"Cradle to Grave": Age Discrimination and Legislative Policy in Australia

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This policy and reverence of
age makes the world bitter to the best of our times . . .
King Lear 1.ii. 47-52.

Age discrimination laws now represent a significant and widespread addition to the equal opportunity armoury in Australian jurisdictions.[2] However, many issues attending the addition of this ground remain unresolved as case law is starting to reveal.[3] In particular, any analysis of the legislative policy attending the introduction of these recent discrimination amendments exposes conflicting and unresolved messages which are likely to influence both the judicial interpretation and community's reception of the laws. This analysis attempts to highlight some of the sources of these tensions. The object of this paper is not to provide an overview of the statutory scheme, nor does it provide a comprehensive description of the range of regional drafting variations amongst state and territory statutes. Rather its concern is to delve behind the linguistic formulae of the statutes to discern those factors which either prompted or informed the promulgation of age discrimination amendments. These sources of influence upon the form of the legislation are complex and this paper attempts to provide an analysis of the contribution of demographic, economic, sociological and broadly historical influences to the politicisation of age discrimination in Australia.

An examination of the evidence in support of legislative policy produces serious and intractable difficulties in the case of the age discrimination legislation in Australia. The principal characteristic of the subject is the absence of a cohesive policy framework which adequately addresses the scope and consequences of state and federal legislative initiatives. Two critical factors which underpin the legislative policy agenda must be highlighted from the outset. First, the scope of the protection envisaged by age discrimination laws is radically distinctive as compared with

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2 See Parts 4E, 4G *Anti-Discrimination Act* 1977 (NSW); Part VA *Equal Opportunity Act* 1984 (SA); Part IVB *Equal Opportunity Act* 1984 (WA); *Anti-Discrimination Act* 1991 (Qld) s 7(1)(f); *Discrimination Act* 1991 (ACT) s 7(1)(ib); *Anti-Discrimination Act* 1992 (NT) s 19(f); *Equal Opportunity Act* 1995 (Vic) s 6(a); *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) ss 11, 31; *Industrial Relations Act* 1988 (Cth) ss 3, 150A, Part VIA Division 3.

3 This trend is well illustrated by the pragmatic decision in *Christie* v *Qantas Airways* (1995) EOC 92-705 and the unresolved difficulties concerning differential benefits offered upon retirement and resignation in *Parsons* v *Western Australian Fire Brigades Board* (1995) EOC 92-735.

previous equal opportunity initiatives in Australia. State and federal governments have espoused a notion of anti-discrimination for all and every age, from the cradle to the grave. Other grounds of discrimination protected by legislation have focussed on historically and empirically disadvantaged groups in establishing a statutory protective regime and have deemed identified immutable characteristics irrelevant to decision making in the public sphere. The age discrimination provisions reflect this pattern superficially but inherently have the potential to destabilise anti-discrimination jurisprudence. The critical examination of legislative policy associated with age discrimination laws in Australia serves to expose the internal conflicts inherent in "cradle to grave" protection which is arguably not best served by the current statutory formulation within existing anti-discrimination statutes.[4]

A second key influence upon the legislative policy agenda is the use of the standard complaint-based, anti-discrimination mechanism for processing age discrimination complaints, at least in state and territory jurisdictions. There is no comprehensive age discrimination protection afforded by Commonwealth legislation. Responsibility for dealing with protected age discrimination issues is currently divided between the Human Rights and Equal Opportunity Commission and the Commonwealth industrial relations jurisdiction.[5] The attempted homogenisation of age discrimination within the existing regime implicitly denies its novel characteristics and obscures the problems this creates, in particular the extreme sensitivities involved in balancing the interests of identifiable groups within the protected population.

The existence of a range of diverse interest groups claiming protection from discrimination on the ground of age is the kernel of the difficulties associated with any analysis of legislative policy: the interests of the young, the middle aged and the elderly are unlikely to be synonymous on any subject. Moreover the contributions of demographers, sociologists, economists and welfare scholars to the debate are addressed primarily to closely-confined problems within the age discrimination debate, usually aligned to a particular age group. The study of the needs and interests of age groups accords harmoniously with established research patterns in the study of other disadvantaged groups, such as women[6] and ethnic minorities.[7]

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4 Norman Daniels has masterfully unmasked the naive argumentation concerning age issues in Daniels N *Am I My Parents' Keeper?: An Essay on Justice Between the Young and the Old* (Oxford University Press, New York, 1988) 40-65. His research is highly provocative and aims at the heart of western society's deep seated ambivalence about youth, age and ageing.

5 The Commonwealth model differs significantly from the States and Territories. The Commonwealth *Industrial Relations Act* 1988 contains provisions which govern age discrimination in the termination of employment. The Human Rights and Equal Opportunity Commission has been granted concilation powers under the *Human Rights and Equal Opportunity Commission Act* 1986 and Regulations to conciliate in employment matters by virtue of ILO Convention 111 and in other areas by virtue of Article 26 of ICCPR.

6 For example, see House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal* (AGPS, Canberra, 1992).

7 For example, see Moss I *State of the Nation* (AGPS, Canberra, 1993).

However, a nagging question about the adequacy of cobbling together unlike interests under the beneficent umbrella of age discrimination legislation remains.[8] Thus the task of policy analysis of age discrimination law is transformed into the unravelling of major and ancillary threads in a "densely tangled skein" of contributions to the policy debate.

The Legislation and the Political Agenda

One of the significant sources of evidence in constructing a policy framework for legislative activity is the political rhetoric associated with Parliamentary debate. In the case of age discrimination this source reflects very clearly a lack of coherence in political strategy.[9] This can be illustrated very clearly by reference to the Second Reading Speeches associated with the introduction of age discrimination provisions in two jurisdictions.[10] In New South Wales the proactive government action was camouflaged by broad considerations of community consultation. The evidence of the circumstances attending the inclusion of age as a ground in the Commonwealth's unfair dismissal laws reveals the triumph of political pragmatism over informed policy.

In the Second Reading Speech presented for the New South Wales *Anti-Discrimination (Age Discrimination) Amendment Bill* by the then Attorney-General, J P Hannaford,[11] five factors were highlighted as innovative benefits. However, these might equally represent sources of division over the operation of the legislation. The Attorney-General stressed at the outset the extensive range of community consultation conducted in the process of framing the bill.[12] The variety of interest groups consulted and their diverse agendas is presented as a benefit to the content of the final bill.[13] However, the rhetoric over community involvement ultimately takes a subordinate role to the putative policy agenda, protection of youth and the aged.[14] There is no apparent consciousness of the contrariety in seeking to protect two

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8 Perhaps the answer to this question lies in the individual and not in the group. At a rarefied level age as a ground of discrimination seems to champion the experience of the individual almost more intensely than other grounds. It has the potential to function as the first "post modern" ground of discrimination, by moving beyond the construction of shared experience and "standard" responses to recognise "individual realities".

9 Professor Margaret Thornton has provided an extensive and critical analysis of the legislative policy of Australia's anti-discrimination statutes in Professor M. Thornton *The Liberal Promise* (Oxford University Press, Melbourne, 1990). Her searching evaluations must be accorded some weight when age discrimination statutes are considered.

