a resilient patient in their nineties is discriminated against by being denied such an operation. The Government responded that HREOC would examine any claimed exemption under section 42 and examine the evidence for such a claim in determining whether the claim was reasonable.

The Explanatory Memorandum stresses that the exemptions given in respect of health-care do not permit the use of age as an arbitrary or inappropriate factor in the delivery of health and medical services in precluding a persons' access to related goods and services.

Exempted health programmes cover public and private sector arrangements. Reasonable evidence about matters affecting people of different ages differently (including effectiveness, risks, benefits and health needs) is required.

#### **4.5.4 Education**

The exception to the provision pertaining to education (section 26) is that it is lawful to discriminate against a person who is not above the age for which an educational institution is established. So a 3 year old cannot complain about a refusal to be admitted to a school for those of 5 upwards. Whilst the section prohibits all forms of age discrimination in educational institutions other than limiting access to an institution specifically established for students above a certain age, a requirement that a student be under a certain age before enrolling in a particular course would be unlawful.

Note that the prohibition would relate to the admission of students and access to benefits as well as expulsion of students.

#### **4.5.5 Accommodation**

The exemption with the prohibition on discrimination in the provision of accommodation (section 29) arises when the discriminator or a near relative resides (and will continue residing) on the premises. In these cases the accommodation provided must be for no more than 3 persons other than the discriminator and their near relatives.

The justification for this exemption is given in the Explanatory Memorandum as “[reflecting] the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised”.

#### **4.5.6 Land**

The exemption to the prohibition of age discrimination in the sale, or in the terms and conditions on which the sale of an estate or interest in land is to be made is where a will or gift discriminated (section 29).

#### **4.5.7 Charitable Benefits**

Section 34 exempts charitable benefits from any requirement that they refrain from discriminating because of age. No reasoning is given for this in the Explanatory Memorandum.

#### **4.5.8 Religious Bodies**

Religious bodies' exemptions from the age discrimination prohibition (section 35) is conditional upon the bodies' behaviour conforming to the doctrines, tenets or beliefs of that religion, or being necessary to avoid injury to the religious sensitivities of adherents to that religion. The Explanatory Memorandum indicates that both these conditions must be met to qualify for the exemption: however the Act gives them as alternatives.

#### **4.5.9 Voluntary Bodies**

The exemption given to voluntary bodies (defined in section 36 so as to exclude trade unions, employer bodies and financial institutions) is given to a limited range of behaviours, including decisions about entitlement to membership and the services offered to members.

The Government assured the Federal Senate Legal and Constitutional Committee that the exemptions in sections 34-36 would not extend to benefits, facilities or services provided by charities or voluntary bodies on behalf of the Commonwealth or in relation to employment. It argued that the protection in section 31 enforced this assurance.

#### **4.5.10 Social Security**

Section 41 exempts social security legislation from liability under the Act. The reasoning by the Government in its Explanatory Memorandum for this was:

*“This exemption recognises that age requirements have particular policy significance in these areas, in the determination of a person’s eligibility for payments or services. The objective of such assistance is to provide support to people with particular needs, being both economic and social assistance. The programs developed are designed to take into account the different needs and circumstances of different age groups, such as young children, youth, parents with children below certain ages and people over the relevant age requirement for eligibility for the age pension ” [page 54]*

The concerns raised about this type of exemption centred on beliefs that there was a lack of a sound policy basis and arbitrary lines used for age based criteria.

#### **4.5.11 Temporary Exemptions**

Sections 44-47 provide for HREOC to make exemptions under the Act. These exemptions can be made in response to an application and can be challenged before the Admin-

istrative Appeals Tribunal (the power of review is found in section 45). The exemptions can be made on particular terms and conditions and can last for a period not exceeding 5 years (although they can be renewed upon further application). The sex and disability discrimination legislation have similar provisions for exemptions to be made by HREOC.

## **4.6 Offences**

Some of the provisions within the Act are defined as being criminal in nature rather than simply illegal (see Part 5).

1. Section 50 makes it an offence to display advertisements or notices indicating (this includes a reasonable understanding to indicate) an intention to discriminate on the basis of age (to the extent such discrimination is made illegal under the Act).
2. Section 51 makes it an offence to victimise someone because they complain of age discrimination under the legislation, or if the offender thinks that they might do so under the HREOC Act 1986. Equally it would be an offence to victimise someone on the basis that they would support someone else in making such a complaint or would provide information about someone else's rights (or their own) under the HREOC Act. Threats to victimise for the same reasons are also an offence, whether the threats are expressed or implied and whether they are believed or not.

It is noted that the first two offences would also constitute unlawful discrimination under the HREOC Act and a complaint could be made to HREOC.

3. Section 52 makes it an offence to refuse to provide the HREOC President or HREOC itself with the source of actuarial or statistical data (data which may be relied on to justify age discrimination under various exemptions, e.g. superannuation) within 28 days after it has been requested. While this is an offence of strict liability a defendant can attempt to establish a reasonable excuse under subsection 2. Section 54 gives HREOC the power to request the source of the actuarial or statistical data on which a body is relying to justify discriminatory acts.

## **4.7 Power of HREOC**

The key functions conferred by section 53 upon HREOC include:

1. promoting the principles of the Act,
2. research and education in the area of age discrimination,

3. examining legislation and proposed legislation to see if it is consistent with the principles of anti-discrimination with respect to age,
4. making recommendations for laws or actions to be made or taken by the Commonwealth and
5. publishing guidelines explaining how to avoid age discrimination.

Many of these powers already exist under HREOC's general human rights jurisdiction contained the 1986 HREOC Act.

## 4.8 Agency

Agency is covered under sections 56 and 57. Someone who '*causes, instructs, induces, aids or permits*' someone else to do a discriminatory act is taken to have also done it. The liability and requisite state of mind of corporate bodies or employers or people acting through an agent are provided for in section 57. Exceptions exist for liability for discriminatory acts made where a corporate body is able to show they took reasonable precautions and exercised due diligence to avoid the conduct occurring. The vicarious liability covered by this section is excluded from forming the basis of imprisonment where an indirect offence has occurred.

HREOC members and their agents are protected against actions for acts done in good faith under their legislative powers and functions via section 58. This also protects third parties from actions that might be taken on the basis of loss suffered when that third party has provided information or evidence or has made submissions or given documents or information to HREOC.

## 5 United States of America

### 5.1 Introduction and Context

#### 5.1.1 What is the Age Discrimination Act?

The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) enforces Federal laws that prohibit discrimination by health care and human service providers that receive funds from the HHS. One such law is the Age Discrimination Act of 1975 (“ADA”).

The ADA does not cover employment discrimination (for such prohibition see the Age Discrimination in Employment Act (“ADEA”) which applies specifically to employment practices and programmes, both in the public and private sectors, and applies only to persons over age 40<sup>142</sup>).

The ADA prohibits discrimination on the basis of age in programmes or activities receiving Federal financial assistance. It also contains certain exemptions that permit, under limited circumstances, use of age distinctions, or factors other than age that might have a disproportionate effect on the basis of age. The ADA applies to persons of all ages (unlike the ADEA).

The ADA is rather limited in that it does not outlaw discrimination (on the grounds of age) in respect of public or private bodies who provide goods and services, except where that public or private body provides programmes or activities which are Federally-funded.

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<sup>142</sup> Summary of the prohibition within the ADEA: The Act protects individuals who are 40 years of age or older. Individuals under 40 are not covered by the Act, but may be protected by State law. It applies to private employers with 20 or more employees in 20 consecutive weeks, to State and local government employers, to labour organisations and employment agencies. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition or privilege of employment. It is also unlawful to retaliate against an individual for opposing discriminatory employment practices or for filing an age discrimination charge, testifying or participating in any way in an investigation, proceeding or litigation under the ADEA.

Age discrimination can be proved by establishing disparate treatment (ie, direct discrimination) or disparate impact (ie, indirect discrimination).

The Equal Employment Opportunity Commission (EEOC), which is a federal agency, is responsible for investigating and conciliating charges. If conciliation is not successful, the Commission may bring a suit in federal court.



Two sets of Regulations have been issued in connection with the ADA:

1. The General Age Discrimination Regulations<sup>143</sup>, whose purpose is to state general, government-wide rules for the implementation of the ADA and to guide each agency in the preparation of agency-specific age discrimination regulations; and
2. The HHS Age Discrimination Regulations<sup>144</sup>, whose purpose is to set out HHS's policies and procedures under the ADA and under the General Age Discrimination Regulations. These Regulations also implement the General Age Discrimination Regulations.

The HHS Age Discrimination Regulations are designed to guide the actions of recipients of financial assistance from the U.S. Department of Health and Human Services (HHS) and incorporate the basic standards for determining the nature of age discrimination that were set forth in the General Regulations. They discuss the responsibilities of HHS recipients and the investigations, conciliation and enforcement procedures HHS will use to ensure compliance with the ADA.

The ADA can be said to have a limited effect in that (like other U.S. civil rights statutes) it applies only to programmes or activities in which there is an intermediary (recipient) standing between the Federal financial assistance and the ultimate beneficiary of that assistance. "Recipient" is defined in the General and HHS Regulations as *"any State or its political sub-division, any public or private agency, institution, organisation, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary or the assistance"*. The ADA, therefore, does not apply to programmes of direct assistance (such as the Social Security programme) in which Federal funds flow directly and unconditionally from the Federal government to the individual beneficiary of those funds. However, the ADA does apply to programmes set up by the State or any other agency or organisation which received Federal funds and then distributes these to the individual beneficiaries. Therefore, every HHS recipient will come within the ambit of the ADA and the General and HHS Regulations.

The supplementary information within the preamble to the HHS Regulations states the following:

*"Prior to the development of any regulations, the Act required the Commission on Civil Rights to conduct a study of age discrimination in federally funded programmes and activities. The Commission transmitted its study to the President and the Con-*

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<sup>143</sup> The Code of Federal Regulations, Title 45 Volume 1, Part 90 (Non-discrimination on the basis of age in programs or activities receiving Federal financial assistance) ("45CFR90"), published in the Federal Register on June 12, 1979

<sup>144</sup> The Code of Federal Regulations, Title 45 Volume 1, Part 91 (Non-discrimination on the basis of age in HHS programs or activities receiving Federal financial assistance) ("45CFR91"), published in the Federal Register on 27 January 1983

gress on January 10, 1978. The Commission published the second part of its study in January 1979. The Act also required each affected Federal agency to respond to the Commission's findings and recommendations, and provided time for the Congress to consider amendments to the Act.

After receipt of the report from the Commission on Civil Rights and the Federal agency responses to that report, the Congress considered amendments to the Age Discrimination Act. In October 1978, Congress amended the Act (Pub. L.95-478). The amendments: (1) Added a private right of action to the Age Discrimination Act; (2) provided a mechanism for the disbursement to alternate recipients of funds that have been withheld under the Age Discrimination Act; (3) added a requirement that the Department of Health, Education and Welfare (then HEW now HHS) approve the final regulations of other Federal agencies; (4) made the effective date of regulations implementing the Act no earlier than July 1, 1979; (5) required annual reports to the Congress on progress in implementing the Act; and (6) removed the word "unreasonable" from the Act's statement of purpose. The 1978 amendments left intact the exceptions to the general prohibition against age discrimination contained in the 1975 Act. The amended Act continues to apply to persons of all ages.

The Act requires HEW (now HHS) to issue proposed and then final general regulations setting standards to be followed by all Federal departments and agencies in implementing the Act. HEW issued proposed general regulations on December 1, 1978 and final general regulations on June 12, 1979. Those general regulations and the prohibition against age discrimination became effective on July 1, 1979.

The Act requires each department or agency which operates programmes of Federal financial assistance to issue proposed and then final regulations which must be consistent with the general regulations. The Secretary of HEW (now HHS) must approve all agency and department regulations.

On September 24 1979, HEW issued proposed age discrimination regulations governing the actions of recipients of HEW funds. In May 1980 HEW became HHS according to the Department of Education Organization Act (Pub. L.96-88). These are the final HHS age discrimination regulations."

The HHS was vitally concerned about the need for public participation in the development of the HHS Regulations because of the substantial impact the ADA could have on the operation of federally assisted programmes. Therefore, it took the following steps:

1. it published in the Federal Register its Notice of Intent to Issue Age Discrimination Regulations on 2 March 1978 – this identified some of the major issues addressed later in the regulatory process;

2. it published a Notice of Proposed Rulemaking for the General Regulations in the Federal Register on 1 December 1978. At certain key places in the proposed General Regulations, HEW (now HHS) presented options for public consideration and comment (with a 90-day consultation period);
3. it distributed 16,000+ copies of the proposed General Regulations (to Congress, State governors, the Heads of every Federal Agency that provides Federal financial assistance, Administrators of Federally-assisted programmes, recipients of Federal funds at State and local levels, interested groups and individuals);
4. in January and February 1979, it held public hearings in Washington DC and in each of the HHS's 10 regions in order to obtain public comment on the proposed General Regulations;
5. it published its own proposed HHS Regulations on 24 September 1979 (setting out the age discrimination requirements for its recipients). It carried out a major distribution of the proposed regulations and held a 60-day consultation period;
6. in October to November 1979, the Age Discrimination Task Force conducted information-providing meetings to explain the requirements of both sets of Regulations;
7. 12 months post-publication, it published the results of a review of the age distinctions imposed on recipients by means of regulations, policies and administrative practices. HHS undertook not to adopt any new age distinctions in the administration of its programmes unless the age distinction was able to meet the requirements of the Regulations and had been published in a regulation after public consultation;
8. 30 months post-publication, the HHS examined the effectiveness of the Regulations and published its assessment (inviting comment) in the Federal Register.

## 5.2 Regulatory Procedures

Legislation such as the ADA, and Regulations made under it, must be subject to various regulatory procedures, including:

1. Impact Analysis Executive Order 12291: this requires that a regulatory impact analysis be prepared for major rules (i.e., regulations). A major rule is defined as any rule that has an annual effect on the national economy of \$100million or more. The HHS concluded that the ADA Regulations are not major rules so no impact analysis was required;
2. Regulatory Flexibility Act of 1980: this requires the Federal government to reduce the impact of rules (with a significant economic impact) on paperwork require-

ments on small businesses. However, because the cost analysis of the ADA Regulations showed that impact was minimal, it concluded that regulatory flexibility analysis was not required;

3. Paperwork Reduction Act: it was concluded that the Regulations placed no new reporting or data collection requirements on recipients.

### 5.3 Substance of the Prohibition against Age Discrimination

The principle of non-discrimination is not neatly divided into direct discrimination (i.e., less favourable treatment on grounds of age) and indirect discrimination (i.e., a neutral policy which has a disproportionate impact on a particular age group). The prohibition against age discrimination does not include an absolute prohibition against separate treatment on the basis of age. As a general rule, separate or different treatment in relation to age which denies or limits services from, or participation in, a programme receiving financial assistance from HHS would be prohibited by the ADA and its Regulations. Separate or different treatment which does not deny or limit services is allowable. Separate or different treatment may be necessary for the “normal operation” of the programme or activity or for the achievement of the “statutory objective”<sup>145</sup> of the programme/activity by the recipient and may, therefore, qualify as an exemption under the Regulations.

### 5.4 Scope

The prohibited discrimination is across programmes and activities receiving Federal financial assistance, applying to anyone involved in a programme that is funded with Federal money, within both the private and as well as the public sector.

Although the ADA generally covers all programmes and activities that receive Federal financial assistance, it does not apply to any age distinction “*established under authority of any law*” which provides benefits or establishes criteria for participation on the basis of age or in age-related terms. Therefore, any age distinction which is established under authority of any law<sup>146</sup> may continue in use.

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<sup>145</sup> “Normal operation” means the operation of a programme or activity without significant changes that would impair its ability to meet its objectives. “Statutory objective” means any purpose of a programme or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body [see section 91.12 of the HHS Regulations].

<sup>146</sup> That is, any Federal statute, State statute, local statute or ordinance adopted by elected, general purpose legislative bodies [see section 91.2 of the HHS Regulations]

The ADA also excludes from its coverage most employment practices, except in programmes funded under the public service employment titles of the Comprehensive Employment and Training Act (CETA).

The scope of programmes and activities are, in summary<sup>147</sup>:

1. State departments or agencies or other instrument of local government;
2. Schools, colleges, universities, postsecondary institutions, or public systems of higher education, local educational agencies or systems of vocational education;
3. Corporations, partnerships, or other private organisations, or entire sole proprietorships which receive Federal assistance or which are principally engaged in the business of providing education, health care, housing, social services, or parks and recreation.

“Programmes and activities” are defined in section 6107(4) of the ADA as all “*operations*” of the bodies set out at 1 – 3 above.

The General and HHS Regulations are divided into 4 subparts:

- Subpart A - General
- Subpart B - Standards for Determining Age Discrimination
- Subpart C - Duties of HHS Recipients
- Subpart D - Investigation, Conciliation and Enforcement Procedures

There are also two appendices. Appendix A contains an analysis of the public comments; Appendix B contains a listing of the age distinctions found in statutes and regulations governing HHS assisted programmes.

## 5.5 What is Age Discrimination?

Subpart B of the HHS Regulations incorporates the basic standards for determining the nature of age discrimination, which are set out in the general regulations.

The Regulations state that no person in the United States shall, on the basis of age, be denied the benefits of, be excluded from participation in, or be subject to discrimination under, any programme or activity receiving Federal financial assistance. (§91.11).

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<sup>147</sup> see further section 6107 of the ADA.

## 5.6 Burden of Proof

The HHS Regulations place on the recipient of HHS funds the burden of proving that an age distinction or other action falls within the exemptions discussed below. (§91.15)

## 5.7 Exemptions

The HHS Regulations adopt the four-part test established in the General Regulations to determine when an explicit age distinction is necessary to the “normal operation” of a programme or to the achievement of a “statutory objective” of a programme. The test (see § 91.13 of the HHS Regulations) requires that:

1. The age distinction be used as a measure of another characteristic(s);
2. The other characteristic(s) must be measured in order for the programme to continue to operate normally or to meet a statutory objective;
3. The other characteristic(s) can be reasonably measured by using age; and
4. It is impractical to measure the other characteristic(s) for each individual participant

All parts of the test must be met for an explicit age distinction to satisfy one of the exemptions and to continue in use in a Federally-assisted programme. This four-part test will be used to scrutinise age distinctions that are imposed by recipients in the administration of Federally-assisted programmes, when the recipient alleges the distinction is necessary to the “normal operation” of the programme or to the achievement of a “statutory objective” of a programme and when the age distinction is not specifically authorised by a Federal, State, or local statute.

Recipients of Federal funds are also permitted to take an action otherwise prohibited by the Act, if the action is based on “reasonable factors other than age.” In that event, the action may be taken even though it has a disproportionate effect on persons of different ages. However, the Regulations provide that the factor must bear a direct and substantial relationship to the programme's normal operation or statutory objective. (§91.14)

There are three other instances in which an HHS recipient may use age distinctions that would otherwise be prohibited by the Act and its Regulations:

1. A recipient may take voluntary affirmative action to overcome the effects of conditions that have resulted in limited participation in the recipient's programme on the basis of age (§91.16);
2. A recipient may give special benefits to the elderly or to children (§91.17); and

3. A recipient may comply with age distinctions contained in HHS regulations. (§91.18)

## 5.8 The Duties of HHS Recipients

Subpart C explains the duties of HHS recipients which are established by the General Regulations.

HHS recipients have primary responsibility to ensure that their programmes and activities are in compliance with the Act, the General Regulations and the HHS Regulations. They must sign an assurance that they will comply with the ADA and its Regulations (§91.33). Recipients must also maintain records to the extent required to determine compliance with the ADA and its Regulations. (§91.31)

Where an HHS recipient passes on financial assistance to sub-recipients, the recipient must do the following:

1. notify the sub-recipients of their obligations under the ADA and its Regulations;
2. inform beneficiaries about the protections provided by the ADA and its Regulations. (§91.32).