10 These examples have been chosen to exemplify the complexity of the issues attendant upon the introduction of age discrimination laws and the gross simplification with which such issues are treated in the political arena.

11 Second Reading speeches are a traditional source of reference in determining the purpose of a statute. See *Interpretation Act* 1987 (NSW) s 34; *Acts Interpretation Act* 1901 (Cth) s 15AB.

12 NSW, Legislative Council and Legislative Assembly, *Parliamentary Debates*, 16-19 November 1993, 4492, 5708.

13 *Ibid.*

14 *Ibid.*

particular age groups by legislation drafted to cover the total population. There is a token attempt to address this issue in the statement that "[i]t would be illogical to introduce age discrimination legislation that discriminates in the ages to which it purports to provide protection."[15] There are obvious difficulties of logic in this statement which are only compounded by the incomplete analogies drawn with the introduction of race and sex discrimination laws.[16] At the time of the introduction of the earlier grounds of protection there was unequivocal empirical evidence of historic and systematic less favourable treatment of these groups.[17] It is seriously debatable whether the disadvantaged position of what amount to sub-groups within the age framework[18] is sufficient to justify such sweeping legislative reform particularly whilst employing the sex and race discrimination legislative formula.

By contrast the Commonwealth age discrimination in termination of employment provisions arose out of the tortuous process of amendment of the *Industrial Relations Reform Bill* in the Senate in December 1993.[19] The government in presenting the Bill to the Parliament in November 1993 stressed the new anti-discrimination legislative objective which had been introduced.[20] However the ground of age was not included in the bill until the Australian Democrats presented a challenging package of human rights inspired amendments.[21] The amendments were enthusiastically supported by the Greens Senators and the members of the government in the Senate.[22] The Opposition Senators rejected the amendments, but the combined forces of the other political parties were sufficient to carry them. Age was one of three grounds added to the anti-discrimination provisions together with disability and sexual preference.[23] It is clear that fundamental and wide ranging

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15 *Ibid.*

16 *Ibid.*

17 A striking and mortifying example of entrenched discrimination against Australia's indigenous people was the presence in the Commonwealth Constitution until 1967 of section 127. The unequal position of women in western society has been attacked systematically since the development of a formal women's suffrage movement in the last century: see Sawer M and Simms M *A Woman's Place: Women and Politics in Australia* (Allen & Unwin, Sydney, 1984); Scutt JA *Women and the Law* (Law Book Company, Sydney, 1990) pp 82-111.

18 The major part of the speech is devoted to a discussion of age discrimination in employment issues with particular emphasis on junior rates of pay, difficulties for mature workers and early retirement or severance schemes. The industrial and economic focus of the government's interest is further reinforced by the Attorney General's statement that he is continuing to work in consultation with the Minister for Industrial Relations and Employment and the Minister for the Status of Women to explore discrimination issues concerning older people in the work force: *Parliamentary Debates, op cit*, pp 4493-4495; 5709-5711.

19 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 7 December 1993, p 4039.

20 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 24 November 1993, p 3581.

21 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 7 December 1993, pp 4038-4039; 8 December 1993, p 4200.

22 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 8 December 1993, p 4201.

23 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, pp 4028-4039.

philanthropic objectives inspired the Democrats' amendments presented by Senator Spindler. However there is no clear evidence of a consciousness of the consequences of the "blanket" introduction of age as a ground of discrimination in industrial legislation of this kind, and the contradictions inherent therein. In his speech introducing the amendments, Senator Spindler confined his remarks to the issues of junior rates of pay, youth unemployment and middle aged employment prospects.[24] Senator Spindler's remarks in the Senate bear a striking resemblance to the factors highlighted by the then New South Wales Attorney-General in introducing the State age discrimination amendments.[25] The key policy issues arising in respect of this legislation are self-evident: age discrimination was not a part of the government agenda when the bill was originally introduced. The government, led by its members in the Senate, acquiesced in the face of a closely drafted and apparently innocuous amendment package crafted by the Australian Democrats. Thus age discrimination in employment provisions were introduced in default of a government-inspired policy framework.[26]

Creating an Age Discrimination "Agenda"

In determining, at a more general level, what has fuelled the increasing official intolerance of entrenched age discriminatory practices in Australia, three areas of research provide dominant influences: demography, economics and social welfare studies. Demographers have plotted a new "rectangular curve" for western populations which confirms increasing numbers of elderly in the population in the next century.[27] Economists in association with sociologists have modelled crippling

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24 Commonwealth of Australia, *Parliamentary Debates, Senate Weekly Hansard*, 7 December 1993, p 4039 (per Senator Spindler): "it is also time that our society paid some attention to the treatment that people receive on the basis of age . . ."

25 *Ibid.*

26 The Industrial Relations Reform Bill was returned to the House of Representatives for consideration of the amendments on 16 December 1993. Some issues emerge from the debate which reinforce the idea that the implications of the Democrat amendments had not been considered by the government. The then Minister for Industrial Relations, Mr Brereton, moved all the amendments made in the Senate should be accepted and gave but cursory attention to the extension of anti-discrimination grounds in proposed sections 150A, 170DF and 170ND. See Commonwealth of Australia, *Parliamentary Debates, House of Representatives Weekly Hansard* 16 December 1993, at 4249. The Minister also revealed in the course of debate the notable fact that employees of the Department of Industrial Relations had been working on a reform bill for some years. This is an extremely significant comment in view of the original draft produced by the government which contained only those grounds of discrimination listed specifically in international conventions and thus did not include age. Perhaps the most unthinkingly insightful observation concerning the final form of the Industrial Relations Reform Bill was made by Mr Charles, the then opposition member for the seat of La Trobe when he said, if rather circuitously (*op cit*, at 4255): "The bill is so complex that I do not think that any of us yet know the total outcomes, ramifications and effects of this bill."

27 Laslett P *A Fresh Map of Life: The Emergence of the Third Age* (Weidenfeld and Nicholson, London, 1989) pp 56-76; Clare R and Tulpule A *Australia's Ageing Society* (Economic Planning Advisory Council, Canberra 1994) pp 13-15.

future social welfare dependency ratios for Australia and other countries,[28] which demand governmental attention. Further the economic impact of long term youth unemployment[29] and the productivity consequences of the current pattern of earlier retirements[30] have been carefully scrutinised. Empirical and speculative social scientific data have had a major impact on government policy, largely on account of its putative objectivity and pessimistic content.

However, the governmental response to this research has not been to focus legislative protection on the elderly or even the middle aged as has been the experience in North America[31] and New Zealand.[32] Thus the new ground of protection cannot be explained merely as a slavish reaction to international trends.[33] It is much broader and more intrusive than enactments in other common law jurisdictions. It may be suggested that historical considerations may shed further light on the form of the legislation. Since widespread industrialisation in the 19th century, humanist philanthropy and enlightened self interest have competed in the realm of social reform. Historically it has been rare to find one of these elements missing in any significant social legislative reform programme. The enactment of factory legislation[34] and the establishment of the welfare state[35] in the 20th century both conform to this model and are highly significant examples for examination in view of the aged based criteria upon which the regimes operated.

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28 Clare R and Tulpule A, *op cit* at 27-44.

29 See, for example, Department of Employment, Education and Training *Federal Government's Strategy for Young Australians* (AGPS, Canberra, 1989); Dawkins P *Part-time Employment and the Youth Labour Market* (National Institute of Labour Studies, Bedford Park, 1991); and Carson E *Employment Development: Do Young People Benefit?* (National Clearinghouse for Youth Studies, Hobart, 1994).

30 See Jones B "The Challenge of an Ageing Society" in Sanders K (ed) *Ageing: Law, Policy and Ethics Directions for the 21st Century* (Law Reform Commission of Victoria, Melbourne, 1993) p 8; Encel S "Work and Opportunity in a Changing Society" in Sanders K (ed), *op cit* at 124-125.

31 The United States' *Age Discrimination in Employment Act* of 1967 provides protection for workers over the age of forty years only.

32 In New Zealand age discrimination protection is afforded under the *Human Rights Act* 1993 to those between the age of 16 years and the national pensionable age. See *Human Rights Act* 1993 (NZ) s 21(1)(I).

33 Age has never been a focus of international human rights jurisprudence. Race and sex have naturally been at the forefront of attempts at legal protection. Nations like Australia wishing to include age as a ground for protection in International Labour Organisation Conventions have done so through a process of negotiation. Age, it has been argued, may be included as a ground of discrimination of international concern by virtue of the expression "or other status" in Article 2 of the *International Covenant on Civil and Political Rights* (see *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) Schedule 1). Analysts also rely on the 'norm of non-discrimination' embodied in the Covenant (Articles 3 and 26), to support an individual's right to protection against age discrimination.

34 See Nardinelli C *Child Labor and the Industrial Revolution* (Indiana University Press, Bloomington, 1990).

35 Fraser D *The Evolution of the British Welfare State* (MacMillan, London, 1973); Jones MA *The Australian Welfare State: Origins, Controls and Choices* (3rd ed, Allen and Unwin, Sydney, 1990).

The suggestion that age discrimination laws reflect a contemporaneous convergence of interests amongst economic, demographic, social welfare, sociological, human rights and industrial policies is alluring. At the most general level this provides a sufficient explanation of some of the complexities inherent in the legislation. However, there is no single, coherent theme which adequately elucidates its content. This invites serious speculation about the intentions of governments introducing age discrimination legislation in the 1990s. In some cases the official aims have been linked to a brand of legally inspired social engineering. In New South Wales in particular, age discrimination legislation has been promoted widely as a legitimate means of inducing social change.[36] The Commonwealth government's response has been less forthright, but nevertheless age discrimination protection has been presented as an instrument of the Labor Government Social Justice Strategy.[37] Thus there is a sense in which age discrimination legislation reflects hybrid interests and purposes: a social idealism which seeks to promote individualism and non-discrimination[38] and the pragmatic strategy of legislatures responding to current social scientific concerns for the future. This conjunction of interests can be most clearly illustrated through an analysis of research results in the areas of demography, economic and social welfare history and theory.

Social and Cultural Reactions to Ageing: the Relevance of Stereotypes

The expansion of the scope of anti-discrimination laws over time must be seen in its social and cultural context as the needs and interests of the population change. Notions of youth and age invite paradoxical responses in Australian society, which have clearly influenced the final form of age discrimination laws. Australia has widely been seen as a society which reveres youth and youthful attributes to the disadvantage of age and experience.[39]. This attitude has also been prevalent in the United States during this century[40] and has provoked concern in public policy makers.[41] The expression "ageism" was first used systematically in the late 1960s

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36 See "Discrimination laws to be tightened" (1993) July *Directions in Government* p 22. This stands in stark contrast to the legislative policy of the United States *Age Discrimination in Employment Act* of 1967. The United States Supreme Court has stated categorically that this Act was not designed to effect social change: *San Antonio School District* v *Rodriguez* (1973) 411 US 1, 93.

37 See Howe A "Policy challenges in an ageing society" in Sanders K (ed), *op cit* pp 24-27.

38 See Dharmananda V and Williams J "An Analysis of Discrimination on the Ground of Age" in Saunders P and Encel D (eds) *Social Policy in Australia: Options for the 1990s*, Social Policy Research Centre, Sydney, 1992 at 37.

39 See Picton CJ "Images of Ageing Around the World: Australia" (1984) 3 *Australian Journal on Ageing* 23-24; Friedan B *The Fountain of Age* (Jonathan Cape, London, 1993) at 68.

40 Graebner contends that the "youth cult" began in the United States during the 1920s. See Graebner W *A History of Retirement* (Yale University Press, New Haven, 1980). See also Gruman GJ "Cultural Origins of Present Day 'Age-ism': The Modernization of the Life Cycle" in Spicker F et al (eds) *Aging and the Elderly* (Atlantic Heights: Humanities Press, 1978) pp 364-369; Jeffreys M and Thane P "An Ageing Society and Ageing People" in Jeffreys M (ed) *Growing Old in the Twentieth Century* (Routledge, London 1989) p 12.

41 Binstock RH "Reframing the Agenda on Policies on Aging" in Minkler M and Estes CL *Readings*

by American geriatrician, Robert Butler.[42] On an analogy with racism and sexism, ageism is used to denote the process of systematic negative stereotyping of people on account of their advancing age.[43] However, unflattering stereotypes about age have proliferated throughout history,[44] as societies have made an unfavourable comparison between youth and age, perceived vigour and deterioration.[45] In non-industrial societies ageing induces a complex series of cultural, economic and religious responses, not all of which are positive.[46]

The enactment of age discrimination legislation in Australia represents a conscious reaction to concerns about persistent ageism[47] but leaves some significant questions unanswered. In particular it is difficult to identify the catalyst for the transformation of entrenched age discrimination in western societies from a benign to a maleficent force requiring legislative intervention.[48] Further it is unclear whether the negative stereotypes about ageing are dominant in the public sphere to the detriment of older people.[49] It is arguable that mandatory retirement ages, which in one sense are

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in the Political Economy of Aging (Baywood Publishing Company, Amityville, 1992) pp 157-165; Binstock RH "Another Form of 'Elder Bashing' " (1992) 17 *Journal of Health Politics, Policy and Law* at 269-271 and Cooper JF "From 'Needy to Greedy'? Are the Elderly a Suspect Class under the Equal Protection Clause of the Florida Constitution?" (1992) 5 *St Thomas Law Review* at 79-99.

42 See Butler RN *Why Survive? Being Old in America* (Harper and Row, New York, 1975).

43 See Radford AJ "Ageism: Public Prejudice and Private Preconceptions" (1987) 6 *Australian Journal on Ageing* at 4.

44 Some scholars have suggested that negative stereotypes about the aged and ageing do not reflect the reality of older people's lives, but rather the deep-seated fears of the young concerning a "worst case" scenario about impending old age. Thane P has argued this point forcefully in "The Experience of Old Age: a Long Run History", a conference paper presented at the *Australian Cultural History: Ageing Conference*, Melbourne, 25-26 June 1994. I gratefully acknowledge the financial assistance of the Law Foundation of New South Wales Legal Scholarship Support Fund for attendance at this conference.