The HHS may require recipients employing the equivalent of 15 or more fulltime employees to examine their use of age distinctions under the Act as part of a compliance review or a complaint investigation conducted by the Department. (§91.33)

This self-evaluation requirement has been revised from the provision contained in the government-wide Regulations and the Notice of Proposed Rule Making. The prior versions would have required all recipients employing 15 or more employees to complete a written self-evaluation. However, section 91.33 states that such recipients may be required to undertake a self-evaluation as part of a compliance review and complaint investigation conducted by the Department. The change is based upon HHS's determination that, to be consistent with the requirements of the Paperwork Reduction Act of 1980, enacted after the publication of the Notice of Proposed Rule Making, the paperwork burden associated with the self-evaluation must be limited to recipients where circumstances indicate, in connection with a compliance review of complaint investigation, the need for self-evaluation.

## **5.9 Record-Keeping by HHS Recipients**

Each HHS recipient must keep records and make available to HHS upon request information that HHS determines is necessary to establish whether the recipient is in compliance with the ADA and its Regulations. Recipients must also allow HHS reasonable access to books and records to the extent HHS finds necessary to determine compliance with the Act and its regulations. (§91.34)

## **5.10 Investigation, Conciliation and Enforcement Procedures**

Subpart D of the HHS Regulations establish the procedures HHS will use in its investigation, conciliation and enforcement activities (including, in relation to specific complaints from individuals, classes (i.e., groups) or third parties). These procedures are closely tied to requirements in the General Regulations (primarily, also in Subpart D of those Regulations). Additional information on the filing of complaints and on mediation is provided in Section V of the preamble to the HHS Regulations.

## **5.11 Filing a Complaint**

Complaints of age discrimination involving HHS recipients and beneficiaries may be filed by an individual, a class, or by a third party, within 180 days from the date of the alleged discriminatory act. This 180-day period may be extended if good cause is shown. The Discrimination Complaint Form need not be used if specific information<sup>148</sup> is included within the written complaint submitted.

Once the ADA complaint is filed, it is screened and transferred to the Federal Mediation and Conciliation Service (FMCS). Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint. Unless extended, the FMCS mediation process will last no more than 60 days from the date a complaint is filed with HHS. HHS will take no further action on a complaint that has been successfully mediated. However, HHS will investigate complaints that are unresolved by the FMCS through mediation, or when cases are reopened because the mediation agreement is violated.

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<sup>148</sup> A complaint must: (1) identify the parties involved, (2) identify the date the complainant first had knowledge of the alleged violation, (3) describe generally the practice complained of, (4) be signed by the complainant



A complainant may file a civil action for injunctive relief, only<sup>149</sup> 180 days from the date the complaint was filed with HHS if no action has been taken, or 180 days from the date that HHS makes a determination in favour of the recipient, whichever comes first. However, no private suit is allowed if there is a pending action involving the same allegations and the same recipient. The complainant has the option either to file this civil action, if allowed, or to have HHS continue to pursue the complaint through administrative processes. Regardless of which option is chosen, HHS retains the right to continue its enforcement activities even if a private court suit is filed<sup>150</sup>.

## **5.12 The Effect of Age Distinctions contained in HHS Regulations**

A new section 91.18 has been added to the HHS Regulations which make explicit what is implicit in section 90.32 of the government-wide General Regulations. Section 90.32 of the General Regulations established the mechanism for determining that age distinctions imposed by government agencies are consistent with the ADA and its Regulations. Under section 91.18, agencies must within 12 months, review age distinctions imposed on recipients by regulations, policies and administrative practices. Each agency must then publish, for public comment, in the Federal Register a comprehensive accounting of all such age distinctions, listing those to be continued, the justification for their continuance, those to be adopted by regulations or those to be eliminated. After this 12-month period, agencies may not continue any age distinction that has not already been adopted by regulation or is adopted by regulations under the Administrative Procedure Act using the notice and comment procedures specified in Rule 5 U.S.C. 553<sup>151</sup>. In addition, beginning with the effective date of an agency's final regulations, an agency may not impose a new age distinction unless it is adopted by regulation under the Administrative Procedure Act using these notice and comment procedures.

This comprehensive mechanism for carefully scrutinising age distinctions imposed by Federal agencies on recipients to ensure their consistency with the ADA and its implementing regulations is based upon public participation and the rulemaking process of the Administrative Procedure Act, through which the appropriateness and validity of any age distinctions can be thoroughly evaluated. Implicit in this far-reaching mechanism is that age distinctions contained in regulations adopted under the Administrative Procedure Act are entitled to a very strong presumption of permissibility. The new section 91.18 in the HHS Regulations makes this explicit by providing that any age distinction contained in a

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<sup>149</sup> There is no possibility for claiming compensation by way of damages (although, costs including attorney's fees, may be claimed, so long as this is specifically claimed in the written complaint submitted to HHS)

<sup>150</sup> See Appendix 1 for further information about making a complaint

<sup>151</sup> See the Federal Register

rule or regulation issued by HHS will be *presumed* to be within the “statutory objective” of the programme to which the rule or regulation applies. This does not mean that such age distinctions are immune from additional scrutiny to ensure their consistency with the ADA and its implementing regulations, but that such further scrutiny will be under the general standards of the ADA, rather than under the process established for previously un-reviewed age distinctions (i.e., the 4-part test referred to above), in which the recipient has the burden of proving that the detailed standards contained in section 91.13 of the HHS Regulations have been met. Since the review and rulemaking processes are intended to subject the age distinctions to scrutiny on all possible bases, it is believed appropriate that any subsequent review be limited to determining violations of fundamental statutory requirements. This provision, therefore, reaffirms that recipients upon whom age distinctions are imposed by the HHS regulations adopted pursuant to statutory authority and under the Administrative Procedure Act, as well as the public, can be assured that such age distinctions have been carefully considered and are believed by HHS to be permissible under the ADA and its implementing regulations.

This monitoring and auditing process is something which is notably missing from, for example, the Australian and Irish jurisdictions in relation to the exemptions in their age discrimination and equality legislation.

### **5.13 Does the ADA and its Regulations secure Proportional Allocation of Services and Funds by Age?**

Some special interest groups believe that certain age groups, especially older people, do not get their “fair share” of funds or programme slots in certain Federally-funded programmes. They argue that the serious under-representation of certain age groups in the allocation of programme funds or services is age discrimination and should be prohibited by the legislation.

However, the ADA and its Regulations do not require proportional programme participation by age or the proportional allocation of funds by age. Nevertheless, disproportionate allocation of funds or programme participation may be one element that triggers an examination of whether age discrimination exists in the Federally-funded programme or activity. If further enquiry is necessary, the recipient may show that the disparity in rates of participation, fund allocation, or services has non-discriminatory causes.

At this point, reference should be made to the Older Americans Act (“OAA”) (originally of 1965 but recently re-authorised by ex-President Clinton in February 1999). The OAA was originally enacted in the same year as Medicaid came into being. Medicaid is the major provider of long-term care and serves people with limited incomes and very low assets. Many people are ineligible for Medicaid, but cannot afford the cost of long-term

care on their own. The OAA, therefore, is able to serve some of those who might otherwise “fall through the cracks”. The OAA is the major vehicle for the delivery of many social, community and nutrition services to older people. It provides a wide range of home and community based services throughout the US and serves over 7 million individuals (39% with incomes below the poverty level). The primary goal of the OAA is to help older people to stay in their homes and communities as long as possible – through programmes including home-delivered meals, home care, transportation assistance, elder abuse protection, senior employment, adult day care, legal assistance and counselling. The OAA sets out the responsibilities and requirements for State and Area Agencies on ageing, creating a partnership among different levels of government and the public and private sectors with the objective of improving the quality of life for older Americans. Interestingly, Title VI of the OAA contains specific provisions in relation to older individuals who are Indians, Alaskan Native and native Hawaiians (collectively referred to as “Native Americans”). This appears to be because this category would need particular assistance with advocacy services. In essence, the OAA is a “special measure” through legislation to provide special treatment for a particular age group in society. Under the ADA, though prima facie discriminatory, it would fall within the exemption contained in section 91.12 of the HHS Regulations (i.e., age distinctions “Established Under Authority of Any Law”).

## **5.14 How do the Exemptions work?**

Above, we have considered the type of exemptions contained in the ADA and its Regulations – i.e.:

1. age distinctions which are necessary for the normal operation of the programme/activity (with the age distinction being scrutinised under the 4-part test in order to determine whether it is necessary) (§91.12 & §91.13);
2. age distinctions which are necessary to achieve the statutory objective of the programme/activity (again, this exemption will be examined under the 4-part test) (§91.12 & §91.13);
3. action which is based on “reasonable factors other than age”. Whilst the action may be taken even though it has a disproportionate effect on persons of different ages, the Regulations provide that the factor must bear a direct and substantial relationship to the programme's normal operation or statutory objective (therefore, again, this exemption will be subjected to scrutiny under the 4-part test) (§91.14);
4. voluntary affirmative action to overcome the effects of conditions that have resulted in limited participation in the recipient's programme on the basis of age (§91.16);
5. special benefits to the elderly or to children (§91.17); and

6. age distinctions that are established under any law (§91.2) or are contained in the HHS regulations. (§91.18).

**Examples of the permitted exceptions are:**

1. Where age is a necessary factor to the normal operation of a programme or to the achievement of any statutory objective of such programme or activity; or the differentiation made by such action is based upon reasonable factors other than age (Section 6103(b)(1)). This is, in effect, a defence of justification to direct age discrimination.
2. a positive discrimination or special measures exemption: where the programme or activity provides benefits or assistance to persons based upon the age of such persons; or establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms (Section 6103(b)(2)).

### **5.14.1 The Meaning of the Exemption for Age Distinctions “Established under Authority of any Law”**

The ADA applies to all programmes and activities that receive Federal financial assistance. However, the Act does not apply to age distinctions “established under authority of any law” that provide benefits or establish criteria for participation on the basis of age or in age related terms. Age distinctions that qualify under this exemption do not require further scrutiny under the HHS Regulations.

The Regulations define the term “any law” to mean Federal, State or local statute or ordinance adopted by an elected, general purpose legislative body. This provision does not provide an automatic exemption for age distinctions that are contained in regulations or in ordinances enacted by bodies which are not elected or are special-purpose even though elected, such as State or local school boards. The first part of Appendix B of the HHS Regulations contains a list of the age distinctions found in Federal statutes administered by HHS.

The exemption for age distinctions “established under authority of any law” applies to both explicit uses of age (e.g. a statute that defines an adult to be a person over age 18) and the use of age-related terms (e.g. statutes that refer only to “adults” or “children” or “youths” without defining those terms explicitly). When a statute (Federal, State or local) uses, but does not define, an age-related term, HHS will accept reasonable definitions of those terms in regulations without further scrutiny. Thus, for example, HHS would not ordinarily question a definition of “child” as a person up to age 18, but would seek further justification of a regulation which defines “child” as a person up to age 30.

#### **5.14.2 Defining when an Age Distinction necessary to the Normal Operation or to the Achievement of a Statutory Objective of a Programme or Activity**

These regulations incorporate from the General Regulations the four-part test for determining when an explicit age distinction is necessary to the normal operation of a programme or activity, or to the achievement of a statutory objective. HHS will use this four-part test to scrutinise age distinctions imposed in the administration of Federally-assisted programmes, but which are not explicitly authorised by a Federal, State or local statute or ordinance adopted by an elected, general-purpose legislative body. If the age distinction in question fails any part of the four-part test, the recipient of HHS funds may not continue to use that age distinction.

The four-part test is designed to require careful scrutiny of age distinctions in programmes receiving Federal financial assistance and to weed out age distinctions that are neither directly related to an essential characteristic of a programme (i.e., “normal operation”) nor based on explicitly stated objectives of a law (i.e., “statutory objective”). It is not intended to serve as a basis for permitting continued use of age distinctions for the sake of administrative convenience, if this results in denial or limitation of services on the basis of age.

HHS encourages its recipients to apply age distinctions flexibility; that is, to permit a person who demonstrates eligibility to participate in the activity or programme even though he or she would otherwise be barred by the age distinction. Other things being equal, a distinction under review is more likely to qualify under any of the exemptions if it does not automatically bar all those who do not meet the age requirements.

#### **5.14.3 The Exemption of a Factor other than Age from the Coverage of these Regulations**

The ADA and its regulations permit a recipient of federal funds to examine its use of factors other than age which have a disproportionate effect on the basis of age in the light of the individual facts and circumstances surrounding their use. This examination will determine whether use of the factor other than age is sufficiently related to achieving a legitimate programme purpose and therefore justifies limiting or denying services or participation to persons disproportionately excluded because of age.

### **5.15 “Special Benefits” for Older People or Children**

The HHS Regulations incorporate the provision of the General Regulations permitting a recipient of a programme to provide special benefits for children or the elderly.

The special benefits provision resulted from HHS's belief that Congress did not intend to disturb the practice of providing special benefits to children or older people. These special benefits often take the form of special discounts or reduced fees in a Federally-funded programme.

The provision allowing special benefits has been revised somewhat from that contained in the government-wide General Regulations and the Notice of Proposed Rule Making to make it clear that special benefits are presumed to be within the statutory exemption applicable to actions necessary to the “normal operation” of a programme. The earlier versions stated that special benefits to older people or to children shall be presumed to be “voluntary affirmative action” to overcome the effects of past under-participation in the recipient's programme of these groups so long as the special benefits do not have the effect of excluding otherwise eligible persons from participation in the programme. HHS has determined that the new wording is more consistent with the Congressional intent that the normal operation of programmes properly designed to provide for special benefits for older people or children should not be disturbed. Therefore, such special benefits are entitled to a presumption of validity. In reviewing such special benefits in specific cases to ensure that they are in fact consistent with the ADA and Congressional intent, HHS will consider the rationale for the special benefits, the effect on other individuals, and all other relevant factors.

The Regulations leave to the reasonable discretion of the recipient the definition of who qualifies as “children” or “older people” for purposes of receiving a special benefit.

### **5.16 Examples of the Interpretation of Exemptions in the ADA and its Regulations**

In the HHS Regulations, examples are given through which HHS interprets the exemptions to the prohibition against age discrimination in situations involving recipients of HHS funds.

The examples assume that the institution involved received funds from HHS and that no exemption to the prohibition against age discrimination applies other than the one being discussed in the particular example.

### **5.16.1 Separate Treatment (91.11)**

The example given is of a hospital which receives funds from HHS and which treats children less than 16 years of age in a separate unit from the adults served by the hospital. However, essentially comparable services are provided to both age groups, including laboratory facilities, specialised care and treatment, and access to the facilities. This separate treatment of the two age groups does not result in a denial or limitation of services, and the practice, therefore is permissible.

In contrast, an example of prohibited separate treatment occurs where a State mental hospital has a separate geriatric wing. Patients in this wing have less supervision, receive fewer therapeutic visits, have fewer recreational opportunities, and receive less rehabilitation. Because a denial or limitation of service results, this separate treatment would be prohibited (unless it could be justified under one of the Act's exceptions).

### **5.16.2 Age Distinctions “Established under Authority of Any Law” (91.12)**

The example given is of the Health Maintenance Organization (HMO) Act which limits the enrolment of beneficiaries entitled to benefits under Title XVIII of the Social Security Act (SSA). The SSA requires *“each health maintenance organization with which the Secretary enters into a contract under this section shall have an enrolled membership at least half of which consists of individuals who have not attained age 65”* (42 U.S.C. 1395mm).

The Older Americans Act authorises the provision of “assistance in the development of new or improved programmes to help older persons.” Specifically, it requires States to *“provide with respect to nutrition services that each project providing nutrition services will be available to individuals aged 60 or older, and to their spouses”* (42 U.S.C. 3027)

A further example under this exemption would be age distinctions in State and local statutes which may affect HHS funded programmes – these include:

1. Age limits for requiring parental consent for medical procedures.
2. Age limits for services to those in the “juvenile” justice system.
3. Age limits for compulsory health procedures, such as particular vaccinations against disease.
4. Maximum age limits for “under age” wards of the State.

### **5.16.3 Age Distinctions under the Exemption Relating to “Normal Operation” or to “Statutory Objectives” (91.13)**

As set out above, to qualify for the normal operation or statutory objective exception, an explicit use of age must meet all four parts of the test set out in § 91.31 which requires that:

- (a) the age distinction must be used as a measure of another characteristic(s);
- (b) the other characteristic(s) must be measured for the programme to operate normally or to meet its satisfactory objective;
- (c) the other characteristic(s) can be reasonably measured by using age; and
- (d) it is impractical to measure the other characteristic(s) for each individual participant.

An example given of the permissible **use of age related to the “normal operation” exemption** is in respect of Head Start grantees which operate programmes providing comprehensive health, nutritional, educational, social, and other services for children who have not reached compulsory school age. Neither the statute creating Head Start nor its implementing regulations specifies a minimum age limit for Head Start participants. Therefore, Head Start cannot rely on the statutory authorisation exemption contained in Regulation 91.12. The only possibility would be to rely upon Regulation 91.13.

The example takes a local Head Start grantee which operates a centre that offers a highly structured programme stressing group activities to promote the educational, social and nutritional development of the children enrolled. Because of the nature of the centre's programme, its physical layout, the training and experience of its staff, the centre generally limits enrolment in its programme to children who are at least 3 years old.

Analysis of the use of age in this example:

1. The minimum age restriction is used as an approximation of the level of development and the capacity for self-discipline that the child must process in order to profit from this particular centre's pre-school child development programme;
2. A child's readiness for this pre-school child development programme must be measured for the Head Start centre to meet its objectives. The enrolment of younger children who are not ready for this programme would require significant changes in the programme such as providing greater assistance in feeding, changing nappies, clothes, etc., which would impair the centre's ability to meet its objectives;
3. Age 3 reasonably approximates the level of development at which children are able to respond to simple commands, move about without assistance, feed themselves,



control body functions and perform other basic activities that are an essential part of this centre's pre-school child development activities; and

4. It is impractical to measure directly and individually each child's level of physical, mental, and emotional development.

Therefore, the minimum age restrictions pass all four parts of the test and, are therefore, necessary for the normal operation of the Head Start centre.

An example given of a prohibited **use of age related to normal operation** is in respect of a university which receives funds from HHS for its graduate social work programme limits fellowships in the programme to persons under age 25. The university claims that the fellowship programme is designed to encourage talented but inexperienced and untrained individuals to pursue graduate training in social work.

Analysis of the Use of Age:

1. Age is used as an approximation of lack of experience and training in social work
2. Measurement of the lack of experience and training is necessary to the normal operation of the department's graduate fellowship programme
3. Age, however, is not a reasonable measure of an individual's experience or training. Talented but inexperienced and untrained individuals of all ages may be seeking graduate aid through the social work programme. (The use of the age fails this part of the test.)
4. Lack of experience and training in the field of social work can reasonably be measured directly on an individual basis. (The use of the age fails this part of the test.)

The age limitation on the university's graduate social work fellowships does not pass either parts (3) or (4) of the four-part test. The use of age, therefore, is not necessary to the normal operation of the graduate fellowship programme.

An example is given of the permissible **use of age related to a "statutory objectives"**:

Applications for grants for disease control programmes under the Public Health Service Act can only be approved if they "*contain assurances satisfactory to the Secretary that the applicant will conduct such programmes as may be necessary (i) to develop an awareness in those persons in the area served by the applicant who are more susceptible to the disease or conditions of appropriate preventive behaviour and measures (including immunization) and diagnostic procedures for such disease, and (ii) to facilitate their access to such measures and procedures.*" (42 U.S.C. 247b). A local public health programme generally gives priority in immunisation to age categories most susceptible to the disease (e.g. the immunisation programme is directed to children under 15).

Analysis of the Use of Age:

1. Age is used as a measure of susceptibility to a particular disease; e.g. ages 1-14 are more susceptible to measles;
2. Susceptibility to the disease must be measured for the statutory objective to be met;
3. Age is a reasonable measure of susceptibility to the particular disease; e.g. epidemiological evidence shows that children ages 1-14 are more susceptible to measles;
4. Susceptibility to the disease is impractical to measure directly on an individual basis.