45 See Stahmer HM "The Aged in Two Ancient Oral Cultures: The Ancient Hebrews and Homeric Greece" in Spicker SF et al (eds), *op cit*, pp 23-36 and Freedman R "Sufficiently Decayed: Gerontophobia in English Literature" in Spicker SF et al (eds), *ibid* at 49-62.

46 See Goody J "Aging in Non Industrial Societies" in Binstock RH and Shanas E (eds) *Handbook of Aging and the Social Sciences* (Van Nostrand Reinhold Company, New York, 1976) pp 117-129.

47 Attorney-General's Department of New South Wales *Age Discrimination: Options for New South Wales*, Attorney General's Department, Sydney, 1992, p 9.

48 It has been suggested that the ageing of the activist generations which lobbied successfully for the enactment of race and sex discrimination legislation from the 1960s to the 1980s has produced a powerful and articulate interest group for the ageing. See Edgar D *Ageing - Everybody's Future* Walter Murdoch Memorial Lecture, Murdoch University, Perth, 17 September 1991, 2; Gruman GJ "Cultural Origins of Present Day 'Age-ism': The Modernization of the Life Cycle" in Spicker F et al (eds) *op cit* at 372; Gerber J et al *Lifetrends: The Future of Babyboomers and Other Aging Americans* (Macmillan Publishing Co, New York, 1989) pp 139-149.

49 It is within the function of anti-discrimination laws to redress the effects of dominant negative stereotypes within a society. It is questionable how effective legislation can be in circumstances where social attitudes are mixed and conflicting. Thane P has argued, *op cit*, that there is no dominant stereotype about the aged in the "Western discourse" and that the view is decidedly mixed, as is the aged population. This argument relies in part upon including the self-perception of ageing people into the equation about ageing stereotypes.

fundamentally discriminatory on grounds of age, have become a convenient tool for management decision making and forward planning in a way which has shorn them of any peculiarly denigratory associations. Their purpose is purely functional. There continues to be an ambivalence in views and attitudes in the community towards age, and age-related phenomena such as retirement, which is served in the current legislative framework only in the sense that it does provide redress for detrimental individual experiences of ageism.[50]

The entrenchment of ageist stereotypes has been facilitated throughout the western world in reliance upon deep seated human fears about poverty and powerlessness, which states are empirically verifiable as afflicting elderly people. The existence of stereotypes about age and ageing has served in Australia as a convenient obscurantist means to justify the enactment of age discrimination laws within the traditional legislative framework. However, there are serious flaws in this neat scheme which are only too apparent. The messages to be derived from the range of ageist stereotypes are sufficiently mixed and diverse to render these suspect as a firm basis upon which to support new legislation. Further, reliance on the existence of stereotypes overshadows the more important demographic and economic factors which have fuelled the age discrimination debate. However, these last factors have little emotional appeal in human rights debates.

Biological and Demographic Concerns[51]

Human rights concerns about negative stereotypes of ageing which highlight aspects of physical deterioration[52] correspond with new patterns of biological and neurological research which provide evidence which tends to challenge current orthodoxy about the process of human ageing. In general gerontological research across a range of fields currently appears to be less doctrinaire about the inevitability of dramatic age-related decline.[53] Indeed one stream of neurological research strongly supports the hypothesis that significant decline of intellectual vigour with increased age is not inevitable.[54] The results of this research provide a major

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50 Ageist stereotypes have a strictly private aspect which influences the public perception of advancing age. This is problematic in view of the remit of anti-discrimination legislation to regulate discrimination in the public domain. The highly elaborate web of private influences which stimulate ageist attitudes is well illustrated by S S Tamke's article "Human Values and Aging: The Perspective of the Victorian Nursery" in Spicker SF et al (eds), *op cit*, especially 77-78.

51 de Vos S "Demography: A Source of Knowledge for Gerontology" in Borgatta EF and Montgomery RJV (eds) *Critical Issues in Aging Policy* (Sage Publications, Newbury Park, 1987) pp 30-52.

52 See, for example, Attorney General's Department of New South Wales *Age Discrimination: Options for New South Wales*, Attorney General's Department, Sydney, 1992, pp 9-10 and Dharmananda V and Williams J, *op cit*, pp 37-38.

53 See Butler RN "Psychosocial Aspects of Aging" in Kaplan HI and Sadock BJ (eds) *Comprehensive Textbook of Psychiatry V*, (5th ed, Williams and Williams, Baltimore, 1989) vol 2, pp 2016-2017.

54 See Diamond M et al "Plasticity in the 904 Day Old Male Rat Cerebral Cortex" (1985) 87 *Experimental Neurology* at 309-317.

challenge to societal assumptions about the capacity of the ageing to contribute to intellectual, business and cultural life. A second major line of research confirms the existence of meaningful and numerous variations in the patterns of ageing amongst the population which defy global generalisations.[55] Deterioration has been shown to be a function of distance from death not chronological age.[56] This research poses the challenge of a more dynamic and individual approach to human development,[57] which arguably will be supported by age discrimination laws. However it is pertinent to note that in Australia far more influence has been accorded to the research of demographers over biologists and neurologists. In fact there is virtually no empirical evidence which connects the human development data and the policy deliberations over age discrimination legislation in Australia.

The zealous dissemination by demographers of the "rectangular survival curve" which illustrates the process of demographic ageing amongst populations in the late 20th century and projections for the next millennium has had a powerful impact on strategic planning by governments. The growing proportion of older people in comparison with earlier demographic patterns has been seen as threatening to long term economic objectives, especially the productivity objectives of industry.[58] The use of demographic evidence for the purpose of economic forecasting has imbued it with distinct negative characteristics[59] which are not found in theoretical studies of demographic patterns. Demographers have identified a newly emerging pattern of life, particularly amongst western societies in the late 20th century which consists of four stages (or ages).[60]

Some of the most recent demographic and economic modelling in Australia takes account of both the demographic shifts in the population and recommends innovative strategies for future implementation, most significant amongst these being the reform of retirement income provision.[61] However, such models are not designed to register the diversity of individual experiences of ageing which the

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55 Baltes PB and Kleige R "On the Dynamics between Growth and Decline in the Aging in Intelligence and Memory" in Poech K et al (eds) *Neurology* (Springer Verlag, Berlin, 1986).

56 Friedan B, *op cit*, p 64; Shader RI and Kennedy JS in Kaplan HI and Sadock BJ (eds), *op cit*, p 2037.

57 See Neugarten BC *Middle Age and Aging* (University of Chicago Press, Chicago, 1968); Neugarten BL and Hagestad GO "Age and the Life Course" in Binstock RH and Shanas E (eds) *Handbook of Aging and the Social Sciences* (Van Nostrand Reinhold Company, New York, 1976) pp 35-55; and Goulet LR and Baltes P (eds) *Life-Span Developmental Psychology; Research and Theory* (Academic Press, New York, 1970).

58 See Shepherd S "Employers' view on opportunities for older workers" in Sanders K (ed) *op cit*, pp 149-152; CEOC "The Ageing of Australia: Labour Market Implications" (1990) 69 *Business Council Bulletin* at 32.

59 The modelling of an increased social welfare dependency ratio also derives from the demographic evidence. See Estes CL "The Politics of Ageing in America" (1986) 6 *Ageing and Society* at 121-134.

60 See Laslett P, *op cit*.

61 Clare R and Tulpule A, *op cit*, 33, 42. The significance of the demographic trends became evident in Australia in the early 1980s. See Pollard AH and Pollard GN "The Demography of Ageing in Australia" in Howe AL (ed) *Towards an Older Australia* (University of Queensland Press, St Lucia, 1981) pp 13-34.

demographic data envisages.[62] There is a logical incongruity between the group concerns which are exemplified in economic modelling and the emerging respect for individual experiences of ageing which is inherent in the recent demographic "third age" research. The potentialities revealed in the humanised demographic research of Laslett and others have much in common with the human rights rhetoric associated with the introduction of age discrimination legislation. It is arguable that a more sensitive legislative mechanism might have been chosen to implement the promotion of individual human potential, rather than the blunt instrument of the race and sex discrimination model. The wide range of interests encompassed by the ground of age has at its core the need for extreme flexibility of response to individual needs and abilities. Thus it might be argued that the disability discrimination model adopted by the Commonwealth government in the *Disability Discrimination Act* 1992 which incorporates notions of "reasonable accommodation", "unjustifiable hardship" and "inherent requirements" of a job more closely accords to the peculiar characteristics of age[63] as a ground of discrimination than other Australian legislative precedents.[64] The failure to synthesise the results of multi-disciplinary research has left the Australian policy framework impoverished. By contrast, despite some difficulties in the application of age discrimination law in North America, the general thrust of age discrimination in employment policy has been crystal clear.

Age Discrimination Policy in the United States: Age Discrimination in Employment Act, the States and the Constitution

The wave of civil rights legislation enacted in the United States in the 1960s has provided an overwhelming influence on the form and content of subsequent legislative initiatives in this sphere throughout the common law world, including Australia. Thus it is surprising that the cautious approach to age discrimination policy adopted by the United States legislatures[65] and judiciary has apparently been rejected in Australia in favour of more complicated and arcane motives. Two principles concerning legislative and judicial policy on age discrimination in the

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62 For an overview of the issues associated with the ageing and demographics in Australia, see Kaplan G "Ageing in Australia" in Kennedy R (ed) *Australian Welfare: Historical Sociology* (MacMillan, Melbourne, 1989) at 340-344.

63 There is a clear overlap between age and disability as grounds of discrimination in the form of age-induced disability, which is pertinent where aged discrimination is challenged.

64 There are a number of practical scenarios which might be used to illustrate this point, including the reasonable accommodation an employer might make for an inexperienced worker in allowing time to develop specific job skills, accommodations in allowing time for retraining and the development of new job skills for older workers, and the flexibility of permitting job sharing amongst the work force without tying job sharing to specific groups eg mothers. This formula recognises that there is some correlation between chronological age and productivity which essentially hinges on individual experience and requires the employer to assist in the surmounting of disadvantage by means of "reasonable accommodation" to the experience and needs of the individual.

65 See Note "The Age Discrimination in Employment Act of 1967" (1976) 90 *Harvard Law Review* 380 at 384.

United States are abundantly clear from the Congressional debates over the *Age Discrimination in Employment Act* and the judicial pronouncements of the Supreme Court in constitutional cases. Firstly, legislative protection against age discrimination should be narrowly confined to the employment sphere, and to the middle aged and elderly on rational economic grounds. The second principle, which was highlighted in the congressional debates on age discrimination and has been upheld by the United States Supreme Court is the notion that age discrimination is qualitatively distinct from other grounds protected by the *Civil Rights Act* and thus requires unique treatment.[66]

Industrial gerontologists made the necessary connection between the *Age Discrimination in Employment Act* and economic independence soon after its enactment.[67] The mandate of the Secretary of Labor in 1965 to investigate age discrimination located this ground firmly in the employment sphere and legislative interest in the United States has not subsequently extended elsewhere. Thus the Congressional debates on the *Age Discrimination in Employment Act* focussed on the position of the "older job seeker".[68] Even before the enactment of age discrimination protection in employment, the legislature signalled that age discrimination was not analogous to race and sex discrimination. There were two proposed reasons for the difference; age discrimination was not prey to the insidious prejudice and bigotry associated with racial prejudice, and that there is at some level a correlation between performance and advancing age.[69] Finally there was never any suggestion in the United States that age discrimination in employment legislation should seek to protect groups other than the middle aged and elderly who found employment and reemployment significantly more difficult than younger groups of job seekers.[70]

The guarded approach of the federal legislature to age discrimination protection is complemented by the approach of the judiciary to the constitutionality of age discriminatory statutes. The Supreme Court signalled in 1976 that the unique qualities associated with age discrimination required a less stringent test for compliance with the equal protection clause in the Fourteenth Amendment than in claims of racial discrimination under Title VII of the *Civil Rights Act*. In *Massachusetts Board of Retirement* v *Murgia*[71] and consistently in a string of subsequent decisions,[72] United States Courts have upheld the constitutional validity

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66 See Rea PK "Coming of Age: Unique and Independent Treatment of the ADEA" (1984) 7 *American Journal of Trial Advocacy* at 583-602.

67 See Sheppard HL (ed) *Towards an Industrial Gerontology* (Schenckmann Publishing, Cambridge, Mass, 1970) at 100.

68 Note, *op cit* at 383.

69 Rep Burke in 113 *Congressional Record* 34742 (1967).

70 The privileged position of younger employees is deeply entrenched in United States jurisprudence. See Marshall J in dissent in *Massachusetts Board of Retirement* v *Murgia* (1976) 427 US 307 at 321-322 and Gewin Circuit J in *Marshall* v *Goodyear Tire and Rubber Company* (1970) 554 F 2d 730 at 736.

71 (1976) 427 US 307.

72 A lone exception is the decision of the United States Court of Appeals Seventh Circuit in *Gault* v

of mandatory retirement statutes in a variety of employment contexts and jurisdictions.[73]

In the *Murgia* case, a Massachusetts State police officer who had been retired at the age of 50 years pursuant to a state mandatory retirement statute sought to challenge the constitutional validity of the statute as an infringement of the equal protection clause in the Fourteenth Amendment. The Supreme Court, with one dissentient,[74] upheld the validity of the mandatory retirement law and simultaneously confirmed the qualitative difference inherent in age discrimination in comparison with other grounds when it determined that age was not a "suspect class" requiring application of the "strict scrutiny" test of constitutional validity. The Court distinguished the position of ageing Americans from those suffering racial prejudice. "Suspect class" was defined as "one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[75] The Supreme Court held that the aged did not represent a "suspect class by reason of entrenched unfavourable treatment" and further that old age does not define a "discrete and insular group in need of extraordinary protection".[76]

The Court held that age discriminatory statutes were to be subjected to the less stringent "rational basis" test of validity,[77] which requires that a statute will not be set aside if any set of facts may reasonably be conceived to justify it.[78] The "rational basis" principle further protects legislatures in the event of inevitable imperfect classifications,[79] such as mandatory retirement. In upholding the validity of the Massachusetts police retirement provision the Court identified a legitimate public safety purpose of the state and found that the mandatory retirement provision rationally furthered such a purpose and was therefore valid.[80] In reaching its

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72—*Continued*
Garrison (1977) 569 F2d 993 where a mandatory retirement statute for school teachers was held to be unconstitutional. However, it is abundantly clear that the decision of the Seventh Circuit in this case did not depart in principle from the Supreme Court's analysis in *Murgia*, but that the School District failed to discharge the evidentiary burden concerning the rational ground for imposing mandatory retirement on teachers in (1976) 427, US 307 at 996.