Therefore, the use of age passes all parts of the four-part test. Thus, age is necessary to the achievement of the explicit statutory objective to give priority in immunisation to age categories most susceptible to the disease in question.

An example is given of the prohibited use of **age related to a “statutory objectives”**:

The statutory objective of the Federal Work Incentive Programme (WIN) is to provide job training and placement services to individuals receiving Aid to Families with Dependent Children (AFDC) so that they may be employed and ultimately become self-sufficient. A local WIN office takes the age of the applicant into account and gives a lower priority for the older persons who will be more difficult to place in employment.

Analysis of the Use of Age:

1. Age is used as an approximation of the individual's employability after training had been completed;
2. The selection of applicants most likely to be employed following the training is necessary to achieve the statutory objective;
3. Age is not a reasonable measure of the employability of an applicant. (The use of age fails this part of the test.)
4. Employability can reasonably be measured on an individual basis. (The use of age fails this part of the test.)

Therefore, the use of age as a factor in screening applicants for training under the WIN programme does not pass parts (3) or (4) and, therefore, is not necessary to achieve the objective of the Federal WIN programme.

#### **5.16.4 Factors other than Age – Examples of Permissible and Prohibited Treatment under the ADA (91.14)**

An example is given of the permissible use of “factors other than age” in relation to a skills training programme which receives Federal Work Incentive Programme (WIN) funds uses a physical fitness test as a factor for selecting participants to train for a certain job. The job involves frequent heavy lifting and other demands for physical strength and stamina. Even though older persons might fail the test more frequently than younger persons (i.e., disproportionate impact), the physical fitness test measures a characteristic that bears a direct and substantial relationship to the job which persons are being trained and, therefore, is permissible under the Act.

In contrast, an instance of prohibited use of “factors other than age” occurs where a training programme which receives WIN funds and uses a physical fitness test to select participants for a clerical training programme. It is claimed that persons who pass the test are likely to do better work than those who are unable to pass the test. Even if this were true, the relationship between the requirements of the test and the requirements of the type of job for which training is being offered is not direct and substantial. It is so tenuous and limited that it will not justify the test's age discriminatory effect. In this situation, use of the test would violate the ADA.

### **5.17 Other Points**

The Older Americans Act establishes an Administration on Aging, headed by an Assistant Secretary for Aging [section 201]. The Assistant Secretary's functions include the following:

1. to serve as the effective and visible advocate for older individuals within the HHS (and with other departments, agencies and instruments of the Federal Government) by reviewing and commenting on all Federal policies affecting older individuals;
2. to collect and disseminate information relating to age;
3. to administer the grants provided by the ADA;
4. to develop plans, conduct and arrange for research in the field of aging and assist in the establishment and implementation of programmes designed to meet the needs of older individuals;
5. to provide technical assistance and consultation to States in relation to programmes for older people;
6. to prepare, publish and disseminate educational materials dealing with the welfare of older people;

7. to gather statistics in the field of aging (which are not collected by other Federal agencies);
8. to coordinate and assist in the planning and development by public and private organisations of programmes for older people (with a view to establishing a nationwide network of coordinated services and opportunities for older people).

Because the ADA is not designed to be a wide-reaching piece of legislation to outlaw all (unjustified) discrimination on grounds of age, there are some key gaps. There is no express requirement not to harass an individual beneficiary. Nor is there any express requirement not to victimise an individual beneficiary (eg, by refusing to provide him/her with benefits under any programme or activity covered by the ADA by reason of the fact that the beneficiary has complained about age discrimination). However, it may be that a claim for harassment or victimisation could be brought within the general prohibition (i.e., no person shall, on the basis of age, be denied the benefits or, be exclude from participation in, or be subject to discrimination under, any programme or activity receiving Federal financial assistance – Regulation 91.11 of the HHS Regulations).

Obviously, because of the fairly restricted ambit of the ADA, very many industries will not be caught by Federal legislation prohibiting discrimination on the grounds of age (eg, insurance, travel and leisure (including access to hotels, bars, restaurants etc)). Challenges in the fields/areas not covered by the ADA would have to be at State level. This, by definition, creates a lack of uniformity or harmony.

## **5.18 Appendix: Making a Complaint**

HHS may conduct compliance or pre-award reviews or use other similar procedures to ensure compliance with the Act and its regulations. These procedures may be used even in the absence of a complaint against a recipient. The reviews may be as comprehensive as necessary to determine whether a violation has occurred. (§91.41)

Complaints of age discrimination may be filed with HHS by an individual or a class or by a third party. The complainant must allege discrimination occurring on or after July 1, 1979. A complainant must file a complaint within 180 days from the date the complainant first knew of the alleged act of discrimination, although HHS may extend this time limit for good cause. The filing date for a complaint will be the date upon which the complaint is sufficient to be processed. A complaint must identify the parties involved and the date the complainant first had knowledge of the alleged violation, describe generally the practice complained of, signed by the complainant. HHS will notify the recipient and the complainant of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the process. HHS will permit a complainant to add information to a complaint when necessary to meet the requirements of a

sufficient complaint. HHS will return to the complainant any complaint that does not fall within the jurisdiction of the Act and will explain the reason(s) why the complaint is outside the jurisdiction of the Act. (§91.42)

HHS will refer to mediation all sufficient complaints that fall within the coverage of the Act. On June 12, 1979, the Secretary of HEW designated the Federal Mediation and Conciliation Service (FMCS) to manage the mediation process which was established by the general regulations for all ADA complaints. Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint, although they need not meet with the mediator at the same time. Generally, mediation may last no more than 60 days from the date a complaint is filed with HHS. The mediator will have the authority to terminate the mediation at any time before the 60 day period if the process appears to have broken down. The mediator also has the authority to extend the 60 day mediation period where settlement is likely. A settlement based on terms satisfactory to both parties will be put in writing and sent to HHS. HHS will take no further action on a complaint that has been successfully mediated. The mediator will protect the confidentiality of all information obtained in the course of mediation. (§91.43)

HHS will investigate complaints that are unresolved after mediation or are reopened because the mediation agreement is violated. HHS will first attempt to resolve the complaint through informal fact-finding. An agreement reached during informal investigation will be signed by both parties and by an HHS official. The agreement will not affect any other enforcement by HHS. The settlement is not a finding of discrimination against a recipient. If these informal effects do not succeed, HHS will develop formal findings through further investigation of the complaint. (§91.44)

A recipient may not intimidate or retaliate against any person who attempts to exercise a right protected by the Act or who participates in any aspect of the proceedings used to resolve allegations of age discrimination. (§91.45)

The procedures for securing compliance with the ADA and its Regulations are taken from the General Regulations. The procedures include termination of Federal funds after an opportunity for a hearing on the record, referral to the Department of Justice, or the use of the services of any Federal, State or local government agency to correct a violation. The HHS Regulations include a provision for the deferral of new Federal financial assistance from HHS when termination proceedings are initiated. (§91.46)

HHS will use the procedural provisions contained in the regulations implementing Title VI of the Civil Rights Act of 1964 to enforce the HHS age discrimination regulations. These provisions are at 45 CFR 80.9-80.11 and 45 CFR 81. (§91.47)

Where HHS finds that a recipient has discriminated on the basis of age, HHS may require the recipient to take necessary remedial action to overcome the effects of the discrimination. (§91.48)

When HHS withholds funds from a recipient (according to the provisions of § 91.46), the Secretary may disburse those funds to an alternate recipient. The alternate recipient must demonstrate the ability to comply with the HHS Regulations and to achieve the goals of the Federal statute which authorizes the financial assistance. (§91.49)

Complainants may file civil actions when administrative remedies are exhausted. Administrative remedies are exhausted if either 180 days have elapsed since the complaint and HHS has made no finding, or if HHS issues a finding in favour of the recipient. The complainant must indicate, at the time the suit is filed in a U.S. district court where the recipient is found or transacts business.

The complainant must indicate, at the time the suit is filed, if attorney's fees will be demanded in the event that the complainant is successful. No action can be brought if the same alleged violation by the same recipient is the subject of a pending action in any U.S. court. Complainants who wish to file an action must give 30 days notice to the Attorney General, the Secretary, and the recipient. (§91.50)

## Appendix

### Summary Presentation of the Five Legal Frameworks

Written by Esther Verwijs, LBL, expert centre on age and society, The Netherlands

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## 1 Belgium

General Information		
1	Country/state	Belgium
2	Name of Act	Act of February 25, 2003 pertaining to the Combat of Discrimination and to the Amendment of the Act of February 15, 1993, pertaining to the Foundation of a Centre for Equal Opportunities and Opposition to Racism
3	When did it come into force?	2003
4	Predecesing law?	An Act prohibiting discrimination on the ground of gender and an Act prohibiting discrimination on the ground of race.
5	Current developments?	-

Type/Style of Legislation		
6	What type of legislation is it and how is it structured? (equal treatment law, constitutional provision, human rights law, regulations etc.)	<p>Equal treatment law</p> <p>Structure:</p> <p>Chapter I    Introductory provision</p> <p>Chapter II    General provisions</p> <p>Chapter III    Penal provisions</p> <p>Chapter IV    Civil provisions</p> <p>Chapter V    Amending provisions</p> <p>Chapter VI    Final provision</p>
7	Is it a ban for 1 ground of discrimination or for more? If so: which?	<p>For more grounds:</p> <ul style="list-style-type: none"> <li>▪ sex</li> <li>▪ so-called race</li> <li>▪ colour</li> <li>▪ descent</li> <li>▪ national or ethnic origin</li> <li>▪ sexual orientation</li> <li>▪ marital status</li> <li>▪ birth</li> <li>▪ fortune</li> <li>▪ age</li> <li>▪ religion or belief</li> <li>▪ current and future state of health</li> <li>▪ disability</li> <li>▪ physical characteristic</li> </ul>



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<b>Scope of Legislation</b>		
<b>8</b>	Scope (where) – what area's does the Act cover? (e.g. employment, housing, goods and services, etc)	<ul style="list-style-type: none"> <li>▪ goods and services</li> <li>▪ employment</li> <li>▪ the appointment, promotion or assignment (for a service) of an official</li> <li>▪ the mention in an official document or report</li> <li>▪ dissemination, publication, disclosure of a text etc.</li> <li>▪ economic, social, cultural or political activities</li> </ul>
<b>9</b>	Where does the Act apply geographically?	The Kingdom of Belgium
<b>10</b>	To whom does the Act apply? (e.g. both public and private sector)	<p>In principle it applies both to the public and the private sector, taking into account the division of competences between the federal government, the communities and the regional governments.</p> <p>The extent to which the federal law applies to regional governments is under discussion.</p> <p>Source: Centre for Equal Opportunities and Opposition to Racism</p>
<b>11</b>	Is there a definition of goods and services? If so, specify	No.
<b>12</b>	Is there a definition of discrimination? Direct/indirect/constructive/by association? If so, specify	<p>There is a definition of direct and of indirect discrimination.</p> <p><b>Direct discrimination</b> <i>Direct discrimination occurs if a difference in treatment that is not objectively or reasonably justified, is directly based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.</i> Art. 2 § 1</p> <p><b>Indirect discrimination</b> <i>Indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons on which one of the grounds for discrimination set out in § 1 applies, unless said provision, measure or practice is objectively and reasonably justified.</i> Art. 2 § 2</p>

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		<p>This definition is extended in three ways:</p> <p>Adaptations for disabled  <i>The lack of reasonable adaptations for a person with a disability constitutes discrimination under this act.</i>  <i>Reasonable adaptation shall be considered an adaptation that entails no unreasonable burden, or one where the burden is sufficiently offset by existing measures.</i>  Art. 2 § 3</p> <p>Harassment  <i>Harassment shall be considered as a form of discrimination in cases of undesired behaviour connected to the discrimination grounds summarised under §1 aimed at or affecting the dignity of a person and creating a threatening, hostile, insulting, demeaning or offensive environment.</i>  Art. 2 § 6</p> <p>Incitement  <i>Any and all practices which consist of inciting discrimination against a person, a group, a community or members of it pursuant to one of the grounds referred to in §1, shall be considered as discrimination pursuant to this act.</i>  Art. 2 §7</p>
<b>13</b>	Is there a definition of age (e.g. calendar age, date of birth)	No
<b>14</b>	Are there definitions of other important concepts?	No
<b>15</b>	Is there a minimum age limit?	No
<b>16</b>	Is there a maximum age limit?	No

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<b>Approach of the Legislation</b>		
<b>17</b>	What norms does the Act contain?	<p><i>Any and all forms of direct or indirect discrimination is prohibited with respect to:</i></p> <ul style="list-style-type: none"> <li>▪ <i>the provision or availment of goods or services to the public;</i></li> <li>▪ <i>the conditions for access to gainful, unpaid, or self-employment, including the selection and appointment criteria, irrespective of the branch of activity, on all levels of the occupational hierarchy, including promotion opportunities, as well as employment and working conditions, including dismissal and pay, in both the private and the public sector;</i></li> <li>▪ <i>the appointment and promotion of an official or the assignment of an official for a service;</i></li> <li>▪ <i>the mention in an official document or in a report;</i></li> <li>▪ <i>the dissemination, publication or disclosure of a text, report, sign or other medium of discriminating remarks;</i></li> <li>▪ <i>the access to and participation in, as well as any and all other exercise of an economic, social, cultural or political activity accessible to the public.</i></li> </ul> <p>Art. 2 § 4 The Act also contains penal norms. See art. 6-14</p>
<b>18</b>	What is the approach of the Act? (open or closed system)	The system is open: it is possible to justify both direct and indirect discrimination and there are no meant exemptions.
<b>19</b>	Is it possible to justify direct age-discrimination?	<p>Yes, it is possible to justify direct discrimination in general. See the definition of direct discrimination.</p> <p><i>Direct discrimination occurs if a difference in treatment that is not objectively or reasonably justified, is directly based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.</i></p> <p>Art. 2 § 1</p>
<b>20</b>	Is it possible to justify indirect age-discrimination?	<p>Yes, it is possible to justify indirect discrimination in general. See the definition of indirect discrimination:</p> <p><i>Indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons on which one of the grounds for discrimination</i></p>

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		<p><i>set out in § 1 applies, unless said provision, measure or practice is objectively and reasonably justified.</i> Art. 2 § 4</p> <p>Note there is a special provision for justifying indirect discrimination in the area of labour: <i>With regard to labour relations, as defined in the second and third indent of § 4, a dispute concerning treatment shall be based on an objective and reasonable justification if, owing to the nature of an occupational activity or the context in which it is carried out, such an identification constitutes an essential and decisive occupational requirements, provided the aim is legitimate and the requirement is proportional to that aim.</i> Art. 2 § 5</p>
<b>21</b>	What are the general exemptions?	-
<b>22</b>	What exemptions are there for specific areas?	-
<b>23</b>	Is there a provision for positive action/preferential treatment on the age ground?	<p>Yes, there is: <i>The provisions of this act shall constitute no obstacle to the taking or using of measures geared to guaranteeing full equality in practice, or preventing or offsetting the disadvantages entailed by one of the grounds referred to in Article 2.</i> Art. 4</p>
<b>24</b>	Is there a provision for incitement/procurement/aid?	<p>Yes, there is: <i>Any and all practices which consist of inciting discrimination against a person, a group, a community or members of it pursuant to one of the grounds referred to in §1, shall be considered as discrimination pursuant to this act.</i> Art. 2 §7</p> <p>Note there is also a penal provision for this: Art. 6 § 1</p>

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<b>In Case of Discrimination...</b>		
<b>25</b>	Who can take action in the legal arena (only victims, or also NGO's etc)	<p>The following persons or organizations can come into action:</p> <ul style="list-style-type: none"> <li>▪ Victims Art. 19 § 1</li> <li>▪ The Centre for Equal Opportunities and Opposition to Racism Art. 31</li> <li>▪ If the statutory tasks which they have set are departed from, the following associations or organisations can take legal action in disputes that result therefrom: <ol style="list-style-type: none"> <li>1. public utility institutions and all associations which on the date of the facts, have enjoyed legal personality for at least five years, and have defined, as their object in their articles of association, to defend human rights and fight discrimination;</li> <li>2. the representative employers' organisations and trade unions, as specified in Article 3 of the Act of 5 December 1968 pertaining to collective bargaining agreements and joint committees;</li> <li>3. the representative organisations pursuant to the Act of 19 December 1974 on the governing of relations between the government and the trade unions of its personnel;</li> <li>4. the representative organisations of the self-employed</li> </ol> </li> </ul> <p>Art. 31.</p> <p>When the victim of a violation of the act or of the discrimination is a natural person or a body corporate, the claim of the groups referred to at the second and third hyphen shall be admissible only if they can prove that they are acting with the approval of the victim. Art. 31</p>
<b>26</b>	Which legal arena would that be (e.g. judge, equality body)	A civil judge (and a criminal judge, see below)
<b>27</b>	Which type of judicial process is open for the victim (e.g. civil law, equal treatment law, penal law)	<p><b>Civil law</b></p> <p>There are two different procedures open to the victim: In the procedure described in the Act, a victim (or organization) can ask the president of the Court in summary proceeding to order the cessation of the discrimination.</p> <p>A victim can also institute a normal civil procedure (a procedure on the merits) in which it can claim payment</p>

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		<p>of damages, because an unlawful act has been committed against him/her. This procedure is not mentioned in the Act.</p> <p><b>Criminal law</b></p> <p>If the “parket” decides to not charge the discriminator, the victim can initiate a penal process by making a “direct writ of summons”. That way, a victim can make proceedings pending at the Criminal Court.</p> <p>A victim can also come up in the process as a “civil party” and ask for payment of damages.</p> <p>These are general rules of criminal procedure in Belgium.</p> <p><u>All questions below are answered with regard to the first civil procedure.</u></p>
<b>28</b>	Is legal or other representation necessary?	<p>No: a victim of discrimination can appear in person before a court and does not need legal representation</p> <p>Source: Centre for Equal Opportunities and Opposition to Racism</p>
<b>29</b>	Describe the process	<p>The procedure is a procedure similar to a summary proceeding. It differs from a normal summary proceeding in that the decision of the president of the court is <u>not</u> provisional (as it is in a normal summary proceeding).</p> <p>Summary proceedings are heard by the president of the competent court (The Court of first instance, the Industrial Tribunal or the Commercial Tribunal, depending on the nature of the act).</p> <p>A claim shall be filed by petition in quadruplicate to the office of the clerk of the competent court or sent to said office by registered letter.</p> <p>The clerk of the court shall notify the other party without delay by a letter from the court, inviting said party to appear at the earliest within three or eight days, at the earliest or the latest respectively, after the dispatching of said letter, a copy of which shall be attached to the petition.</p> <p>Art. 22</p> <p>The president of the court shall rule on the existence of an act that falls even under penal law, whereby the provisions of this act are violated, and shall order the cessation thereof.</p> <p>Art. 19 § 1</p>

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<b>30</b>	When a complaint is received, what are procedural requirements?	<p>As mentioned above, the claim shall be filed by petition in quadruplicate to the office of the clerk of the competent court or sent tot said office by registered letter.</p> <p>The petition shall, on pain of voidance, indicate:</p> <ol style="list-style-type: none"> <li>1. the day, month and year;</li> <li>2. the surname, first names, occupation and official residence of the petitioner;</li> <li>3. the name and address of the natural person or the body corporate against whom the claim is filed;</li> <li>4. the object and the statement of the grounds on which the claim is based.</li> </ol> <p>Art. 22</p>
<b>31</b>	Are there any demands on the content of the case before the case is being accepted?	<p>No. But a process can be terminated by the judge if it is a so-called “tergend en roekeloos geding”.</p> <p>Source: Centre for Equal Opportunities and Opposition to Racism</p> <p>This is a general rule of Belgian law and probably means abuse of law.</p>
<b>32</b>	How is the burden of proof arranged?	<p>There is a provision on the burden of proof:</p> <p><i>When the victim of discrimination or one of the groups referred to in Article 31 produces before the competent court facts such as statistical data or field trials that lead to the supposition of direct or indirect discrimination, the burden of proof that no discrimination has been committed shall fall on the defendant.</i></p> <p>Art. 19 § 3</p> <p>In addition, there is a provision on the means of proof:</p> <p><i>Proof of discrimination on the grounds of sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current or future state of health, disability or physical characteristic can be provided by means of a field trial which can be carried out by a bailiff.</i></p> <p>Art. 19 § 4</p> <p>However, until now, the Royal Decree that should set out the practical rules for this field trial is lacking.</p> <p>Source: Centre for Equal Opportunities and Opposition to Racism</p>

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<b>33</b>	What are the sanctions/remedies?	<p>The president of the court shall order the <i>cessation</i> of the discriminative act. Art. 19 § 1</p> <p>The president can also decide that the <i>decision be promulgated</i>: <i>The president of the court may rule that his decision or the summary which he draws up, is affixed for a period that he shall specify inside and outside the institutions of the transgressor or the premises belonging to the latter, and that his ruling or summary thereof be published in newspapers or in any other manner, at the expense of the transgressor.</i> <i>These publicising measures may however be imposed only if they can contribute to putting a stop to the challenged act or the effect thereof.</i> Art. 19 § 2</p> <p>In addition, the court may, at the request of the victim of discrimination or one of the groups referred to in Article 31, order those who have committed the discrimination to pay a fine if the discrimination is not stopped (a penalty payment). Art. 20</p>
<b>34</b>	Is there appeal?	Yes, there is appeal. A party can appeal from the judgment according to the general Belgian rules of competency. This will usually be at the “hof van beroep” (cour d’appel)
<b>35</b>	Can the decision be enforced?	<p>Compliance with a decision can be stimulated by imposing a penalty payment (see above).</p> <p>It is not quite clear yet what can be done if there is no penalty payment and the decision is not being complied with. According to the Centre for Equal Opportunities and Opposition to Racism there is no other way of enforcement, perhaps claiming damages.</p>

**Other Issues**

<b>36</b>	The approach to concurrence is important to note	<p>Concurrence <i>The court shall rule on the claim, notwithstanding any proceedings based on the same facts pending before any other criminal court</i> Art. 22</p>
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## 2 Ontario, Canada

General Information		
1	Country/state	Ontario
2	Name of the Act	Human Rights Code
3	When did it come into force?	1962
4	Predeceasing law?	Before 1962, various laws dealt with different kinds of discrimination
5	Current developments?	-

Type/Style of Legislation		
6	What type of legislation is it and how is it structured? (equal treatment law, constitutional provision, human rights law, regulations etc.)	<p>Human rights law</p> <p>Structure:</p> <p>Part I     basic rights and responsibilities</p> <p>Part II    interpretation and application</p> <p>Part III   role and structure of the Commission</p> <p>Part IV   enforcement</p> <p>Part V    general matters</p>
7	Is it a ban for 1 ground of discrimination or for more? If so: which?	<p>For more:</p> <ul style="list-style-type: none"> <li>▪ race</li> <li>▪ ancestry</li> <li>▪ place of origin</li> <li>▪ colour</li> <li>▪ ethnic origin</li> <li>▪ citizenship</li> <li>▪ creed</li> <li>▪ sex<sup>0</sup></li> <li>▪ sexual orientation</li> <li>▪ handicap/disability<sup>1</sup></li> <li>▪ age</li> <li>▪ marital status</li> <li>▪ family status<sup>2</sup></li> <li>▪ same-sex partnership status<sup>3</sup></li> <li>▪ the receipt of public assistance</li> <li>▪ record of offences</li> </ul> <p>Note that not all grounds apply to all areas. E.g.: “the receipt of public assistance” applies to housing only; “record of offences” applies to employment only.</p>

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		<p>Notes:</p> <p><sup>0</sup>The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant. - Section 10(2)</p> <p><sup>1</sup>The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. - Section 10(3)</p> <p><sup>2</sup>"family status" means the status of being in a parent and child relationship - Section 10(1)</p> <p><sup>3</sup>"same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage" - Section 10(1)</p>
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<b>Scope of Legislation</b>		
<b>8</b>	Scope (where) – what area's does the Act cover? (e.g. employment, housing, goods and services, etc)	<ul style="list-style-type: none"> <li>▪ services, goods and facilities</li> <li>▪ housing</li> <li>▪ contracts</li> <li>▪ employment</li> <li>▪ membership in vocational associations and trade unions</li> </ul>
<b>9</b>	Where does the Act apply geographically?	State of Ontario
<b>10</b>	To whom does the Act apply? (e.g. both public and private sector)	Both to the public and the private sector
<b>11</b>	Is there a definition of goods and services? If so, specify	<p>Sort of:</p> <p><i>"services" does not include a levy, fee, tax or periodic payment imposed by law</i></p> <p>Section 10(1)</p> <p>There is no definition of goods.</p> <p>Note that the area of "goods, services and facilities" is very broad, it includes:</p> <ul style="list-style-type: none"> <li>▪ stores, restaurants and bars</li> <li>▪ hospitals and health services</li> <li>▪ schools, universities and colleges</li> <li>▪ public places, amenities and utilities such as recreation centres, public washrooms, malls and parks</li> <li>▪ services and programs provided by municipal and provincial governments, including social assistance and benefits, and public transit</li> <li>▪ services provided by insurance companies; and</li> <li>▪ classified advertisement space in a newspaper</li> </ul> <p>Source: "Guide to the Human Rights Code", published by the Ontario Human Rights Commission</p>

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<p><b>12</b></p>	<p>Is there a definition of discrimination? Direct/indirect/constructive/by association? If so, specify.</p>	<p>The Act confers certain rights to persons and contains a ban on direct and indirect infringement of these rights.</p> <p>In Section 11-13 it is further specified what is meant by infringement:</p> <p><b>Constructive discrimination</b> <i>A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,</i></p> <ul style="list-style-type: none"> <li>(a) <i>the requirement, qualification or factor is reasonable and bona fide in the circumstances; or</i></li> <li>(b) <i>it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.</i></li> </ul> <p>Section 11(1)</p> <p><b>Discrimination because of association</b> <i>A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.</i></p> <p>Section 12</p> <p><b>Intention to discriminate</b> <i>A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.</i></p> <p>It is provided that this section shall not interfere with freedom of expression of opinion.</p> <p>Section 13</p>
<p><b>13</b></p>	<p>Is there a definition of age (e.g. calendar age, date of birth)</p>	<p>Yes, there is:</p> <p><i>“age” means an age that is eighteen years or more, except in subsection 5(1) where “age” means an age that is eighteen years or more and less than sixty-five years</i></p> <p>Section 10(1)</p> <p>(Section 5(1) applies to employment)</p>

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<b>14</b>	Are there definitions of other important concepts?	Yes, there are: <i>“equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination</i> <i>“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome</i> Section 10(1)
<b>15</b>	Is there a minimum age limit?	Yes: the general minimum age limit is eighteen years.  There is an exemption to this: sixteen and seventeen year old persons that have withdrawn from parental control have a right to equal treatment in housing, see section 4.  There is also a specific minimum age limit: the provision for preferential treatment contains a minimum age limit of 65 years, see section 15.  In addition, up to the age of nineteen, the right to equal treatment in the area of goods and services is not infringed by the provisions of the Liquor License Act and the Tobacco Control Act. Section 20 (2) and (4)  Note that the right to contract on equal terms without discrimination applies to “every person having legal capacity”. This might be regulated by age, but is not further investigated. Section 3
<b>16</b>	Is there a maximum age limit?	There is no general maximum age limit, but in the area of employment there is a maximum age limit of 65 years. Section 10(1)

**Approach of the Legislation**

<b>17</b>	What norms does the Act contain?	The Act prohibits infringements of human rights: <i>No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.”</i> Section 9  The rights referred to in this norm are laid down in section 1-8:
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		<p><b>Services</b>  <i>Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.</i>  R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1).</p> <p><b>Accommodation</b>  <i>Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance.</i>  R.S.O. 1990, c. H.19, s. 2 (1); 1999, c. 6, s. 28 (2); 2001, c. 32, s. 27 (1).</p> <p><b>Harassment in accommodation</b>  <i>Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance.</i>  R.S.O. 1990, c. H.19, s. 2 (2); 1999, c. 6, s. 28 (3); 2001, c. 32, s. 27 (1).</p> <p><b>Contracts</b>  <i>Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.</i>  R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28 (4); 2001, c. 32, s. 27 (1).</p> <p><b>Accommodation of person under eighteen</b>  <i>Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the</i></p>
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		<p><i>person is less than eighteen years old.</i>  R.S.O. 1990, c. H.19, s. 4 (1).  <i>A contract for accommodation entered into by a sixteen or seventeen year old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old.</i>  R.S.O. 1990, c. H.19, s. 4 (2).</p> <p><b>Employment</b>  <i>Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.</i>  R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1).</p> <p><b>Harassment in employment</b>  <i>Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability.</i>  R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1).</p> <p><b>Vocational associations</b>  <i>Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.</i>  R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1).</p> <p><b>Sexual harassment</b></p> <p><b>Harassment because of sex in accommodation</b>  <i>Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.</i>  R.S.O. 1990, c. H.19, s. 7 (1).</p>
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		<p><b>Harassment because of sex in workplaces</b>  <i>Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.</i>  R.S.O. 1990, c. H.19, s. 7 (2).</p> <p><b>Sexual solicitation by a person in position to confer benefit, etc.</b>  <i>Every person has a right to be free from,</i>  (a) <i>a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or</i>  (b) <i>a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.</i>  R.S.O. 1990, c. H.19, s. 7 (3).</p> <p><b>Reprisals</b>  <i>Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.</i>  R.S.O. 1990, c. H.19, s. 8.</p>
<b>18</b>	What is the approach of the Act? (open or closed system)	The system is mixed: it is possible to justify constructive discrimination and there are exemptions, both general and for specific areas.
<b>19</b>	Is it possible to justify direct age discrimination?	No.
<b>20</b>	Is it possible to justify indirect age discrimination?	<p>Yes, it is. There is a provision for this in the definition of constructive discrimination:  <i>A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, <u>except where,</u></i>  (a) <i><u>the requirement, qualification or factor is reasonable and bona fide in the circumstances;</u> or</i></p>

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		<p><i>(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.</i></p> <p>There are two additional provisions:  <i>The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.</i>            Section 11(2)</p> <p><i>The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.</i>            Section 11(3)</p>
<b>21</b>	What are the general exemptions?	<ul style="list-style-type: none"> <li>▪ A right under Part I to non-discrimination because of <u>citizenship</u> is not infringed where Canadian citizenship is a requirement, qualification or consideration <u>imposed or authorized by law</u>            Section 16(1)</li> <li>▪ A right under Part I to non-discrimination because of <u>citizenship</u> is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of <u>fostering and developing participation in cultural, educational, trade union or athletic activities</u> by Canadian citizens or persons lawfully admitted to Canada for permanent residence.            Section 16(2)</li> <li>▪ A right under Part I to non-discrimination because of citizenship is not infringed where Canadian <u>citizenship</u> or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of <u>chief or senior executive positions</u>.            Section 16(3)</li> <li>▪ A right of a person under this Act is not infringed for the reason only that the person is <u>incapable of performing or fulfilling the essential duties or require-</u></li> </ul>



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		<p><u>ments attending the exercise of the right because of disability.</u></p> <p>But:</p> <p>The Commission, the Tribunal or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.</p> <ul style="list-style-type: none"> <li>▪ The right under sections 1 and 3 to equal treatment with respect to <u>services and to contract</u> on equal terms, without discrimination because of <u>age, sex, marital status, same-sex partnership status, family status or disability</u>, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group <u>insurance</u> between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of <u>age, sex, marital status, same-sex partnership status, family status or disability</u>.</li> </ul>
<b>22</b>	What are exemptions for specific areas?	<p><b>Goods, services and facilities</b></p> <ul style="list-style-type: none"> <li>▪ The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where <u>membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization</u> that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.</li> <li>▪ This Act shall not be construed to adversely affect any right or privilege respecting <u>separate schools</u> enjoyed by separate school boards or their supporters under the Constitution Act, 1867 and the Education Act.</li> <li>▪ This Act does not apply to affect the <u>application of the Education Act</u> with respect to the duties of teachers.</li> <li>▪ The right under section 1 to equal treatment with respect to services and facilities without discrimination because of <u>sex</u> is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of <u>public decency</u></li> </ul>

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		<p>The right under section 1 to equal treatment with respect to services, goods and facilities without discrimination because of <u>age</u> is not infringed by the provisions of the <u>Liquor Licence Act</u> and the regulations under it relating to providing for and enforcing a minimum drinking age of nineteen years.</p> <ul style="list-style-type: none"> <li>▪ The right under section 1 to equal treatment with respect to services and facilities is not infringed where a <u>recreational club</u> restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status, same-sex partnership status or family status.</li> <li>▪ The right under section 1 to equal treatment with respect to goods without discrimination because of <u>age</u> is not infringed by the provisions of the <u>Tobacco Control Act</u>, 1994 and the regulations under it relating to selling or supplying tobacco to persons who are, or who appear to be, under the age of 19 years.</li> </ul> <p><b>Housing</b></p> <ul style="list-style-type: none"> <li>▪ The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the <u>residential accommodation</u> is in a dwelling in which the owner or his or her family <u>reside</u> if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner.</li> <li>▪ The right under section 2 to equal treatment with respect to the occupancy of <u>residential accommodation</u> without discrimination because of <u>sex</u> is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the <u>same sex</u>.</li> <li>▪ The right under section 2 to equal treatment with respect to the occupancy of <u>residential accommodation</u> without discrimination is not infringed if a landlord uses it in the manner prescribed under this Act, income information, credit checks, credit references, rental history, guarantees or other similar <u>business practices</u> which are prescribed in the regulations made under this Act in <u>selecting prospective tenants</u>.</li> </ul>
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		<p><b>Contracts</b></p> <p>-</p> <p>(see the last general exemption)</p> <p><b>Employment</b></p> <p>See section 23-26</p> <p><b>Membership in vocational associations and trade unions</b></p> <p>-</p>
<b>23</b>	Is there a provision for positive action/preferential treatment on the age ground?	<p>Yes, there are two provisions for positive action: there is a provision for special programs and there is a provision for preferential treatment (which applies to person of or over the age of 65).</p> <p><b>Special programs</b></p> <p><i>A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.</i></p> <p>Section 14(1)</p> <p>This provision is limited:</p> <p>(2) <i>The Commission <u>may</u>,</i></p> <p style="padding-left: 20px;">(a) <i>upon its own initiative;</i></p> <p style="padding-left: 20px;">(b) <i>upon application by a person seeking to implement a special program under the protection of subsection (1); or</i></p> <p style="padding-left: 20px;">(c) <i>upon a complaint in respect of which the protection of subsection (1) is claimed, <u>inquire</u> into the special program and, in the discretion of the Commission, may by order <u>declare</u>,</i></p> <p style="padding-left: 40px;">- <i>that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or</i></p> <p style="padding-left: 40px;">- <i>that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).</i></p> <p>(3) <i>A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.</i></p>

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		<p><b><i>Effect of order</i></b>  <i>(4) Subsection (1) does not apply to a special program where an order is made under clause (2) (d) or where an order is made under clause (2) (e) with modifications of the special program that are not implemented.</i></p> <p><b><i>Subs. (2) does not apply to Crown</i></b>  <i>(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.</i></p> <p><b>Preferential treatment</b>  <i>A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.</i>  Section 15</p>
<b>24</b>	Is there a provision for incitement/procurement/aid?	No

<b>In Case of Discrimination ...</b>		
<b>25</b>	Who can take action in the legal arena (only victims, or also NGO's etc)	<ul style="list-style-type: none"> <li>▪ A victim:  <i>Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission</i>  Section 32(1)</li> <li>▪ The Ontario Human Rights Commission (in short: the Commission)  <i>The Commission may initiate a complaint by itself or at the request of any person</i>  Section 32(2)</li> </ul>
<b>26</b>	Which legal arena would that be (e.g. judge, equality body)	An equality body: The Ontario Human Rights Commission and possibly later a judge: the Human Rights Tribunal of Ontario.
<b>27</b>	Which type of judicial process is open for the victim (e.g. civil law, equal treatment law, penal law)	Human rights law
<b>28</b>	Is legal or other representation necessary?	Both before the Commission and before the Human Rights Tribunal, legal representation is not necessary. It is possible though.

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<b>29</b>	Describe the process	<p>If a complaint is filed with the Commission, the Commission shall investigate the complaint and endeavour to effect a settlement.  Section 33(1)</p> <p>The Commission has several investigative powers.  Section 33(2)-(13)</p> <p>The Commission may decide to not deal with a complaint, if it appears to the Commission that:</p> <ul style="list-style-type: none"> <li>(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;</li> <li>(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;</li> <li>(c) the complaint is not within the jurisdiction of the Commission; or</li> <li>(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,</li> </ul> <p>Section 34</p> <p>If the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer the subject-matter of the complaint to the Human Rights Tribunal of Ontario (in short: the Tribunal)  Section 36</p> <p>If the Commission decides to terminate the complaint or to not refer it to the Tribunal, a complainant may request the Commission to reconsider the decision.  Section 37(1)</p> <p>A decision of the Commission on reconsideration shall be final.  Section 37(3)</p> <p>Within thirty days after the referral of the complaint, the Tribunal shall hold a hearing.  Section 39(1)</p>
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		<p>The parties to a proceeding before the Tribunal are:</p> <ul style="list-style-type: none"> <li>(a) the Commission, which shall have the carriage of the complaint;</li> <li>(b) the complainant;</li> <li>(c) any person who the Commission alleges has infringed the right;</li> <li>(d) any person appearing to the Tribunal to have infringed the right;</li> <li>(e) where the complaint is of alleged conduct constituting harassment under subsection 2 (2) or subsection 5 (2) or of alleged conduct under section 7, any person who, in the opinion of the Tribunal, knew or was in possession of facts from which the person ought reasonably to have known of the conduct and who had authority to penalize or prevent the conduct.</li> </ul> <p>Section 39(2)</p> <p>A party may be added by the Tribunal under clause (2)(d) or clause (2)(e) at any stage of the proceedings.</p> <p>Section 39(3)</p> <p>The Tribunal shall make its finding and decision within thirty days after the conclusion of its hearing.</p> <p>Section 41(5)</p>
<b>30</b>	When a complaint is received, what are procedural requirements?	<p>A complaint must be filed with the Commission within six months of the occurring of the facts upon which the complaint is based.</p> <p>Section 34</p> <p>The only procedural requirement for a complaint to be receptive before the Tribunal, is that the complaint is referred by the Commission.</p>
<b>31</b>	Are there any demands on the content of the case before the case is being accepted?	<p>Yes; the Commission may decide to not deal with a complaint, if it appears to the Commission that the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith.</p> <p>Section 34</p> <p>The Tribunal can dismiss a complaint for the same reason.</p> <p>Section 41(4)</p>
<b>32</b>	How is the burden of proof arranged?	<p>There is no provision for this in the Code.</p> <p>A publication of the Ontario Human Rights Commission says:</p>