73 The lenient practice of the Supreme Court in assessing the constitutional validity of mandatory retirement statutes has been vigorously attacked as unsophisticated and inappropriate by Marshall J in dissenting judgments in all the major decisions by the Court. For example, see *Massachusetts Board of Retirement* v *Murgia* (1976) 427 US 307 at 317-327.

74 Justice Marshall.

75 The Supreme Court accepted the definition of "suspect class" proposed in *San Antonio School District* v *Rodriguez* (1973), 411 US 1, 28 at (1976), 411 US 313.

76 The Supreme Court in this instance adopting an alternative test from *United States* v *Carolene Products Co* (1938), 304 US 144, 152-153 at (1976), 427 US 313.

77 (1976) 427 US 307 at 314.

78 *McGowan* v *Maryland* (1961) 366 US 420 at 426.

79 *Dandridge* v *Williams* (1970) 397 US 471, 485.

80 (1976) 427 US 307 at 314.

decision the majority also identified the weakness in the "rational basis" test as applied to age discrimination. The Court noted that the State might have chosen to determine the fitness of police officers more precisely through the use of individual testing and noted obiter that "the state perhaps has not chosen the best means to accomplish [its] purpose."[81]

In his dissenting opinion in the *Murgia* case, Marshall J revealed further anomalies in the treatment of age discrimination.[82] The judgment has two points of focus, both of which are pertinent to the treatment of age discrimination. Marshall J attacked the Supreme Court's test for the analysis of equal protection cases. He claimed that "strict scrutiny" and "rationality" did not accurately describe the process which the Court has in fact undertaken. He suggested that a far more sophisticated balancing exercise of individual and state interests should be pursued. In respect of the facts in the *Murgia* case itself Marshall J suggested that the majority had failed to have regard to relevant factors by adhering rigidly to a "rational basis" test.[83] His Honour was in favour of a more flexible standard and proposed that the party relying on a mandatory retirement statute should be required to show a "reasonably substantial interest and a scheme reasonably closely tailored to achieve that interest."[84] He also revealed a deep concern with the practical and individualised effects of upholding the validity of mandatory retirement provisions and the prevalence of arbitrary and systemic age discrimination in employment.[85] Justice Marshall's suggested test was much closer to the Supreme Court's treatment of sex discriminatory provisions. In equal protection cases women have been treated as a "quasi-suspect" class and state action has been viewed with heightened scrutiny, but less strict than in the case of race discrimination.[86]

In the wake of the Supreme Court's decision in *Murgia*, a number of constitutional challenges to mandatory retirement policies were instituted by white collar workers, including school teachers,[87] civil servants,[88] university academics[89] and judges.[90] In all but one case[91] the plaintiffs were unsuccessful as the courts followed the reasoning of the majority in *Murgia*. The Supreme Court itself reconsidered the

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81 (1976) 427 US 307 at 316.

82 Academic commentators have also criticised the majority opinion in *Murgia*. See, for example, Rosenblum M "Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions" (1981) 32 *Hastings LJ* 1261, at 1275-1278; Whiteside FW and Batt JR "The Effects of Mandatory Retirement" (1979-1980) 18 *J Fam Law* 761, at 769-779. Whiteside and Batt place particular emphasis on the argumentation of Marshall J in *Murgia*.

83 (1976) 427 US 307 at 318.

84 (1976) 427 US 307 at 325.

85 (1976) 427 US 307 at 321-324.

86 *Frontiero* v *Richardson* (1973) 411 US 677; *Orr* v *Orr* (1979), 440 US 268.

87 *Gault* v *Garrison* (1977) 569 F2d 993 7th Cir.

88 *Johnson* v *Lefkowitz* (1977) 566 F2d 866 2nd Cir.

89 *Klain* v *Pennsylvania State University* (1977) 434 F Supp 571 USDC MDPenn; *Crozier* v *Howard* (10th Cir 1993) 11 F 3d 967.

90 *Malmed* v *Thornburgh* (1980) 621 F 2d 565.

91 (1976) 427 US 307.

issue raised in *Murgia* in 1979 in *Vance* v *Bradley*,[92] a case in which foreign service personnel employed by the United States challenged the government's mandatory retirement provisions. The Court, with the exception of Marshall J, affirmed the approach adopted in their earlier decision. The *Vance* decision is in many ways the more unsettling, as there was no clear public safety ground to satisfy the Court's "rational basis" test. In *Vance* the Court accepted evidence of highly discriminatory personnel policies based on predictability and stimulus to performance as a "rational basis" for the mandatory retirement provision.[93] This decision represents the nadir of rational scrutiny of state action.[94]

The United States Courts and legislatures[95] have consistently asserted the heterodox nature of age discrimination and have consequently separated it in legislation and judicial treatment from other prohibited forms of discrimination. Concomitant with this approach has been the characterisation of age discrimination in employment not just as different from but as inherently less injurious to the victim than other forms of discrimination.[96] This stands in contrast to overt policy statements in Australia which are premised on the equal status of grounds of discrimination. Age discrimination is another ground for which legislatures are now prepared to provide protection, but not a ground of lesser status. Indeed rhetoric associated with the enactment of age discrimination legislation in Australia would suggest that age discrimination is an entrenched evil which has only recently received appropriate attention.[97]

The British Inheritance

There are sufficient social, political and historical dissimilarities to explain adequately the reluctance of Australian legislatures to follow the United States age discrimination model.[98] In view of these factors the nature of the industrial and social welfare inheritance from Britain requires consideration in assessing the form of the policy agenda in Australia. The United Kingdom currently has no age

92 (1979) 440 US 93.

93 (1979) 440 US 93 at 98.

94 A further example of the laxity inherent in the "rational basis" test can be found in the case of *Malmed* v *Thornburgh*, *op cit*, pp 572-573.

95 It should be noted that whilst a variety of approaches to the legislative protection against age discrimination has been adopted by state legislatures in the United States, 31 States have tended to follow the federal model. Only two states have no form of protection against age discrimination and a minority of states protect all persons over 18 years. Just over one-fifth of the States provide protection for all age groups. State legislation in the United States may provide a plaintiff with an additional cause of action where age discrimination has been alleged. See Ruzicho AJ and Jacobs LA *Litigating Age Discrimination Cases* (Clark Boardman Callaghan, Deerfield, 1986+) pp 43-97.

96 See *Cunningham* v *Central Beverage Inc* (1980) 486 F Supp 59 at 62.

97 *Ibid*.