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		<p><i>“The complainant has the responsibility for proving his or her allegations of discrimination. After a complaint is referred to the Board of Inquiry, the Board has to be convinced on a “balance of probabilities” that the Code was violated. “Balance of probabilities” means that there is sufficient evidence to support the allegations that the discriminatory behaviour took place. The decision-maker must find that it was more likely than not that the allegations are true in order for the complaint to succeed.”</i></p> <p>Source: “A Complainant’s Guide”, publication of the Ontario Human Rights Commission</p>
<b>33</b>	What are the sanctions/remedies?	<p>The Tribunal may:</p> <ul style="list-style-type: none"> <li>▪ direct the party who infringed the rights of the complainant to <u>do anything</u> that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and</li> <li>▪ direct the party to make <u>restitution</u>, including <u>monetary compensation</u>, for loss arising out of the infringement, and, where the infringement has been engaged in willfully or recklessly, monetary compensation may include an award, not exceeding \$10,000,-, for mental anguish</li> </ul> <p>Section 41(1)</p> <ul style="list-style-type: none"> <li>▪ The Tribunal can also make an <u>order to prevent harassment</u>: <ul style="list-style-type: none"> <li><i>Where the Tribunal makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2 (2) or subsection 5 (2) or conduct under section 7, and the Tribunal finds that a person who is a party to the proceeding,</i></li> <li><i>(a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and</i></li> <li><i>(b) had the authority by reasonably available means to penalise or prevent the conduct and failed to use it,</i></li> <li><i>the Tribunal shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36 (2), request the Tribunal to reconvene and if the Tribunal finds that a person who is a party to the proceeding,</i></li> <li><i>(c) knew or was in possession of knowledge from which the person ought to have known of the</i></li> </ul> </li> </ul>

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		<p><i>repetition of infringement; and</i></p> <p><i>(d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it, the Tribunal may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.</i></p> <p>Section 41(2)</p> <ul style="list-style-type: none"> <li>▪ Finally, the Tribunal can order the <u>Commission to pay costs</u>:  <i>Where, upon dismissing a complaint, the Tribunal finds that,</i> <ul style="list-style-type: none"> <li><i>(a) the complaint was trivial, frivolous, vexatious or made in bad faith; or</i></li> <li><i>(b) in the particular circumstances undue hardship was caused to the person complained against, the Tribunal may order the Commission to pay to the person complained against such costs as are fixed by the Tribunal.</i></li> </ul> </li> </ul> <p>Section 41(4)</p>
<b>34</b>	Is there appeal?	<p>Yes:</p> <p><i>Any party to a proceeding before the Tribunal may appeal from a decision or order of the Tribunal to the Divisional Court in accordance with the rules of court.</i></p> <p>Section 42(1)</p>
<b>35</b>	Can the decision be enforced?	<p><b>Enforcement of settlements:</b></p> <p><i>Where a settlement of a complaint is agreed to in writing, signed by the parties and approved by the Commission, the settlement is binding upon the parties, and a breach of the settlement is grounds for a complaint under section 32, and this Part applies to the complaint in the same manner as if the breach of the settlement were an infringement of a right under this Act.</i></p> <p>Section 43</p> <p><b>Enforcement of decisions of the Tribunal</b></p> <p>It is one of the functions of the Commission to enforce orders of the Tribunal.</p> <p>Section 29(i)</p> <p>It is also possible to get a court order at the Divisional Court.</p> <p>Source: Ontario Human Rights Commission</p>



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Other Issues		
36	Scope	<p><b>Scope</b></p> <p>(1) <i>This Act binds the Crown and every agency of the Crown.</i></p> <p>(2) <i>Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.</i></p> <p>Section 47</p>
	Acts of officers etc.	<p>Acts of officers etc.</p> <p>(1) <i>For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 44 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.</i></p> <p>(2) <i>At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the Tribunal in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1).</i></p>
	Penal law	<p><b>Penal law</b></p> <p>(1) <i>Every person who contravenes section 9, subsection 33 (11), or an order of the Tribunal, is guilty of an offence and on conviction is liable to a fine of not more than \$25,000.</i></p> <p>(2) <i>No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General.</i></p> <p>Section 44</p> <p>According to the Ontario Human Rights Commission, this is not criminal law. It is unclear to us what the status and meaning of this provision exactly is.</p>

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### 3 Ireland

General Information		
1	Country/state	Ireland
2	Name of the Act	Equal Status Act 2000
3	When did it come into force?	2000
4	Predecessing law?	The Employment Equality Act 1998 outlaws discriminatory practices in relation to and within employment.
5	Current developments?	Equality Bill 2004: to amend the Employment Equality Act 1998 and the Equal Status Act 2000

Type/Style of Legislation		
6	What type of legislation is it and how is it structured? (equal treatment law, constitutional provision, human rights law, regulations etc.)	<p>Equal treatment law</p> <p>Structure:</p> <p>Part I: Definitions, including a definition of discrimination</p> <p>Part II: The actual bans on discrimination, defined separately for each area, and the exemptions</p> <p>Part III: Provisions for enforcement</p> <p>Part IV: Additional functions of the Equality Authority</p> <p>Part V: General provisions</p>
7	Is it a ban for 1 ground of discrimination or for more? If so: which?	<p>It is a ban for ten grounds of discrimination:</p> <ol style="list-style-type: none"> <li>1. gender</li> <li>2. marital status</li> <li>3. family status<sup>1</sup></li> <li>4. sexual orientation</li> <li>5. religion</li> <li>6. age</li> <li>7. disability</li> <li>8. race</li> <li>9. membership of the Traveller community<sup>2</sup></li> <li>10. victimisation<sup>3</sup></li> </ol> <p>Section 3(2)</p> <p>Notes:</p> <p><sup>1</sup>"family status" means being pregnant or having responsibility as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years or as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such nature as to give rise to the need for care or support on a continuing, regular or frequent basis - Section 2(1)</p> <p><sup>2</sup>"Traveller community" means the community of people who</p>

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		<p>are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland. - Section 2(1)</p> <p><sup>3</sup>The victimisation ground means that one person is discriminated because he or she has taken a certain action under the Equality Status Act and the other person has not. - See also Section 3(2)(j)</p>
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Scope of Legislation		
<b>8</b>	Scope (where) – what area's does the Act cover? (e.g. employment, housing, goods and services, etc)	<p>The Act covers:</p> <ol style="list-style-type: none"> <li>1. goods and services</li> <li>2. premises and accommodation</li> <li>3. education</li> <li>4. clubs</li> <li>5. transport and public space with regard to disability</li> </ol>
<b>9</b>	Where does the Act apply geographically?	Republic of Ireland
<b>10</b>	To whom does the Act apply? (e.g. both public and private sector)	<p>Both the private and the public sector:</p> <p><i>"Government Departments are covered by the Equal Status Act, to the extent that they are providing services to the public or part of the public"</i></p> <p>Source: <a href="http://www.equalitytribunal.ie">www.equalitytribunal.ie</a></p>
<b>11</b>	Is there a definition of goods and services? If so, specify	<p>Yes, there is:</p> <p><i>"goods" means any articles of movable property</i></p> <p><i>"service" means a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes</i></p> <p><i>(a) access to and the use of any place,</i></p> <p><i>(b) facilities for</i></p> <ol style="list-style-type: none"> <li><i>(i) banking, insurance, grants, loans, credit or financing,</i></li> <li><i>(ii) entertainment, recreation or refreshment,</i></li> <li><i>(iii) cultural activities, or</i></li> <li><i>(iv) transport or travel,</i></li> </ol> <p><i>(c) a service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and</i></p> <p><i>(d) a professional or trade service,</i></p> <p><i>but does not include pension rights (within the meaning of the Employment Equality Act, 1998) or a service or</i></p>

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		<p><i>facility in relation to which that Act applies.</i></p> <p>Section 2(1)</p> <p>(This definition does not include services provided under a contract of service.)</p>
<b>12</b>	<p>Is there a definition of discrimination?</p> <p>Direct/indirect/constructive/by association?</p> <p>If so, specify</p>	<p>Yes, there is. The definition includes direct and indirect discrimination (although these terms do not appear in the Act) and discrimination by association. The definition is:</p> <p><i>For the purposes of this Act, discrimination shall be taken to occur where</i></p> <p>(a) <i>on any of the grounds specified in subsection (2) (in this Act referred to as “the discriminatory grounds”) which exists at present or previously existed but no longer exists or may exist in the future, or which is imputed to the person concerned, a person is treated less favourably than another person is, has been or would be treated,</i></p> <p>(b) (i) <i>a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated, and</i></p> <p>(ii) <i>similar treatment of that person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination,</i></p> <p>or:</p> <p>(c) (i) <i>a person is in a category of persons who share a common characteristic by reason of which discrimination may, by virtue of paragraph (a), occur in respect of those persons,</i></p> <p>(ii) <i>the person is obliged by the provider of a service (within the meaning of section 4(6)) to comply with a condition (whether in the nature of a requirement, practice or otherwise) but is unable to do so,</i></p> <p>(iii) <i>substantially more people outside the category than within it are able to comply with the condition, and</i></p> <p>(iv) <i>the obligation to comply with the condition cannot be justified as being reasonable in all the circumstances of the case.</i></p> <p>Section 3(1)</p> <p>In relation to disability, the definition of discrimination is extended to:</p>

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		<p><i>A refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.</i></p> <p><i>A refusal or failure to provide the special treatment or facilities shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.</i></p> <p>Section 4 (1-2)</p>
<b>13</b>	Is there a definition of age (e.g. calendar age, date of birth)	No.
<b>14</b>	Are there definitions of other important concepts?	<p>Yes.</p> <p>“Club” means a club that has applied for or holds a certificate of registration”</p> <p>Accommodation is not defined</p> <p>Education is not defined</p>
<b>15</b>	Is there a minimum age limit?	<p>Yes:</p> <p>The ban for discrimination on the age ground does not cover people under the age of 18 years. In the new Bill an exception to the age limit is proposed for motor vehicle insurance to licensed drivers under 18.</p> <p>Section 3(3)</p>
<b>16</b>	Is there a maximum age limit?	No.

**Approach of the Legislation**

<b>17</b>	What norms does the Act contain?	<p><b>Goods and services</b></p> <p><i>A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.</i></p> <p>Section 5(1)</p> <p><b>Premises and accommodation</b></p> <p><i>A person shall not discriminate in</i></p> <p>(a) disposing of any estate or interest in premises,</p> <p>(b) terminating any tenancy or other interest in premises,</p> <p>or</p> <p>(c) providing accommodation or any services or amenities</p>
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		<p><i>related to accommodation or ceasing to provide accommodation or any such services or amenities</i></p> <p><b>Education</b> An educational establishment shall not discriminate in relation to</p> <ul style="list-style-type: none"> <li>(a) the admission or the terms or conditions of admission of a person as a student to the establishment,</li> <li>(b) the access of a student to any course, facility or benefit provided by the establishment,</li> <li>(c) any other term or condition of participation in the establishment by a student, or</li> <li>(d) the expulsion of a student from the establishment or any other sanction against the student.</li> </ul> <p><b>Clubs</b> There is not a ban, but a sanction on discrimination by clubs (possibility of losing their license to sell alcohol) A club is a discriminating club:</p> <p><i>(a) a club shall be considered to be a discriminating club if</i></p> <ul style="list-style-type: none"> <li><i>(i) it has any rule, policy or practice which discriminates against a member or an applicant for membership, or</i></li> <li><i>(ii) a person involved in its management discriminates against a member or an applicant for membership in relation to the affairs of the club,</i></li> </ul> <p><i>(b) without prejudice to the generality of paragraph (a), any of the following acts, if done by a club or a person involved in its management on any of the discriminatory grounds, is evidence that the club is a discriminating club:</i></p> <ul style="list-style-type: none"> <li><i>(i) refusing to admit a person to membership;</i></li> <li><i>(ii) providing different terms and conditions of membership for members or applicants for membership;</i></li> <li><i>(iii) terminating the membership of a person or subjecting a member to any other sanction; or</i></li> <li><i>(iv) refusing or failing, in contravention of <u>section 4(1)</u>, to do all that is reasonable to accommodate the needs of a member, or an applicant for membership, with a disability.</i></li> </ul> <p>Section 8</p> <p><b>Harassment and sexual harassment</b> <i>(1) A person shall not sexually harass or harass (within the meaning of subsection (4) or (5)) another person ("the</i></p>
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		<p><i>victim”) where the victim</i></p> <p>(a) <i>avails or seeks to avail himself or herself of any service provided by the person or purchases or seeks to purchase any goods being disposed of by the person,</i></p> <p>(b) <i>is the proposed or actual recipient from the person of any premises or of any accommodation or services or amenities related to accommodation, or</i></p> <p>(c) <i>is a student at, has applied for admission to or avails or seeks to avail himself or herself of any service offered by, any educational establishment (within the meaning of <u>section 7</u>) at which the person is in a position of authority.</i></p> <p>Section 11</p> <p><b>Advertisement</b> <i>A person shall not publish or display or cause to be published or displayed an advertisement which indicates an intention to engage in prohibited conduct or might reasonably be understood as indicating such an intention.</i></p> <p>Section 12</p> <p><b>Procurement</b> <i>A person shall not procure or attempt to procure another person to engage in prohibited conduct.</i></p> <p>Section 13</p> <p><b>Transport and public space</b> There are some provisions for possible actions to accommodate transport and public space, only with regard to disability.</p> <p>Section 17-19</p>
<b>18</b>	What is the approach of the Act? (open or closed system)	<p>The system is mixed.</p> <p>It is possible to justify indirect discrimination.</p> <p>There also are general meant exemptions (which apply to all or a few area's) and in addition there are meant exemptions for some area's specifically (goods and services, premises and accommodation, education and clubs).</p>
<b>19</b>	Is it possible to justify direct age discrimination?	No.
<b>20</b>	Is it possible to justify indirect age discrimination?	<p>Yes, it is possible to justify indirect discrimination in general; if the obligation to comply with a condition can be justified as being reasonable in all the circumstances of the case, there is no indirect discrimination.</p> <p>Section 3(1)(c)</p>

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21	What are the general exemptions?	<p>Measures or activities not prohibited:</p> <ol style="list-style-type: none"> <li>1. the taking of any action that is <u>required</u> under: <ul style="list-style-type: none"> <li>▪ statutory provision or court order</li> <li>▪ any act done or measure adopted by the EU</li> <li>▪ any international treaty which imposes an obligation on the state</li> </ul> <p>Addition proposed in Bill:</p> <ul style="list-style-type: none"> <li>▪ any action taken in accordance with any provision or condition made by or under any enactment, or made otherwise by a public authority, and governing or arising from the entry to and residence in the State of persons who are not nationals or a category of such persons</li> </ul> </li> <li>2. <u>preferential treatment</u> or the taking of positive measures which are bona fide intended to: <ul style="list-style-type: none"> <li>▪ promote equality of opportunity for persons who are disadvantaged</li> <li>▪ cater for the special needs of persons may require facilities, arrangements, service or assistance because of their circumstances</li> </ul> </li> <li>3. a provider of goods/services or a person providing accommodation or related services, can refuse service/accommodation to a person if a reasonable individual, having the knowledge and experience of the provider, would form the belief (on grounds other than discriminatory grounds) that the provision of service/accommodation to the person would produce a <u>substantial risk of criminal or disorderly conduct or behaviour</u>; or damage to property in or around the area where the service is provided.</li> <li>4. Actions taken by the holder of a licence which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the provisions of the <u>Licensing Acts</u>.</li> <li>5. Providers of goods and services, providers of accommodation and clubs are allowed to impose and maintain a <u>preferential fee</u>, charge or rate in respect of anything offered to <u>persons together with their children, named couples, persons in a specific AGE group and persons with a disability</u>.</li> <li>6. The different treatment of a person does not consti-</li> </ol>
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		<p>tute discrimination where the person is treated solely in the exercise of a <u>clinical judgement</u> in connection with a diagnosis of illness or his/her medical treatment.</p> <p>7. The different treatment of a person does not constitute discrimination where the person is <u>incapable</u> of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.</p> <p>Section 14, 15, 16</p>
<b>22</b>	What are exemptions for specific areas?	<p><b>Goods and services</b></p> <ul style="list-style-type: none"> <li>▪ activities referred to in <u>section 7 (2)</u></li> <li>▪ matters provided for under section 6 or <u>section 8</u></li> <li>▪ differences in treatment on the gender ground in aesthetic or <u>cosmetic</u> services</li> <li>▪ differences in treatment in relation to <u>annuities, pensions, insurance policies</u>, and other matters relating to risk assessments, when they are based on reliable actuarial or statistical data or other relevant underwriting or commercial factors</li> <li>▪ differences in treatment on the <u>religion</u> ground in relation to goods or services provided for a religious purpose</li> <li>▪ differences in treatment because of <u>gender/AGE/disability/nationality</u> in relation to providing or organizing <u>sporting</u> events or facilities (the differences must be “reasonably necessary” and “relevant”)</li> <li>▪ differences based on the <u>gender</u> ground where <u>embarrassment or infringement of privacy</u> can reasonably be expected to result from the presence of a person of another gender</li> <li>▪ differences in treatment to <u>promote special interests</u> of a group for bona fide purposes and in a bona fide manner (the differences must be “reasonably necessary”)</li> <li>▪ differences on the <u>AGE, gender, disability or race ground</u>, when reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a <u>dramatic performance or other entertainment</u></li> <li>▪ an <u>AGE</u> requirement for being <u>adoption or fostering</u>, when it is reasonable having regard to the needs of the child.</li> <li>▪ a disposal of goods by <u>will or gift</u></li> </ul>

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		<ul style="list-style-type: none"> <li>▪ differences in treatment in relation to goods or services which can reasonably be regarded as suitable only to the <u>needs of certain persons</u>.</li> </ul> <p>Section 5(2)</p> <p><b>Premises and accommodation<sup>1</sup></b></p> <ul style="list-style-type: none"> <li>▪ disposal of any estate or interest in premises by <b>will or gift</b></li> <li>▪ disposal otherwise of an estate or interest or provision of accommodation where the person making the disposal or another person who has an estate or interest in the premises or a person who is a near relative of either of them intends to continue to <u>reside</u>, or in the immediate future to take up residence, in the premises or a part thereof, and the premises in question are small premises<sup>2</sup></li> </ul> <p style="padding-left: 40px;">In the Bill it is proposed to narrow this exemption to:</p> <p style="padding-left: 40px;"><i>“The provision of accommodation by a person in a part (other than a separate and self-contained part) of the person’s home, where the provision of the accommodation affects the person’s private or family life or that of any other person residing in the home”</i></p> <ul style="list-style-type: none"> <li>▪ any disposal of estate or interest or provision of accommodation, which is <u>not available to the public</u> or a section of the public</li> <li>▪ provision of accommodation to persons of one <u>gender</u> where <u>embarrassment or infringement of privacy</u> can reasonably be expected to result from the presence of a person of another gender</li> <li>▪ where any premises or accommodation are reserved for <u>religious purposes, refuge, nursing home, retirement home, home for persons with a disability, hostel for homeless people or for a similar purpose</u>, persons who are not in that category can be refused</li> <li>▪ <u>Housing Authorities</u> can provide different treatment in relation to housing accommodation based on <u>family size, family status, marital status, disability, age or member of the Traveller community</u></li> </ul> <p>Notes:</p> <p><sup>1</sup>References to the disposal of an estate or interest in premises or the provision of accommodation or of any services or amenities relating to accommodation include references to the termination of any tenancy or other interest in those premises or ceasing to provide such accommodation, services or amenities</p> <p>Section 6(3)</p>
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		<p><sup>2</sup>Premises shall be treated as small premises if in the case of premises comprising residential accommodation for more than one household, there is not normally accommodation in the premises for more than three households, or in any other case, there is not normally residential accommodation in the premises for more than six persons in addition to a person mentioned in those paragraphs and any persons residing with that person Section 6(3)</p> <p><b>Education</b></p> <ul style="list-style-type: none"> <li>▪ in non third level institutions, schools may be for <u>one gender only</u></li> <li>▪ institutions established for providing training to <u>ministers of religion</u> may admit students of only one gender or religious belief</li> <li>▪ primary and post primary schools which have the objective of providing education in an environment which promotes certain <u>religious value</u>, may admit persons of a particular religious denomination in preference to others and may refuse to admit a student who is not of that denomination if it is proved that the refusal is essential to maintain the ethos of the school</li> <li>▪ a university or other third-level institution can provide different treatment in relation to fees for admission or attendance by persons who are <u>nationals of a member state of the European Union</u> and persons who are not and in relation to the allocation of places at the establishment to those nationals and other nationals</li> <li>▪ a university or other third-level institution can offers assistance to particular categories of persons by way of <u>sponsorships, scholarships, bursaries or other awards</u>, being assistance which is justifiable, having regard to traditional and historical considerations, or in relation to the <u>allocation of places</u> at the establishment, where the allocation is made pursuant to an agreement concerning the exchange of students made between the establishment and an educational institution or authority in a jurisdiction other than the State</li> <li>▪ a university or other third-level institution may provide different treatment in relation to the allocation of places to <u>mature students</u></li> <li>▪ different treatment of students on the <u>gender, AGE or disability</u> ground in relation to the provision or organisation of <u>sporting</u> facilities or sporting events, to the extent that the differences are reasonably necessary having regard to the nature of the facilities or events</li> </ul>
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		<ul style="list-style-type: none"> <li>different treatment of students on the disability ground, if the disability is making the provision of educational services impossible to other students or having a seriously <u>detrimental effect</u> on that provision</li> </ul> <p><b>Clubs</b></p> <ul style="list-style-type: none"> <li>If the principal purpose of the club is to <u>cater only for the needs</u> of persons of a particular <u>gender, marital status, family status, sexual orientation, religious belief (or no religious belief), AGE, disability, nationality, ethnic or national origin</u> or for members of the <u>Traveller community</u>, it can refuse membership to other persons</li> <li>A club can confine <u>benefits or privileges</u> to particular categories of age or gender where it is not practicable for those outside the category enjoy the benefit or privilege at the same times as members within the category. The club must make arrangements to offer the same or a reasonably equivalent benefit or privilege to those members outside the category</li> <li><u>different types of membership</u>, access to which is not based on any discriminatory ground</li> <li>A club can, for the purpose of <u>reducing or eliminating the effect of any rule or practice of the club</u> (whether adopted before or after the commencement of this section) restricting access to particular types of membership to persons of a particular gender, <u>offer concessionary rates, fees or membership arrangements</u> to persons who were or are disadvantaged by any such rule or practice</li> <li>A club can provide reasonably necessary different treatment to members of a particular <u>gender, AGE, disability, nationality or national origin</u> in relation to <u>sporting</u> facilities or events</li> <li>A club can have, for the principle purpose of <u>promoting equality</u>, a reserved place or places on its board or committee of management for persons who are members of a particular category or take other measures to obtain more equal involvement in club matters of persons who are members of a particular category</li> </ul>
<b>23</b>	Is there a provision for positive action/preferential treatment on the age ground?	<p>Yes, there are both general provisions, as well as provisions for the specific area's.</p> <p>Note that many of the provisions below can <u>possibly</u> be a provision for positive action, depending on the reason why the action is taken.</p>

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		<p><b>General</b></p> <p><i>“Nothing in this Act shall be construed as prohibiting preferential treatment or the taking of positive measures which are bona fide intended to</i></p> <p><i>(i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or</i></p> <p><i>(ii) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.”</i></p> <p>Section 14(b)</p> <p><i>“Imposing or maintaining a reasonable preferential fee, charge or rate in respect of anything offered or provided to or in respect of persons together with their children, married couples, persons in a specific age group or persons with a disability does not constitute</i></p> <p><i>(a) discrimination for the purposes of section 5 or 6, or</i></p> <p><i>(b) a discriminatory rule, policy or practice for the purposes of section 8(2)(a)”</i></p> <p>Section 16(1)</p> <p><b>Goods and services</b></p> <p><i>“Subsection 1 does not apply in respect of differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a bona fide purpose and in a bona fide manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests.”</i></p> <p>Section 5(2)(h)</p> <p><i>“Subsection 1 does not apply in respect of differences, not otherwise specifically provided for in this section, in the treatment of persons in respect of the disposal of goods, or the provision of a service, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.”</i></p> <p>Section 5(2)(l)</p> <p><b>Accommodation</b></p> <p><i>“Where any premises or accommodation are reserved for the use of persons in a particular category of persons for a</i></p>
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		<p><i>religious purpose or as a refuge, nursing home, retirement home, home for persons with a disability or hostel for homeless persons or for a similar purpose, a refusal to dispose of the premises or provide the accommodation to a person who is not in that category does not, for that reason alone, constitute discrimination”</i></p> <p>Section 6(5)</p> <p><i>“Nothing in subsection (1) shall be construed as prohibiting</i></p> <p><i>(a) a housing authority, pursuant to its functions under the Housing Acts, 1966 to 1998, or</i></p> <p><i>(b) a body approved under <u>section 6 of the Housing (Miscellaneous Provisions) Act, 1992</u>, from providing, in relation to housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.”</i></p> <p>Section 6(6)</p> <p><b>Education</b></p> <p>-</p> <p><b>Clubs</b></p> <p><i>“For the purposes of <u>section 8</u>, a club shall not be considered to be a discriminating club by reason only that</i></p> <p><i>(a) if its principal purpose is to cater only for the needs of</i></p> <p><i>(i) persons of a particular gender, marital status, family status, sexual orientation, religious belief, <u>age</u>, disability, nationality or ethnic or national origin,</i></p> <p><i>(ii) persons who are members of the Traveller community, or</i></p> <p><i>(iii) persons who have no religious belief, it refuses membership to other persons”</i></p> <p>Section 9(1)(a)</p> <p><i>“For the purposes of <u>section 8</u>, a club shall not be considered to be a discriminating club by reason only that it confines access to a membership benefit or privilege to members within the category of a particular gender or age, where</i></p> <p><i>(i) it is not practicable for members outside the category to enjoy the benefit or privilege at the same time as members within the category, and</i></p> <p><i>(ii) arrangements have been made by the club which offer the same or a reasonably equivalent benefit</i></p>
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		<p><i>or privilege both to members within the category and to members outside the category”</i></p> <p>Section 9(1)(b)</p> <p><i>“For the purposes of section 8, a club shall not be considered to be a discriminating club by reason only that it has, for the principal purpose of promoting equality, a reserved place or places on its board to or committee of management for persons who are members of a particular category, or</i></p> <p><i>takes other measures for the principal purpose of obtaining a more equal involvement in club matters of persons who are members of a particular category”</i></p> <p>Section 9(2)</p>
<b>24</b>	Is there a provision for incitement/procurement/aid	<p>Yes there is:</p> <p><i>(1) A person shall not procure or attempt to procure another person to engage in prohibited conduct</i></p> <p><i>(2) A person who contravenes subsection (1) shall be guilty of an offence</i></p> <p>Section 13</p>

<b>In Case of Discrimination ...</b>		
<b>25</b>	Who can take action in the legal arena (only victims, or also NGO's etc)	<p>1. A person who claims that prohibited conduct has been directed against him or her can come into action.</p> <p>Section 21(1)</p> <p>2. The Equality Authority can also come into action when it appears that</p> <ul style="list-style-type: none"> <li>▪ prohibited conduct is being generally directed against persons or</li> <li>▪ prohibited conduct has been directed against a person who has not made a claim and it is not reasonable to expect that the person will do so or</li> <li>▪ a person has contravened or is contravening section 12(1), 19 or regulations made under section 17 and 18</li> </ul> <p>Section 23(1)</p>
<b>26</b>	Which legal arena would that be (e.g. judge, equality body)	<p>An equality body; the Director of Equality Investigations, this is the Director of the Equality Tribunal. S/he is supported by Equality Officers and Equality Mediation Officers.</p> <p>Possibly later a judge.</p>

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<b>27</b>	Which type of judicial process is open for the victim (e.g. civil law, equal treatment law, penal law)	<p>Equal treatment law</p> <p>The Act also defines certain behaviour as “offences”. There are specific sanctions on these offences, but that is criminal law.</p> <p>Section 43-44</p> <p>There haven’t been any proceedings under these Sections yet, and it is very unclear who can initiate a criminal procedure.</p> <p>Source: Equality Authority</p> <p>Section 44 though provides that summary proceedings for an offence under any provision of this Act may be instituted by the Minister or the Authority.</p>
<b>28</b>	Is legal or other representation necessary?	<p>No, neither in making a complaint, nor in appeal legal representation is necessary. It would be wise though to have yourself represented in appeal before the Circuit Court, because this court is very formal.</p> <p>Source: Equality Authority</p>
<b>29</b>	Describe the process	<p>A person who claims that prohibited conduct has been directed against him can refer the case to the Director of Equality Investigations appointed under section 75(1) of the Employment Equality Act, 1998 (in short: the Director)</p> <p>Section 21(1)</p> <p>As mentioned above a case could also be referred to the Director by the Equality Authority.</p> <p>Section 23</p> <p>If it appears to the Director that a case referred to him under section 21 (which is by a victim) could be resolved by mediation, he shall refer the case to an equality mediation officer, but only if both parties agree.</p> <p>Section 24(1-2)</p> <p>If a case is not referred to the equality mediation officer, or when it appears to the officer the case cannot be resolved by mediation, the Director shall investigate the case and hear all persons appearing to the Director to be interested and desiring to be heard. At the conclusion of the investigation the Director shall make a decision on the case and if the decision is in favour of the complainant, it shall provide for redress.</p> <p>Section 25</p> <p>Decisions of the Director have legal status as any other judicial decision.</p> <p>Source: the Equality Authority</p>



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		<p>The Director has investigative powers to enter premises and to obtain information, through interview or otherwise, as well as powers to ensure the imposition of sanctions in the event of failure or refusal by persons to co-operate with an investigation.</p> <p>Section 33-35</p> <p>Note that in case of a discriminating club the process is different. Any person including the Equality Authority can apply to the District Court for a declaration that a club is a discriminating club. If it is found to be a discriminating club and it is the first such order made against the club the court can suspend a club's certificate for a period of up to 30 days. The effect of the suspension is that the club cannot sell alcoholic drinks. While a second or subsequent determination that a club is a discriminating club remains in effect, no certificate of registration shall be granted or renewed.</p> <p>Section 8</p>
<b>30</b>	When a complaint is received, what are procedural requirements?	<p>The complaint must be made within six months of the last incident of discrimination.</p> <p>Before seeking redress, the persons who feels discriminated against must notify the respondent within two months after the incident in writing on the nature of the complaint and the intention to seek redress and to refer the matter to the Director.</p> <p>When the complainant has received an unsatisfying reply to this notification a complaint can be made. If no reply is being received, a complaint can be made one month after the notification was sent.</p> <p>Both the time-limit of two months for sending a notification and of six months for making a complaint can in exceptional circumstances be extended by the Director, on application by the complainant.</p> <p>Section 21</p>
<b>31</b>	Are there any demands on the content of the case before the case is being accepted?	<p>In section 22 it is laid down that the Director may dismiss a claim at any stage in the investigation if he or she is of opinion that the claim has been made in bad faith or is frivolous or vexatious or relates to a trivial matter.</p>
<b>32</b>	How is the burden of proof arranged?	<p>There is no specific provision on the burden of proof. It is provided that the complainant may, in the notification he or she must send to the respondent prior to making a complaint, question the respondent in writing so as to obtain material information.</p> <p>Section 21(2)</p>

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		<p>The respondent is not obliged to reply to any such questions, but if he does not or if he provides false or misleading information, the Director may draw such inferences, as seem appropriate from the failure to reply or the supply of false or misleading information.</p> <p>Section 26</p> <p>In practice the provider of the service will have to prove that s/he did not discriminate the complainant. This is decided by the Director.</p> <p>Source: the Equality Authority</p>
<b>33</b>	What are the sanctions/remedies?	<p>The Director may provide for either or both:</p> <ul style="list-style-type: none"> <li>▪ an <u>order for compensation</u> for the effects of discrimination (up to a maximum amount equal to the maximum amount that could be awarded by the District Court in civil cases in contract);</li> <li>▪ an order that a person or persons take a (specified) <u>course of action</u>.</li> </ul> <p>In the new Bill it is proposed that an order for compensation can not be made in favour of the Authority in a case referred to the Director by the Authority under section 23(1)</p> <p>Section 27(1)</p>
<b>34</b>	Is there appeal?	<p>Yes. Both the complainant and the respondent can appeal against the decision to the Circuit Court, where a new hearing will take place. An appeal must be made within 42 days from the date of the Decision. There is no further appeal possible except to the High Court on a point of law.</p> <p>Section 28</p>
<b>35</b>	Can the decision be enforced?	<p>Yes. If the Decision has not been complied with after 42 days, parties have the right to apply to the Circuit Court for an order for enforcement.</p> <p>This can also be done if a case is settled in mediation. The Circuit Court than can make an order directing a person to carry out the terms of the settlement, although the Circuit Court can not direct a person to pay or do anything which could not have been provided for by the Director.</p> <p>The Equality Authority can also apply for an order of enforcement if it considers that the decision or settlement is unlikely to be implemented without its intervention. The consent of the complainant is required.</p> <p>Section 31</p>

## 4 Australia

General Information		
1	Country/state	Australia
2	Name of the Act	Age Discrimination Act 2004
3	When did it come into force?	June 23rd 2004
4	Predecesing law?	Only on state level
5	Current developments?	-

Type/Style of Legislation		
6	What type of legislation is it and how is it structured? (equal treatment law, constitutional provision, human rights law, regulations etc.)	<p>Equal treatment law.</p> <p>Structure:</p> <p>Part I Preliminary</p> <p>Part II Application and constitutional provisions</p> <p>Part III Concept of age discrimination</p> <p>Part IV Unlawful age discrimination</p> <p>Part V Offences</p> <p>Part VI Functions of Human Rights and Equal Opportunity Commission</p> <p>Part VII Miscellaneous</p>
7	Is it a ban for 1 ground of discrimination or for more? If so: which?	For one ground: age.

Scope of Legislation		
8	Scope (where) – what area's does the Act cover? (e.g. employment, housing, goods and services, etc)	<ul style="list-style-type: none"> <li>▪ Work (which includes more than employment, see below)</li> <li>▪ Education</li> <li>▪ Premises</li> <li>▪ Goods, services and facilities</li> <li>▪ Accommodation</li> <li>▪ Land</li> <li>▪ Administration of Commonwealth laws and programs</li> <li>▪ Requests for information</li> </ul> <p>Division 2 and 3 of Part 4</p>
9	Where does the Act apply geographically?	<p>The Act has effect throughout Australia, including the external Territories</p> <p>It is provided that the limited application provisions (provisions for specific areas, for example employment)</p>

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		have effect in relation to discrimination within Australia even if the discrimination involves persons or things, or matters arising, outside Australia. Section 9
<b>10</b>	To whom does the Act apply? (e.g. both public and private sector)	Both public and private sector. Section 10
<b>11</b>	Is there a definition of goods and services? If so, specify	There is no definition of goods.  There is a definition of services:  <i>In this Act services includes:</i> <ul style="list-style-type: none"> <li>(a) <i>services relating to banking, insurance, superannuation and the provision of grants, loans, credit or finance; or</i></li> <li>(b) <i>services relating to entertainment, recreation or refreshment; or</i></li> <li>(c) <i>services relating to transport or travel; or</i></li> <li>(d) <i>services relating to telecommunications; or</i></li> <li>(e) <i>services of the kind provided by the members of any profession or trade; or</i></li> <li>(f) <i>services of the kind provided by a government, a government authority or a local government body</i></li> </ul> Section 5
<b>12</b>	Is there a definition of discrimination? Direct/indirect/constructive/ by association? If so, specify	Yes, there is. The definition includes direct discrimination and indirect discrimination:  <b>Direct discrimination</b> <i>For the purposes of this Act, a person (the <u>discriminator</u>) <u>discriminates</u> against another person (the <u>aggrieved person</u>) on the ground of the age of the aggrieved person if:</i> <ul style="list-style-type: none"> <li>(a) <i>the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and</i></li> <li>(b) <i>the discriminator does so because of:</i> <ul style="list-style-type: none"> <li>(i) <i>the age of the aggrieved person; or</i></li> <li>(ii) <i>a characteristic that appertains generally to persons of the age of the aggrieved person; or</i></li> <li>(iii) <i>a characteristic that is generally imputed to persons of the age of the aggrieved person.</i></li> </ul> </li> </ul> Section 14

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		<p><b>Indirect discrimination</b></p> <p><i>For the purposes of this Act, a person (the <u>discriminator</u>) <u>discriminates</u> against another person (the <u>aggrieved person</u>) on the ground of the age of the aggrieved person if:</i></p> <p><i>(a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and</i></p> <p><i>(b) the condition, requirement or practice is not reasonable in the circumstances; and</i></p> <p><i>(c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.</i></p> <p>Section 15</p> <p>This definition is extended:</p> <p>In section 7 it is laid down that omitting to do an act is taken to be the doing of an act and a reference to an act includes a reference to an omission to do an act.</p>
<b>13</b>	Is there a definition of age (e.g. calendar age, date of birth)	<p>Sort of:</p> <p><i>In this Act age includes age group.</i></p> <p>An example is added:</p> <p><i>“The reference in subsection 26(3) to students above a particular age includes a reference to students above a particular age group”</i></p> <p>Section 5</p>
<b>14</b>	Are there definitions of other important concepts?	<p>Yes:</p> <p>Premises includes:</p> <p><i>(a) a structure, building, aircraft, or vessel; and</i></p> <p><i>(b) a place (whether enclosed or built on or not); and</i></p> <p><i>(c) a part of premises (including premises of a kind mentioned in paragraph (a) or (b))</i></p> <p>Section 5</p>
<b>15</b>	Is there a minimum age limit?	<p>Not in general, but in section 25 it is provided that it is allowed to discriminate in the area of work on a person's age in relation to youth wages (remunerations for persons who are under 21)</p>
<b>16</b>	Is there a maximum age limit?	<p>No.</p>

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Approach of the Legislation		
17	What norms does the Act contain?	<p><b>Work</b></p> <p>The Act contains bans on discrimination in employment, discrimination against commission agents, discrimination against contract workers, discrimination in partnerships, discrimination by qualifying bodies, discrimination by registered organizations under Schedule 1B to the Workplace Relations Act 1996 and discrimination by employment agencies</p> <p>See section 18-24</p> <p><b>Education</b></p> <p><i>It is unlawful for an educational authority<sup>1</sup> to discriminate against a person on the ground of the person's age:</i></p> <p>(a) <i>by refusing or failing to <u>accept</u> the person's application for admission as a student; or</i></p> <p>(b) <i>in the <u>terms or conditions</u> on which it is prepared to admit the person as a student.</i></p> <p>Section 26(1)</p> <p><i>It is unlawful for an educational authority<sup>1</sup> to discriminate against a student on the ground of the student's age:</i></p> <p>(a) <i>by denying the student access, or limiting the student's access, to any <u>benefit</u> provided by the educational authority; or</i></p> <p>(b) <i>by <u>expelling</u> the student; or</i></p> <p>(c) <i>by subjecting the student to any other <u>detriment</u>.</i></p> <p>Section 26(2)</p> <p>Note:</p> <p><sup>1</sup>educational authority means a body or person administering an educational institution</p> <p>Section 26(4)</p> <p><b>Access to premises</b></p> <p><i>It is unlawful for a person to discriminate against another person on the ground of the other person's age:</i></p> <p>(a) <i>by refusing to allow the other <u>person</u> access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or</i></p> <p>(b) <i>in the <u>terms or conditions</u> on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or</i></p> <p>(c) <i>in relation to the provision of <u>means of access</u> to such premises; or</i></p> <p>(d) <i>by refusing to allow the other person the <u>use of any</u></i></p>