98 Amongst the distinctive factors which have affected the national development of the United States and its legal and political structures are the declaration of independence and the war of revolution, the drafting of a republican constitution and the inclusion of a bill of rights, the legacy of slavery and the singular history of European migration.

discrimination in employment legislation and thus the British inheritance derives from other spheres. Two radical legislative experiments, which were based firmly on age distinctions, have had a lasting influence on British social policy, and indirectly on the course of Australian initiatives. The young and the old have been the subject of special regulatory regimes which have recognised the unequal bargaining power of these groups in the industrial arena.

During the 19th century in England[99] children were singled out as a special category requiring industrial regulation.[100] The successive *Factory Acts* enacted by the United Kingdom Parliament represent an early example of systematic age discriminatory employment legislation.[101] Factory legislation limited the number of hours children were permitted to work in particular industries, notably cotton mills. However the obscure and eclectic policies associated with that legislation coincidentally appear to reflect the diversity of policy interests apparent in the contemporary debate over age discrimination laws. Economic and productivity issues were prominent amongst the concerns of the promoters and opponents of the *Factory Acts*. This indicates a recognition of the correlation between age and productivity which is still at the heart of the indecisive policy debate surrounding the form of contemporary age discrimination in employment laws.

The low cost of child labour rather than the tender age of the employees, served as an important influence upon the form and motivation of the original *Factory Act* of 1833.[102] As technology improved during the course of the 19th century extremely youthful child labour became obsolescent[103] and by 1871 compulsory school attendance had become part of the national legislative agenda.[104] The adult labour movement registered contradictory responses to factory legislation, which involved on the one hand a recognition of the inherent limitations of child labour and on the other the fear of economic competition.[105] Even social philanthropists were divided in several directions from Tory humanitarians in favour of protective employment legislation,[106] advocates of systemic industrial reform,[107] and liberals opposed to

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99 Many of the difficult issues associated with the study of this period have been canvassed by Smelser NJ in *Social Change in the Industrial Revolution* (University of Chicago Press, Chicago, 1959).

100 The arguments which follow rely heavily upon the cogent and revisionist analysis of Nardinelli C, *op cit*, all.

101 Earlier legislation which regulated aspects of the labour force had been responses to labour supply shortages and inflationary wages. See *Statute of Labourers* 1351 and *Poor Law Act* 1388. See Fraser D *The Evolution of the British Welfare State* (2nd ed, Macmillan, London, 1984) pp 31-32.

102 Nardinellli C, *op cit*, pp 102-103.

103 Nardinelli C, *op cit*, pp 111-115.

104 *Education Act* 1871 (UK).

105 This view has been taken up by some historians of the period, particularly those of the Marxian school of historical analysis. See Hobsbawm EJ *Labouring Men: Studies in the History of Labour* (Weidenfeld and Nicholson, London, 1964) pp 292-29; 310-312.

106 Nardinelli C, *op cit*, pp 14-17.

107 This view is exemplified most clearly in Richard Oastler, a trenchant critic of the factory system. See Nardinelli C, *op cit*, pp 3, 10-12, 14.

the existence of child labour.[108] There are undoubtedly historical factors which contribute to explaining the range of responses to the regulation of child labour, however the intractable problems associated with aged based criteria emerge only too clearly.

The development of the welfare state in Britain and also in Australia has produced its own legacy for contemporary legislative policy. The competing ideologies of self-help[109] and state responsibility[110] still underpin human right initiatives. The debate over the abolition of mandatory retirement and social dependency of the elderly on old age pensions has formed a major element in the current age discrimination policy debate. It is deeply ironical that the instrument widely regarded as the cornerstone of beneficent social reform earlier in this century[111] is now at the heart of disputation about personal freedom and equal opportunity. The complex results of extensive historical research on retirement in western societies simultaneously underlie and fillip policy discussion about aged discrimination and inter generational welfare entitlements.

The inauguration of old age pension schemes in England[112] and Australia[113] designated the establishment of the welfare state in the 20th century. The empirical evidence of widespread poverty amongst the elderly and infirm in the 19th century[114] provided the impetus for new legislative responses to social welfare. Until the enactment of old age pension statutes the English had relied on a series of Poor Laws to regulate the problem of poverty and destitution amongst those unable to work, including the aged and disabled.[115] By contrast, until the end of the 19th

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108 *Ibid* at 17-23. Amongst the principles relied on by this group was the romanticised notion of a past "golden age" in which childhood had been an idyllic time unencumbered by regulated work. See also Fraser D, *op cit* at 11. The romantic view of childhood powerfully influenced Friedrich Engels in *The Condition of the Working Classes in England* (1845), Henderson WO and Chaloner WH (trans.) (Stanford University Press, Stanford, 1968) p 10.

109 See Fraser D, *op cit*, p 85; Hay JR *The Development of the British Welfare State 1880-1975* (Edward Arnold, London, 1978) pp 23-24; 55-56.

110 This notion emerged in England in the late Victorian period and ushered in an era of liberal social reform in the early 20th century. See Fraser D, *op cit*, p 146 ff.

111 The New South Wales old age pension was described in the *New South Wales Year Book 1908* as "a gift by the state to the citizens, who, during the prime of life, have helped to bear the public burdens of the state by the payment of taxes, and by opening up its resources by their labour and skill." in Jones MA, *op cit*, 21.

112 *Old Age Pension Act* 1908 (UK).

113 In accord with colonial and state concern over the provision of old age pensions, the power to legislate for old age and invalid pensions was included in section 51(xxiii) Commonwealth Constitution. The Commonwealth relied on the power in 1908 in enacting the *Invalid and Old-Age Pensions Act* 1908 (Cth). On the history of the limited scope of this power, see Sackville R "Social Welfare in Australia: The Constitutional Framework" (1973) 5 *FLR* 248.

114 See, for example, Henry Mayhew, as *London Labour and the London Poor* (1852, 1862), (Dover Publications, New York, 1968 (reprint)). The issues which influenced the introduction of old age pensions in Australia were slightly different and involved exciting the sympathy of the populace for "old pioneers" who faced destitution. See Jones MA, *op cit*, p 24.

115 Fraser D, *op cit*, pp 31-55.

century in Australia there had been a very small elderly population and extensive employment opportunities. The ageing of the pioneering generations and the evidence of their increasingly precarious economic circumstances ushered in a new policy.[116] As a complement to pension legislation, the notion of retirement became more formalised and extended to white and blue collar employment.[117] The British Labour Movement embraced the notion of mandatory retirement in the 1920s and 1930s as an industrial benefit.[118] Mandatory retirement was institutionalised in the United Kingdom in 1948 with the enactment of the *National Insurance Act* 1948.[119] The entrenchment of mandatory retirement and the development of social welfare structures has spawned a school of critical social research which maintains that mandatory retirement and pension schemes have had the negative effects of creating social dependency and reducing individual freedom.[120] It is significant that the results of the research begin to appear in the 1980s at a time when the movement for the protection of individual rights by means of anti-discrimination legislation had gained significant momentum and was extending its influence to new grounds of discrimination.[121] It has been suggested that alarmist reactions to the potential impact of demographic change seem to recur periodically[122] and it may be that the social dependency movement can be seen in this context. Already temporising academic influences[123] and rival approaches[124] have emerged. However there is still

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116 See *supra* n 109.