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		<p><i>facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or</i></p> <p>(e) <i>in the <u>terms or conditions</u> on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or</i></p> <p>(f) <i>by requiring the other person to <u>leave</u> such premises or cease to use such facilities.</i></p> <p>Section 27</p> <p><b>Goods, services and facilities</b></p> <p><i>It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age:</i></p> <p>(a) <i>by <u>refusing to provide</u> the other person with those goods or services or to make those facilities available to the other person; or</i></p> <p>(b) <i>in the <u>terms or conditions</u> on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or</i></p> <p>(c) <i>in the <u>manner</u> in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.</i></p> <p>Section 28</p> <p><b>Accommodation<sup>2</sup></b></p> <p><i>It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's age:</i></p> <p>(a) <i>by <u>refusing</u> the other person's application for accommodation; or</i></p> <p>(b) <i>in the <u>terms or conditions</u> on which the accommodation is offered to the other person; or</i></p> <p>(c) <i>by <u>deferring</u> the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</i></p> <p>Section 29(1)</p> <p><i>It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's age:</i></p> <p>(a) <i>by denying the other person <u>access</u>, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person; or</i></p>
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		<p>(b) by <u>evicting</u> the other person from accommodation occupied by the other person; or</p> <p>(c) by <u>subjecting</u> the other person to any other <u>detriment</u> in relation to accommodation occupied by the other person.</p> <p>Section 29(2)</p> <p>Note:  <sup>2</sup>accommodation includes residential or business accommodation  Section 29(4)</p> <p><b>Land</b>  <i>It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's age:</i></p> <p>(a) by <u>refusing</u> or failing to dispose of an estate or interest in land to the other person; or</p> <p>(b) in the <u>terms or conditions</u> on which an estate or interest in land is offered to the other person.</p> <p>Section 30(1)</p> <p><b>Administration of Commonwealth<sup>3</sup> laws and programs</b>  <i>It is unlawful for a person who:</i></p> <p>(a) performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program; or</p> <p>(b) has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program;</p> <p><i><u>to discriminate against another person on the ground of the other person's age in the performance of that function, the exercise of that power or the fulfilment of that responsibility.</u></i></p> <p>Section 31(1)</p> <p>Note:  <sup>3</sup>Commonwealth program means a program conducted by or on behalf of the Commonwealth Government  Section 31(2)</p> <p><b>Requests for information</b>  <i>It is unlawful for a person (the first person) to request or require another person (the other person) to provide information (whether by way of completing a form or otherwise) if:</i></p> <p>(a) the information is requested or required in connection</p>
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		<p><i>with, or for the purposes of, the first person doing a particular act; and</i></p> <p><i>(b) under Division 2 or this Division, it would be unlawful in particular circumstances for the first person, in doing that act, to discriminate against the other person on the ground of the other person's age; and</i></p> <p><i>(c) persons of a different age would not be requested or required to provide the information in circumstances that are the same or not materially different.</i></p> <p>Section 32</p> <p><b>Offences</b></p> <p>In Part 5 of the Act there are provisions on offences. Certain behaviour is qualified to be an offence. It is explicitly laid down that behaviour that is unlawful because of a provision in Division 2 or 3 of Part 4 of the Act, does not make an offence (unless expressly provided by Part 5).</p> <p>Section 49</p> <p>Offences are:</p> <ul style="list-style-type: none"> <li>▪ publishing or displaying advertisements that indicate an intention to do an act that is unlawful under Part 4 Section 50</li> <li>▪ victimization Section 51</li> <li>▪ a failure to disclose source of actuarial or statistical data. Section 52</li> </ul>
<b>18</b>	What is the approach of the Act? (open or closed system)	<p>The system is mixed.</p> <p>It is possible to justify indirect discrimination and there are exemptions: both general and specific area exemptions</p>
<b>19</b>	Is it possible to justify direct age-discrimination?	No.
<b>20</b>	Is it possible to justify indirect age-discrimination?	<p>Yes it is.</p> <p>In the case of indirect discrimination, the discriminator can prove that a condition, requirement or practice is reasonable, see the definition of indirect discrimination. Section 15(1)</p> <p>The burden of proof lies on him. section 15(2)</p>
<b>21</b>	What are the general exemptions?	<p><b>33 Positive discrimination</b></p> <p><i>This Part does not make it unlawful for a person to discriminate against another person, on the ground of the</i></p>

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		<p><i>other person's <u>age</u>, by an act that is consistent with the purposes of this Act, if:</i></p> <p><i>(a) the act provides a bona fide benefit to persons of a particular <u>age</u>; or</i></p> <p style="padding-left: 40px;">Example: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.</p> <p><i>(b) the act is intended to meet a need that arises out of the age of persons of a particular <u>age</u>; or</i></p> <p style="padding-left: 40px;">Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.</p> <p><i>(c) the act is intended to reduce a disadvantage experienced by people of a particular <u>age</u>.</i></p> <p style="padding-left: 40px;">Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.</p> <p><b>34 Charities</b></p> <p><i>(1) This part does not:</i></p> <p style="padding-left: 40px;"><i>(a) affect a provision in a charitable instrument that confers charitable benefits, or enables charitable benefits to be conferred, wholly or in part on persons of a particular <u>age</u>; or</i></p> <p style="padding-left: 40px;"><i>(b) make unlawful any act done to give effect to such a provision.</i></p> <p><i>(2) In this section:</i></p> <p style="padding-left: 40px;"><u>Australia</u> includes the external Territories.</p> <p style="padding-left: 40px;"><u>charitable benefits</u> means benefits for purposes that are exclusively charitable according to the law in force in any part of Australia.</p> <p style="padding-left: 40px;"><u>charitable instrument</u> means a deed, will or other document, whether made before or after the commencement of this Act, that confers charitable benefits or enables charitable benefits to be conferred on persons.</p> <p><b>35 Religious bodies</b></p> <p><i>This Part does not affect an act or practice of a body established for religious purposes that:</i></p> <p style="padding-left: 40px;"><i>(a) conforms to the doctrines, tenets or beliefs of that religion; or</i></p> <p style="padding-left: 40px;"><i>(b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.</i></p>
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		<p><b>36 Voluntary bodies</b></p> <p>(1) <i>This Part does not make it unlawful for a voluntary body to discriminate against a person, on the ground of the person's <u>age</u>, in connection with:</i></p> <p style="margin-left: 40px;">(a) <i>the admission of persons as members of the body; or</i></p> <p style="margin-left: 40px;">(b) <i>the provision of benefits, facilities or services to members of the body.</i></p> <p>(2) <i>In this section:</i></p> <p style="margin-left: 40px;"><u>registered organisation</u> <i>means an organisation within the meaning of Schedule 1B to the Workplace Relations Act 1996.</i></p> <p style="margin-left: 40px;"><u>voluntary body</u> <i>means an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:</i></p> <p style="margin-left: 40px;">(a) <i>a registered organisation; or</i></p> <p style="margin-left: 40px;">(b) <i>a body established by a law of the Commonwealth, of a State or of a Territory; or</i></p> <p style="margin-left: 40px;">(c) <i>an association that provides grants, loans, credit or finance to its members.</i></p> <p><b>37 Superannuation, insurance and credit – actuarial data etc.</b></p> <p><i>Superannuation and insurance</i></p> <p>(1) <i>Subsections (2) and (3) apply to the following:</i></p> <p style="margin-left: 40px;">(a) <i>an annuity;</i></p> <p style="margin-left: 40px;">(b) <i>a life insurance policy;</i></p> <p style="margin-left: 40px;">(c) <i>a policy of insurance against accident or any other policy of insurance;</i></p> <p style="margin-left: 40px;">(d) <i>membership of a superannuation or provident fund;</i></p> <p style="margin-left: 40px;">(e) <i>membership of a superannuation or provident scheme.</i></p> <p>(2) <i>This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's <u>age</u>:</i></p> <p style="margin-left: 40px;">(a) <i>in respect of the terms or conditions on which the annuity, policy or membership is offered to, or may be obtained by, the other person; or</i></p> <p style="margin-left: 40px;">(b) <i>by refusing to offer the annuity, policy or membership to the other person;</i></p> <p style="margin-left: 40px;"><i>if the condition in subsection (3) is satisfied.</i></p> <p>(3) <i>The condition is satisfied if:</i></p> <p style="margin-left: 40px;">(a) <i>the discrimination:</i></p> <p style="margin-left: 80px;">(i) <i>is based upon actuarial or statistical data on which it is reasonable for the first-mentioned</i></p>
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		<p><i>person to rely; and</i></p> <p>(ii) <i>is reasonable having regard to the matter of the data and other relevant factors; or</i></p> <p>Note: The Commission and the President can require the disclosure of the source of the actuarial or statistical data (see section 54).</p> <p>(b) <i>in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.</i></p> <p>Credit</p> <p>(4) <i>This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's <u>age</u>:</i></p> <p>(a) <i>in respect of the terms or conditions on which credit is provided to, or may be obtained by, the other person; or</i></p> <p>(b) <i>by refusing to offer credit to the other person; if the condition in subsection (5) is satisfied.</i></p> <p>(5) <i>The condition is satisfied if the discrimination:</i></p> <p>(a) <i>is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and</i></p> <p>(b) <i>is reasonable having regard to the matter of the data.</i></p> <p>Note: The Commission and the President can require the disclosure of the source of the actuarial or statistical data (see section 54).</p> <p><b>38 Superannuation legislation</b></p> <p>(1) <i>This Part does not make unlawful anything done by a person in direct compliance with:</i></p> <p>(a) <i>a Commonwealth Act relating to superannuation; or</i></p> <p>(b) <i>a regulation or any other instrument made under such an Act.</i></p> <p>(2) <i>This Part does not make unlawful anything done by an exempt public sector superannuation scheme (within the meaning of the Superannuation Industry (Supervision) Act 1993) in accordance with an Act of the Commonwealth, a State or a Territory, or a trust deed, by or under which the scheme is established.</i></p> <p><b>39 Direct compliance with laws, orders etc.</b></p> <p><i>Acts, regulations and instruments mentioned in Schedule 1</i></p>
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		<p>(1) <i>This Part does not make unlawful anything done by a person in direct compliance with:</i></p> <ul style="list-style-type: none"> <li>(a) <i>an Act mentioned in Schedule 1; or</i></li> <li>(b) <i>a regulation or any other instrument mentioned in Schedule 1.</i></li> </ul> <p><i>Other Acts or regulations—2 year exemption period</i></p> <p>(2) <i>This Part does not make unlawful anything done by a person, in direct compliance with any other Commonwealth Act or regulation, during the period:</i></p> <ul style="list-style-type: none"> <li>(a) <i>beginning on the day on which this Act commences; and</i></li> <li>(b) <i>ending 2 years after that day.</i></li> </ul> <p>(3) <i>To avoid doubt, subsection (2) does not affect the operation of any other provision in this Division.</i></p> <p><i>State and Territory Acts, regulations and instruments</i></p> <p>(4) <i>This Part does not make unlawful anything done by a person in direct compliance with:</i></p> <ul style="list-style-type: none"> <li>(a) <i>an Act of a State or Territory; or</i></li> <li>(b) <i>a regulation or any other instrument made under an Act of a State or Territory.</i></li> </ul> <p>(5) <i>Subsection (4) does not apply in relation to an Act, regulation or other instrument of a State or Territory if the Act, regulation or instrument is specified in regulations made for the purposes of this subsection.</i></p> <p>(6) <i>To avoid doubt, section 49A of the Acts Interpretation Act 1901 does not prevent a regulation made for the purposes of subsection (5) from specifying an Act, regulation or instrument as in force at a particular time or as in force from time to time.</i></p> <p><i>Court orders</i></p> <p>(7) <i>This Part does not make unlawful anything done by a person in direct compliance with an order of a court.</i></p> <p><i>Workplace relations</i></p> <p>(8) <i>This Part does not make unlawful anything done by a person in direct compliance with any of the following:</i></p> <ul style="list-style-type: none"> <li>(a) <i>an order or award of a court or tribunal having power to fix minimum wages;</i></li> <li>(b) <i>a certified agreement (within the meaning of the Workplace Relations Act 1996);</i></li> <li>(c) <i>an Australian workplace agreement (within the meaning of the Workplace Relations Act 1996).</i></li> </ul> <p><b>40 Taxation laws</b></p> <p><i>This Part does not make unlawful anything done by a person in direct compliance with a taxation law (within</i></p>
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		<p><i>the meaning of the Income Tax Assessment Act 1997).</i></p> <p><b>41 Pensions, allowances and benefits etc.</b></p> <p>(1) <i>This Part does not make unlawful anything done by a person in direct compliance with:</i></p> <p style="padding-left: 20px;">(a) <i>the A New Tax System (Family Assistance) Act 1999; or</i></p> <p style="padding-left: 20px;">(b) <i>the A New Tax System (Family Assistance) (Administration) Act 1999; or</i></p> <p style="padding-left: 20px;">(c) <i>the Child Support (Assessment) Act 1989; or</i></p> <p style="padding-left: 20px;">(d) <i>the Child Support (Registration and Collection) Act 1988; or</i></p> <p style="padding-left: 20px;">(e) <i>the Defence Service Homes Act 1918; or</i></p> <p style="padding-left: 20px;">(f) <i>the Disability Services Act 1986; or</i></p> <p style="padding-left: 20px;">(g) <i>the Social Security Act 1991; or</i></p> <p style="padding-left: 20px;">(h) <i>the Social Security (Administration) Act 1999; or</i></p> <p style="padding-left: 20px;">(i) <i>the Social Security (International Agreements) Act 1999; or</i></p> <p style="padding-left: 20px;">(j) <i>the Veterans' Entitlements Act 1986.</i></p> <p>(2) <i>This Part does not make unlawful anything done by a person in direct compliance with a regulation under an Act mentioned in paragraph (1)(a), (b), (c), (d), (f), (g), (h) or (i).</i></p> <p>(2A) <i>This Part does not make unlawful anything done by a person in direct compliance with a determination in force under subparagraph 169(1)(a)(i) of the A New Tax System (Family Assistance) (Administration) Act 1999.</i></p> <p>(3) <i>This Part does not make unlawful anything done by a person in direct compliance with the CDEP Scheme (within the meaning of the Social Security Act 1991).</i></p> <p>(3A) <i>This Part does not make unlawful anything done by a person in direct compliance with a determination in force under subparagraph 209(1)(a)(i) of the Social Security (Administration) Act 1999.</i></p> <p>(4) <i>This Part does not make unlawful anything done by a person in direct compliance with a determination in force under paragraph 88A(1)(c) of the Veterans' Entitlements Act 1986.</i></p> <p>(5) <i>This Part does not make unlawful anything done by a person in direct compliance with the Approved Guide to the Assessment of Rates of Veterans' Pensions (within the meaning of the Veterans' Entitlements Act 1986).</i></p>
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		<p><b>42 Health</b></p> <p><i>Exempted health programs</i></p> <p>(1) <i>This Part does not make an exempted health program (see subsection (6)) unlawful.</i></p> <p style="padding-left: 40px;">Example: A program for providing free influenza vaccines to older people, based on evidence showing that older people are at greater risk of complications as a result of influenza than are people of different <u>ages</u>, would be covered by this subsection.</p> <p>(2) <i>This Part does not make unlawful anything done by a person in accordance with an exempted health program.</i></p> <p style="padding-left: 40px;">Example: A person providing free influenza vaccines to older people in accordance with an exempted health program would be covered by this subsection.</p> <p><i>Individual decisions—health or medical goods or services</i></p> <p>(3) <i>This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's <u>age</u>, by taking the other person's <u>age</u> into account in making a decision relating to health goods or services or medical goods or services, if:</i></p> <p style="padding-left: 40px;">(a) <i>taking the other person's <u>age</u> into account in making the decision is reasonably based on evidence, and professional knowledge, about the ability of persons of the other person's <u>age</u> to benefit from the goods or services; and</i></p> <p style="padding-left: 40px;">(b) <i>the decision is not in accordance with an exempted health program.</i></p> <p style="padding-left: 80px;">Note: The exemption in subsection (2) covers anything done by a person in accordance with an exempted health program.</p> <p>(4) <i>The evidence mentioned in paragraph (3)(a) is the evidence that was reasonably available at the time the decision was made.</i></p> <p><i>Administration of certain health legislation</i></p> <p>(5) <i>This Part does not make unlawful anything done by a person in relation to the administration of:</i></p> <p style="padding-left: 40px;">(a) <i>the Health Insurance Act 1973, or a regulation or any other instrument made under that Act, to the extent that the thing done relates to:</i></p> <p style="padding-left: 80px;">(i) <i>the release of, or the giving of access to, information held by the Health Insurance Commission; or</i></p> <p style="padding-left: 80px;">(ii) <i>the issue of a medicare card; or</i></p> <p style="padding-left: 40px;">(b) <i>the National Health Act 1953, or a regulation or any other instrument made under that Act, to</i></p>
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		<p><i>the extent that the thing done relates to the release of, or the giving of access to, information held by the Health Insurance Commission; or</i></p> <p>(c) <i>the Therapeutic Goods Act 1989, or a regulation or any other instrument made under that Act.</i></p> <p><i>Definitions</i></p> <p>(6) <i>In this section:</i></p> <p><i>evidence includes medical, clinical and scientific evidence.</i></p> <p><i>exempted health program means a program, scheme or arrangement that:</i></p> <p>(a) <i>relates to health goods or services or medical goods or services; and</i></p> <p>(b) <i>to the extent that it applies to people of a particular age, is reasonably based on evidence of effectiveness, and on cost (if cost has been taken into account in relation to the program, scheme or arrangement).</i></p> <p><i>The evidence of effectiveness mentioned in paragraph (b) is evidence that is reasonably available from time to time about matters (such as safety, risks, benefits and health needs) that:</i></p> <p>(c) <i>affect people of the age mentioned in that paragraph (if no comparable evidence is reasonably available from time to time in relation to people of a different age); or</i></p> <p>(d) <i>affect people of the age mentioned in that paragraph in a different way to people of a different age</i></p> <p>(e) <i>(in all other cases).</i></p> <p><i>medicare card has the meaning given by subsection 84(1) of the National Health Act 1953.</i></p> <p><b>43 Migration and citizenship etc.</b></p> <p>(1) <i>This Part does not make unlawful anything done by a person in relation to the administration of:</i></p> <p>(a) <i>the Migration Act 1958; or</i></p> <p>(b) <i>the Immigration (Guardianship of Children) Act 1946; or</i></p> <p>(c) <i>a regulation or any other instrument made under either of those Acts.</i></p> <p>(2) <i>This Part does not make unlawful anything done by a person in direct compliance with:</i></p> <p>(a) <i>the Australian Citizenship Act 1948; or</i></p> <p>(b) <i>the Immigration (Education) Act 1971.</i></p>
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<p><b>22</b></p>	<p>What are exemptions for specific areas?</p>	<p><b>Work</b> See Division 2 of Part 4</p> <p><b>Education</b> <i>This section does not make it unlawful to discriminate against a person on the ground of the person's <u>age</u> in respect of admission to an educational institution<sup>1</sup> established wholly or primarily for <u>students above a particular age</u>, if the person is not above that age.</i> Section 26(3)</p> <p>Note: <sup>1</sup>Educational institution means a school, college, university or other institution at which education or training is provided</p> <p><b>Access to premises</b> -</p> <p><b>Goods, services and facilities</b> -</p> <p><b>Accommodation</b> <i>This section does not apply to or in respect of the provision of accommodation in premises if:</i> (a) <i>the person who provides or proposes to provide the accommodation or a near relative<sup>2</sup> of that person <u>resides</u>, and intends to continue to reside on those premises; and</i> (b) <i>the accommodation provided in those premises is for no more than 3 persons other than a person mentioned in paragraph (a) or near relatives of such a person</i> Section 29(3)</p> <p>Note: <sup>2</sup>near relative, in relation to a person, means: <i>a parent, child, grandparent, grandchild, brother or sister of the person; or</i> <i>the spouse or de facto spouse of the first-mentioned person or of a person mentioned in paragraph (a)</i> Section 29(4)</p> <p><b>Land</b> <i>This section does not apply in relation to a disposal of an estate or interest in land <u>by will or by way of gift</u>.</i></p> <p><b>Administration of Commonwealth laws and programs</b> -</p>
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		<p><b>Requests for information</b></p> <p>-</p>
<b>23</b>	Is there a provision for positive action/preferential treatment on the age ground?	<p>Yes there is. The first of the general exemptions is a provision for positive action.</p> <p><i>This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's <u>age</u>, by an act that is consistent with the purposes of this Act, if:</i></p> <p><i>(a) the act provides a bona fide benefit to persons of a particular age; or</i></p> <p style="padding-left: 40px;">Example: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.</p> <p><i>(b) the act is intended to meet a need that arises out of the age of persons of a particular age; or</i></p> <p style="padding-left: 40px;">Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.</p> <p><i>(c) the act is intended to reduce a disadvantage experienced by people of a particular age.</i></p> <p style="padding-left: 40px;">Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.</p> <p>Section 33</p>
<b>24</b>	Is there a provision for incitement/procurement/aid?	<p>Yes:</p> <p><i>A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Part 4 is, for the purposes of this Act, taken also to have done the act.</i></p> <p>Section 56</p>

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<b>In Case of Discrimination...</b>		
All references below are references to the Human Rights and Equal Opportunity Commission Act 1986, unless expressly provided otherwise.		
<b>25</b>	Who can take action in the legal arena (only victims, or also NGO's etc)	<ul style="list-style-type: none"> <li>▪ a person aggrieved by the alleged unlawful discrimination can make a complaint on his own behalf or on behalf of himself and one or more other persons who are also aggrieved by the alleged unlawful discrimination</li> <li>▪ 2 or more persons aggrieved by the alleged unlawful discrimination can make a complaint on their own behalf or on behalf of themselves and one or more other persons aggrieved by the alleged unlawful discrimination</li> <li>▪ a person or trade union can make a complaint on behalf of one or more other persons aggrieved by the alleged unlawful discrimination</li> </ul> <p>Section 46P(2)</p> <p>In Section 46PB and 46PC conditions for lodging representative complaints are laid down</p> <p>A person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter.</p> <p>Section 46P(3)</p>
<b>26</b>	Which legal arena would that be (e.g. judge, equality body)	First an equality body and possibly later a judge
<b>27</b>	Which type of judicial process is open for the victim (e.g. civil law, equal treatment law, penal law)	<p>Equal treatment law. A victim can make a complaint.</p> <p>Note that it is laid down in section 59 of the Age Discrimination Act that the Act does not confer on a person a right of civil action, unless expressly so provided.</p> <p>A victim can initiate a criminal procedure with regard to the offences, but only under certain conditions (see below).</p>
<b>28</b>	Is legal or other representation necessary?	<p>No, legal representation is not necessary, neither in lodging a complaint with the Commission, nor before Court. It is possible though.</p> <p>Section 46P and 46PQ, <a href="http://www.humanrights.gov.au">www.humanrights.gov.au</a></p>
<b>29</b>	Describe the process	<p>A complaint can be lodged with the Human Rights and Equal Opportunity Commission (in short: the Commission).</p> <p>Section 46P(1)</p>

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		<p>If a complaint is lodged under Section 46P(1), which means by the right person, the Commission must refer the complaint to the President of the Commission (in short: the President).</p> <p>Section 46PD</p> <p>The president must inquire into the complaint and attempt to conciliate the complaint.</p> <p>Section 46PF(1)</p> <p>The president has power to obtain information Section 46PI, 46PM and 46PN and Section 54 Age Discrimination Act</p> <p>The president may decide to hold a conference.</p> <p>Section 46PJ, 46PK, 46PL</p> <p>The president may terminate a complaint on any of the following grounds:</p> <ul style="list-style-type: none"> <li>(a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;</li> <li>(b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;</li> <li>(c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;</li> <li>(d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;</li> <li>(e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;</li> <li>(f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;</li> <li>(g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;</li> <li>(h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court;</li> </ul>
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		<p>(i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.</p> <p>Section 46 PH</p> <p>When a complaint is referred to the Director, the matter is in principle settled by conciliation.</p> <p>This means that either the complainant and the respondent reach an agreement through conciliation or the complaint is terminated because it is unable to be conciliated or on any of the other grounds.</p> <p>If the complaint is terminated, any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination.</p> <p>Section 46PO(1)</p> <p>This application must be made within 28 days after the date of issue of the notification of the President of terminating the complaint.</p> <p>Section 46PO(2)</p> <p>It is up to the complainant to decide what Court to turn to. The Federal Court is the higher level Court and it usually deals with cases that are more complex. The Federal Magistrates Court aims to provide a simpler and more accessible service for people taking legal action under certain Commonwealth law, including anti-discrimination law. Generally costs are lower in the Federal Magistrates Court than the Federal Court. However, a judge may decide to transfer the case to the other court.</p> <p>Source: <a href="http://www.humanrights.gov.au">www.humanrights.gov.au</a></p> <p>With regard to a criminal procedure:</p> <p>A complainant may make a complaint to the Human Rights and Equal Opportunities Commission about conduct that is qualified to be an offence, in the same way as other types of discrimination under the Act.</p> <p>See note at section 50 and 51</p> <p>The Commission will investigate the complaint and, if it is unable to be conciliated, the applicant may (as with any other complaint of unlawful discrimination) make an application to the Federal Court or Federal Magistrates Court. However only if a finding of an offence is made by the court can the complainant refer the case to the relevant state authority responsible for prosecuting</p>
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		<p>criminal matters, for possible prosecution of the respondent.</p> <p>Source: The Human Rights and Equal Opportunities Commission</p>
<b>30</b>	When a complaint is received, what are procedural requirements?	<p>There are no procedural requirements for the Commission to <u>accept</u> the case, but the President may <u>terminate</u> a complaint because procedural requirements are not met. This will be done when more than 12 months have passed since the event with no explanation for the delay or if the matter has already been dealt with by another authority (see above). Section 46PH</p> <p>An application to court must be made within 28 days after the date of issue of the notice of termination by the President. Section 46 PO</p>
<b>31</b>	Are there any demands on the content of the case before the case is being accepted?	<p>There are no demands on the content for the Commission to <u>accept</u> the case, but the President may <u>terminate</u> a complaint if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance (see above). Section 46 PH</p> <p>There are also no demands on the content of the case before the case is being accepted by either Court.</p>
<b>32</b>	How is the burden of proof arranged?	<p>In the case of indirect discrimination it is provided that the discriminator has to prove that a condition, requirement or practice imposed by the discriminator is reasonable in the circumstances Section 15(2) Age Discrimination Act</p> <p>There is no further provision on the burden of proof. In discrimination cases generally the burden of proof rests with the applicant rather than the respondent. While there are no court decisions under the Act as yet, it is likely that this will also be the case under the Act. Source: The Human Rights and Equal Opportunity Commission</p>
<b>33</b>	What are the sanctions/remedies?	<p>The Federal Court or the Federal Magistrates Court can make any of the following orders or any order to a similar effect:</p> <p>(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent <u>not to repeat or continue</u> such</p>

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		<p>unlawful discrimination;</p> <p>(b) an order requiring a respondent to perform any <u>reasonable act or course of conduct to redress any loss or damage</u> suffered by an applicant;</p> <p>(c) an order requiring a respondent to <u>employ or re-employ an applicant</u>;</p> <p>(d) an order requiring a respondent to <u>pay to an applicant damages</u> by way of compensation for any loss or damage suffered because of the conduct of the respondent;</p> <p>(e) an order requiring a respondent to <u>vary the termination of a contract or agreement</u> to redress any loss or damage suffered by an applicant;</p> <p>(f) an order declaring that it would be <u>inappropriate for any further action</u> to be taken in the matter.</p> <p>Section 46PO(4)</p>
<b>34</b>	Is there appeal?	<p>Yes:</p> <p>A complainant who has taken his or her case to the Federal Magistrates Court has 21 days in which to appeal the decision to the Federal Court. On judgement being handed down in the Federal Court the parties may then (within 28 days) seek leave to appeal to the High Court (which is Australia's highest court).</p> <p>A complainant who has taken his or her case to the Federal Court has 21 days in which to appeal the decision to the Full Federal Court. On the appeal judgement being handed down the parties may then (within 28 days) seek special leave to appeal to the High Court (which is Australia's highest court).</p> <p>Source: Human Rights and Equal Opportunities Commission</p>
<b>35</b>	Can the decision be enforced?	<p>Yes:</p> <p>Decisions of a court in discrimination matters are enforced through the usual enforcement mechanisms of the court. The processes of the Federal Court are set out in Order 37 of the <i>Federal Court Rules</i>, available at: <a href="http://scaletext.law.gov.au/html/pastereg/0/49/0/PR004420.htm">http://scaletext.law.gov.au/html/pastereg/0/49/0/PR004420.htm</a>. The enforcement mechanisms of the Federal Magistrates Court can be found in Part 25B of the <i>Federal Magistrates Court Rules 2001</i> available at: <a href="http://scaleplus.law.gov.au/html/pastereg/3/1684/0/PR002750.htm">http://scaleplus.law.gov.au/html/pastereg/3/1684/0/PR002750.htm</a></p> <p>Source: Human Rights and Equal Opportunities Commission</p>

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	Other Issues	
<b>36</b>	<p>Dominant reason test</p> <p>Exemptions granted by the commission</p>	<p><b>Act done for more reasons</b>  <i>If an act is done for 2 or more reasons, then, for the purposes of this Act, the act is taken to be done for the reason of the age of a person only if:</i>  <i>(a) one of the reasons is the age of the person; and</i>  <i>(b) that reason is the dominant reason for doing the act</i>  Section 16</p> <p><b>Exemptions granted by the Commission</b>  The Commission may, on application, grant by instrument to a person or persons an exemption from the operation of a provision of Division 2 or 3.  The terms and conditions to which the exemption is granted and the circumstances in which it applies must be specified in the instrument. The exemption is to be granted for a specified period not exceeding 5 years.  Section 44</p> <p><b>Provision for conduct by directors, employees and agents</b></p> <p><b>57 Conduct by directors, employees and agents</b>  <i>Bodies corporate</i>  (1) <i>If, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:</i>  <i>(a) that the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and</i>  <i>(b) that the director, employee or agent had the state of mind.</i>  (2) <i>Any conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.</i></p> <p><i>Persons other than bodies corporate</i>  (3) <i>If, for the purposes of this Act, it is necessary to establish the state of mind of a person other than a body corporate in relation to a particular conduct, it is sufficient to show:</i>  <i>(a) that the conduct was engaged in by an employee</i></p>



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		<p><i>or agent of the person within the scope of his or her actual or apparent authority; and</i></p> <p><i>(b) that the employee or agent had the state of mind.</i></p> <p><i>(4) Any conduct engaged in on behalf of a person other than a body corporate by an employee or agent of the person within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.</i></p> <p><i>(5) If:</i></p> <p><i>(a) a person other than a body corporate is convicted of an offence; and</i></p> <p><i>(b) the person would not have been convicted of the offence if subsections (3) and (4) had not been enacted;</i></p> <p><i>the person is not liable to be punished by imprisonment for that offence.</i></p> <p><i>Interpretation</i></p> <p><i>(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:</i></p> <p><i>(a) the knowledge, intention, opinion, belief or purpose of the person; and</i></p> <p><i>(b) the person's reasons for the intention, opinion, belief or purpose.</i></p> <p><i>(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.</i></p> <p><i>(8) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.</i></p>
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## 5 United States of America

General Information		
1	Country/state	United States of America
2	Name of the Act	Age Discrimination Act of 1975
3	When did it come into force?	1975
4	Predecesing law?	The Age Discrimination in Employment Act of 1967 prohibits discrimination on the ground of age in employment practices and programs, both in the public as in the private sectors.
5	Current developments?	-

Type/Style of Legislation		
6	What type of legislation is it and how is it structured? (equal treatment law, constitutional provision, human rights law, regulations etc.)	It is federal law. Structure: Section 6101: Statement of purpose Section 6102: Prohibition of discrimination Section 6103: Regulations Section 6104: Enforcement Section 6105: Judicial review Section 6106: Study of discrimination based on age Section 6106a: Reports to Secretary and Congress Section 6107: Definitions
7	Is it a ban for 1 ground of discrimination or for more? If so: which?	For one ground: age.

Scope of Legislation		
8	Scope (where) – what fields does the Act cover? (e.g. employment, housing, goods and services, etc)	Programs and activities receiving Federal financial assistance
9	Where does the Act apply geographically?	In the United States of America
10	To whom does the Act apply? (e.g. both public and private sector)	The Act applies to all programs and anybody who is involved in a program, that is financially supported with Federal money. This can be both the public as well as the private sector.

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<b>11</b>	Is there a definition of goods and services? If so, specify	No.
<b>12</b>	Is there a definition of discrimination? Direct/indirect/constructive/ by association If so, specify	No (although the term “discrimination” does appear in the Act, see for example section 6102)
<b>13</b>	Is there a definition of age (e.g. calendar age, date of birth)	No.
<b>14</b>	Are there definitions of other important concepts?	<p>Yes:</p> <p>There is a definition of “Federal department or agency”:  <i>The term “Federal department or agency” means any agency as defined in section 551 of Title 5 and includes the United States Postal Service and the Postal Rate Commission</i>  Section 6107</p> <p>There is a definition of “program or activity”:  <i>The term “program or activity” means all of the operations of -</i></p> <p>(A) (i) <i>a department, agency, special purpose district, or other instrumentality of a State or of a local government; or</i>  (ii) <i>the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;</i></p> <p>(B) (i) <i>a college, university, or other postsecondary institution, or a public system of higher education; or</i>  (ii) <i>a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system;</i></p> <p>(C) (i) <i>an entire corporation, partnership, or other private organization, or an entire sole proprietorship</i>  (I) <i>if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or</i>  (II) <i>which is principally engaged in the business of providing education, health care, hous-</i></p>

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		<p><i>ing, social services, or parks and recreation;</i> <i>or</i> <i>(ii) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or</i> <i>(D) any other entity which is established by two or more of the entities described in paragraph (A), (B) or (C);</i>  <i>any part of which is extended Federal financial assistance.</i> Section 6107</p>
<b>15</b>	Is there a minimum age limit?	No
<b>16</b>	Is there a maximum age limit?	No

<b>Approach of the Legislation</b>		
<b>17</b>	What norms does the Act contain?	<p><i>Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) of this title and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.</i> Section 6102</p>
<b>18</b>	What is the approach of the Act? (open or closed system)	The system is mixed: it is possible to justify direct age-discrimination and there are general exemptions.
<b>19</b>	Is it possible to justify direct age discrimination	<p>Yes, it is: <i>It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if, in the program or activity involved--</i> <i>(A) Such action <u>reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity</u>; or</i> <i>(B) the differentiation made by such action is <u>based upon reasonable factors other than age</u>.</i> Section 6103(b)(1)</p>
<b>20</b>	Is it possible to justify indirect age discrimination?	No

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<b>21</b>	What are the general exemptions?	<p><i>It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if, in the program or activity involved</i></p> <p><i>(A) Such action reasonably takes into account age as a factor <u>necessary to the normal operation or the achievement of any statutory objective</u> of such program or activity; or</i></p> <p><i>(B) the differentiation made by such action is based upon <u>reasonable factors</u> other than age.</i></p> <p>Section 6103(b)(1)</p> <p><i>The provisions of this chapter shall not apply to any program or activity established under authority of any <u>law</u> which (A) provides any <u>benefits or assistance</u> to persons based upon the age of such persons; or (B) establishes <u>criteria for participation</u> in age-related terms or describes intended beneficiaries or target groups in such terms.</i></p> <p>Section 6103(b)(2)</p> <p><i>Except with respect to any program or activity receiving Federal financial assistance for public service employment under the Workforce Investment Act of 1998 (29 USC 9201 et seq.), nothing in this chapter shall be construed to authorize action under this chapter by any Federal department or agency with respect to any <u>employment practice</u> of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program.</i></p> <p>Section 6103(c)1</p>
<b>22</b>	What are exemptions for specific areas?	-
<b>23</b>	Is there a provision for positive action/preferential treatment on the age ground?	<p>One of the exemptions can <u>possibly</u> be preferential treatment:</p> <p><i>The provisions of this chapter shall not apply to any program or activity established under authority of any <u>law</u> which (A) provides any <u>benefits or assistance</u> to persons based upon the age of such persons; or (B) establishes <u>criteria for participation</u> in age-related terms or describes intended beneficiaries or target groups in such terms.</i></p> <p>Section 6103(b)(2)</p>
<b>24</b>	Is there a provision for incentive/procurement/aid?	No

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<b>In Case of Discrimination ...</b>		
<b>25</b>	Who can take action in the legal arena (only victims, or also NGO's etc)	The Head of the federal department or agency that funds the program or activity can come into action. Victims can come into action as well.
<b>26</b>	Which legal arena would that be (e.g. judge, equality body)	For victims that would be an administrative procedure (guided by the internal rules of each federal department) and possibly later a judge.
<b>27</b>	Which type of judicial process is open for the victim (e.g. civil law, equal treatment law, penal law)	Administrative procedure and civil law. But: it is clear that under the Age Discrimination Act, there is no private right of action for financial damages. Tyrell v. City of Scranton, 134 F. Supp. 2d 373, 381 (M. D. PA 2001). An individual can only sue to attempt to stop the discriminatory practice.
<b>28</b>	Is legal or other representation necessary?	No, legal representation is not necessary, but it would be wise to have yourself represented before the District Court, because there are many formal requirements. Source: Administrative Office of the U.S. Courts
<b>29</b>	Describe the process	<p>The primary enforcement mechanism of the ADA is administrative action pursuant to §6104(a)-(d): The head of any Federal department or agency who prescribes regulations under section 6103 of this title, may seek to achieve compliance with any regulation:</p> <ol style="list-style-type: none"> <li>1. by terminating, or refusing to grant or to continue, assistance under the program or activity involved to any recipient with respect to whom there has been an express finding on the record, after reasonable notice and opportunity for hearing, of a failure to comply with any such regulations; or</li> <li>2. by any other means authorized by law.</li> </ol> <p>No such action may be taken until the head of the Federal department or agency involved has advised the appropriate person of the failure to comply with the regulation involved and has determined that compliance cannot be secured by voluntary means. Section 6104(D)</p> <p>An interested person can bring an action in a US district court to enjoin a violation of the Act by any program or activity receiving Federal financial assistance. Section 6104(e)(1)</p> <p>This remedy is available only after the interested person has exhausted administrative remedies (see below). Section 6104(e)(2)</p>

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		<p>Administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance.</p> <p>Section 6105</p> <p>What are administrative remedies?</p> <p>The general regulation implementing the Age Discrimination Act requires that age discrimination complaints be referred to a mediation agency of the federal department within 60 days. If mediation is not successful, the complaint is returned to the responsible Federal agency for investigation.</p> <p>Source: <a href="http://www.hhs.gov/ocr">www.hhs.gov/ocr</a> and <a href="http://www.hud.gov">www.hud.gov</a></p>
<b>30</b>	When a complaint is received, what are procedural requirements?	<p>Procedural requirements for an action in a district court by an interested person:</p> <p>No action shall be brought:</p> <ul style="list-style-type: none"> <li>▪ if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States</li> <li>▪ if administrative remedies have not been exhausted</li> </ul> <p>Section 6104(e)(2)</p> <p>Not less than 30 days prior to the commencement of the action, the interested person shall give notice by registered mail to the Secretary of Health and Human Services, the Attorney General of the United States and the person against whom the action is directed.</p> <p>Section 6104(e)(1)</p> <p>The notice shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event the plaintiff prevails.</p> <p>Section 6104(e)(2)</p>
<b>31</b>	Are there any demands on the content of the case before the case is being accepted?	Nothing found
<b>32</b>	How is the burden of proof arranged?	Nothing found

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<b>33</b>	What are the sanctions/remedies?	<ul style="list-style-type: none"> <li>▪ an order to stop the discriminatory practice</li> <li>▪ if the interested person prevails in his/her suit for an injunction, he/she may recover attorney's fees and costs associated with the lawsuit</li> </ul> <p>Source: AARP</p>
<b>34</b>	Is there appeal?	<p>Yes, appeal is possible before the U.S. Court of Appeals</p> <p>Source: Administrative Office of the U.S. Courts</p>
<b>35</b>	Can the decision be enforced?	Nothing found