117 See Le Gros Clark F *Work, Age and Leisure* (Joseph, London, 1966) pp 21-22.

118 MacNichol J and Blaikie A "The Politics of Retirement 1908-1948" in Jeffreys M (ed), *op cit*, p 25.

119 MacNichol J and Blaikie A, *op cit*.

120 See Townsend P in "The Structured Dependency of the Elderly: A Creation of Social Policy in the Twentieth Century" (1981) 1 *Ageing and Society* 5; "Ageism and Social Policy" in Phillipson C and Walker A (eds) *Ageing and Social Policy: A Critical Assessment* (Gower, Aldershot, 1986) pp 15-44; Walker A "Social Policy and Elderly People in Great Britain: The Construction of Dependent Social and Economic Status in Old Age" in Guillemard A-M (ed) *Old Age and the Welfare State* (Sage Publications, London, 1983) p 143; Phillipson C *Capitalism and the Construction of Old Age* (Macmillan, London, 1982).

121 In Australia, Lansbury R surveyed the problem in 1981 in "Older Workers and Retirement" in Howe AL *Towards an Older Australia, op cit*, pp 237-253. The issue of age discrimination in employment in Australia began to be canvassed in the early 1980s in the *Australian Journal on Ageing*. In these articles the authors lamented the lack of empirical evidence. See Kalisch DW and Williams LS "Discrimination in the Labour Force at Older Ages" (1983) 2 *Australian Journal on Ageing* 8 at 15. However, arguably the most concerted efforts to reorient and politicise Australian thinking on age discrimination in employment issues have been by John McCallum and Frank Reid in the second half of the decade. See McCallum J "Lifestyle Implications of Australian Retirement Patterns" (1985) 4 *Australian Journal on Ageing* 9; "A Right to Retire But Not to Work? The Future for Australia's Older Workers" (1986) 21 *Australian Journal of Social Issues* 93; "Australian Mandatory Retirement Challenged" (1990) 2 *Journal of Ageing and Social Policy* 183; Reid F "Age Discrimination and Compulsory Retirement in Australia" (1989) 31 *Journal of Industrial Relations* 169; Kendig H and McCallum J *Grey Policy: Australian Policy for an Ageing Society* (Allen and Unwin, Sydney, 1990).

122 See Thane P "The Debate on the Declining Birth Rate in Britain: The 'Menace' of an Ageing Population, 1920s-1950s" (1990) 5 *Continuity and Change* 283, at 303.

123 See, for example, Hannah L in *Inventing Retirement: The Development of Occupational Pensions in*

a degree of community consternation about issues related to retirement and welfare dependency. In Australia the pattern of earlier retirements[125] which has been emerging in recent decades and the potential this creates for longer term social dependency has been noted with concern.[126] Amongst social welfare scholars it has been suggested that the ready availability of pensions[127] in Australia has created the incentive to retire.[128] This view is yet another, more complicated permutation of the social dependency theory,[129] which also relies on arguments based on a theory of inter generational competition for the welfare dollar.[130]

Conclusion: Current Australian Attitudes: Why human rights and why now?

There are no simple conclusions to be drawn from this wide ranging review of age discrimination policy issues. It is clear that demographic patterns and social welfare models have assisted in a definitive way in the politicisation of age discrimination in government circles for rational economic reasons. However, attempts to clothe this reality in the form and rhetoric of human rights is problematical. The current form of anti-discrimination laws provides ill-fitting protection for the plethora of issues encompassed by age as a ground, as government papers reveal.[131] Despite its legislative history, the form, if not the substance, of the age discrimination provisions in the Commonwealth's *Industrial Relations Act* 1988, is perhaps a more successful statutory adaptation than those pursued by the States. With the exception of the provisions phasing out mandatory retirement in New South Wales,[132] there is

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123— *Continued*
Britain (Cambridge University Press, Cambridge, 1986); Johnson P "The Structured Dependency of the Elderly: A Critical Note" in Jeffreys M (ed), *op cit*, pp 62-68.

124 Daniels N, *op cit*, especially chapter 3; "Justice and Transfers Between Generations" in Johnson P, Conrad C and Thomson D *Workers Versus Pensioners: Intergenerational Justice in an Ageing World* (University of Manchester Press, Manchester, 1989), p 57 ff. Daniels offers an approach to age issues which takes into account the entire lifespan and argues that issues of distributive justice only have meaning in the context of the entire life cycle.

125 Jones B, *op cit*; Encel S, *op cit*, pp 124-125. This pattern has also been repeated in other western countries throughout this century. See Riddle SM "Age, Obsolescence and Unemployment, Older Men in the British Industrial System" (1984) 4 *Ageing and Society* 517; Johnson P "The Employment and Retirement of Older Men in England and Wales, 1881-1981" (1994) 47 *Economic History Review* 106.

126 See Guillemard A-M "The Trend Towards Early Labour Force Withdrawal and the Reorganisation of the Life Course: A Cross-national Analysis" in Johnson P, Conrad C and Thomson D, *op cit*, pp 176-177.

127 Dixon J "The Age Pension: Developments from 1890 to 1978" in Howe AL (ed) *Towards an Older Australia*, *op cit*, p 65.

128 See Jones MA, *op cit*, p 25.

129 Kaplan G, *op cit*, pp 344-352 provides a balanced appraisal of the evidence on this topic.

130 Jones MA, *op cit*, pp 111-121.

131 See, for example, the Attorney General's Department of New South Wales green and white papers on age discrimination, in which a restive balance between youthful and aged concerns is attempted. See *supra* n 45.

132 Part 4E *Anti-Discrimination Act* 1977 (NSW).

no example of legislative attempts to protect the interests of particular disadvantaged age groups. There can be little doubt that the present blanket model for age discrimination protection has the potential to operate as a catalyst for social change,[133] but in view of the complaint-driven scheme, change is unlikely to be systematic and predictable.[134] However, the existence of legislation may provide a de facto stimulus in the community to reassess attitudes and practices based on chronological criteria.

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133 There is evidence that employers have responded to the introduction of age discrimination laws by altering recruitment and work place practices in order to comply with the provisions of the legislation: see Anti-Discrimination Board of New South Wales *Annual Report 1993-1994*, (Anti-Discrimination Board of New South Wales, Sydney, 1995), p 16. However, it is impossible to predict whether changes in practice will presage systemic social change in attitudes to age and ageing. It is clear that in some areas of white collar work, the presence of age discrimination laws is acting as a more powerful stimulus to the revision of work place culture than previous equal opportunity initiatives. For example, see Sheehan BA *Redefining a Working Life: Age and Performance in Higher Education* (AVCC Papers No 4), (AVCC, Canberra, 1995).

134 The unpredictability associated with the operation of the legislative schemes is well illustrated by the case of *Christie* v *Qantas Airways* (1995) EOC 92-705. The Australian Industrial Relations Court held that it was not an inherent operational requirement that domestic pilots should be aged under 60 years, but that the difficulties of compliance with multiple foreign regimes dictated that an age of less than 60 years was an inherent occupational requirement for international pilots. The pragmatic basis of this decision is readily intelligible, but the equal opportunity objectives seem to have been obscured.