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No. 47 2001–02

Abolition of Compulsory Age Retirement (Statutory
Officeholders) Bill 2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 47 2001–02

Abolition of Compulsory Age Retirement (Statutory
Officeholders) Bill 2001

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7 September 2001

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Abolition of Compulsory Age Retirement (Statutory Officeholders) Bill 2001

Date Introduced: 29 August 2001

House: House of Representatives

Portfolio: Attorney-General

Commencement: Subject to two exceptions for provisions which will be repealed if other legislation has commenced before this Bill,¹ 28 days after Royal Assent.

Purpose

To abolish compulsory age retirement for a range of Commonwealth statutory officeholders.

Background

According to population forecasts, Australia is expected to experience significant demographic changes over the next few decades, particularly a growth in the number of aged persons as a percentage of the general population. The Minister for Aged Care, the Hon. Bronwyn Bishop, recently noted that:²

In 1976 Australia had 1.3 million people over 65 years or 9 per cent of the total population. Today there are 2.3 million people over the age of 65 years or 12 per cent of the total population. By 2016 there will be 3.5 million or 16 per cent; and by 2051, 6.03 million or over 25 per cent – one-quarter of Australia's population – will be aged over 65.

Among the recommendations made by the OECD to developed nations dealing with the challenges of an ageing population are the removal of early retirement incentives in both public and private sectors, and changing a range of practices that discriminate against mature-age workers, including abolition of compulsory retirement ages.³

All States and Territories in Australia have passed laws outlawing various forms of discrimination including age discrimination.⁴ Additionally, all States and Territories except the Northern Territory⁵ have removed compulsory age retirement provisions from their public service legislation.

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The Commonwealth government has not legislated comprehensively in the field of age discrimination. Its specific discrimination laws are confined to discrimination on the grounds of race, sex and disability.⁶ In part this reluctance may be attributable to doubts about the Commonwealth's constitutional power to enact laws specifically prohibiting age discrimination.⁷ Nevertheless, over the past decade the Commonwealth has slowly been moving towards removing age-based discrimination in employment from Commonwealth laws.

The first step was taken in 1993, when the *Industrial Relations Reform Act 1993* was passed. The Act, which came into effect on 30 March 1994, established minimum national standards in relation to the termination of employment, including prohibiting termination of employment on the ground of age.⁸ This prohibition applies to most employment relations and not only to workers covered by federal awards.

From 5 December 1999, when the new *Public Service Act 1999* commenced operation, compulsory retirement on the ground of age was abolished for Commonwealth public servants employed under that Act.

This Bill proposes also to abolish compulsory age retirement for a range of employees who hold appointments to positions created under a number of Commonwealth laws. Current provisions prevent the appointment of people once they reach a certain age, usually 65, or require them to retire from existing appointments at that age.

The removal of compulsory retirement provisions affecting statutory officeholders has been justified on the basis of the need to retain the expertise and experience of older Australians in the workforce. The Government claims the amendments 'will assist in changing attitudes about the abilities of older workers and will remove artificial and archaic boundaries between work and retirement.'⁹

The need for federal action on age discrimination has been noted for some considerable time. As the then Human Rights Commissioner, Chris Sidoti, commented in launching the report *Age Matters: A Report on Age Discrimination* in July 2000:¹⁰

For over 10 years federal governments of both political persuasions have talked about this but done little. The situation now is that the Commonwealth lags far behind every state and territory in protecting people from discrimination based on age. it's time to catch up.

Relevant international instruments

Australia is a party to a number of international instruments which are relevant to the issue of age discrimination in general and compulsory age retirement in particular. None expressly prohibits discrimination on the basis of age, although they contain general obligations of non-discrimination, including in relation to employment.

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International human rights instruments

The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which are the foundational international treaties on human rights, do not specifically refer to 'age' as a ground upon which discrimination is to be prohibited. However, countries are required to respect and guarantee the equal enjoyment of the rights contained in the covenants (including the right to work and the right to appropriate promotion in employment)¹¹ without discrimination of any kind, including on grounds of 'race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status'.¹² It is likely, although not yet entirely clear, that 'other status' would be taken to include 'age'.

Additionally, Article 26 of the ICCPR requires countries through their laws to:

prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Again, the reference to 'other status' may provide a foundation for legislation guaranteeing equal protection of the law to all persons regardless of age.

ILO Conventions

Subclause 2(b) of *ILO Recommendation (No.111) Concerning Discrimination in Respect of Employment and Occupation* states that national policies should be developed, consistent with national conditions and practice, which prevent discrimination in employment including in relation to security of employment. Subclause 2(c) of this Recommendation specifically provides that "government agencies should apply non-discriminatory employment policies in all their activities." This Recommendation accompanies *ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*. Although the definition of 'discrimination' in Convention No 111 does not specifically refer to 'age' as a prohibited ground of discrimination, article 5 notes that special measures designed to provide special protection for people by reason of attributes which include 'age' do not constitute discrimination.

Article 5 of *ILO Convention (No.158) Concerning Termination of Employment at the Initiative of the Employer*¹³ lists reasons which do not constitute valid reasons for termination of employment. The reasons listed do not, however, include age. Clause 5 of the accompanying recommendation, *ILO Recommendation (No.166) Concerning Termination of Employment at the Initiative of the Employer*, states that in addition to the grounds listed in article 5 of Convention No 158, "age, subject to national law and practice regarding retirement" should also not constitute a valid reason for termination.

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Compulsory retirement ages not affected

The Bill does not abolish all compulsory retirement ages in Commonwealth legislation.

Compulsory retirement ages will continue to apply to serving Australian Defence Force personnel. The age of retirement varies, and is generally lower for women than for men, and for lower-ranking officers than for more senior officers.¹⁴ The Attorney-General justifies the retention of these restrictions on the basis that they ‘are primarily based on considerations of operational effectiveness.’¹⁵

Justices of the High Court and other federal courts (such as the Federal Court, the Family Court and the Federal Magistrates’ Court) will continue to be required to retire at the age of 70. This limitation is contained in the Constitution.¹⁶

Similarly, under section 201C of the *Corporations Act 2001*, directors of public companies and their subsidiaries may only hold office until the next Annual General Meeting following the day they turn 72. Persons over 72 may act as directors of public companies and their subsidiaries only if they are appointed by special resolution at an Annual General Meeting of the company, and the notice of the meeting states the person’s age.¹⁷

Main Provisions

Currently, a number of Commonwealth laws provide for the appointment of certain officeholders for fixed terms. Many also provide that these terms cannot extend beyond a compulsory retiring age, which is usually 65, but in some cases is 70. The Bill will abolish provisions mandating compulsory retirement at a certain age for the majority of Commonwealth statutory officeholders.

The abolition of compulsory retirement will apply only to appointments made after the Bill commences (**item 97**). This means that it will not apply to existing statutory officeholders, unless they are appointed for a further term after the Bill commences.

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The following table lists the statutory officeholders whose compulsory retiring ages will be abolished.

Statutory body	Officeholders	Compulsory retiring age	Schedule 1 item no
	Director of Chemicals Notification and Assessment	65	63
	Director of War Graves	65	95
	Judge Advocate General Deputy Judge Advocates General	65	38
	Native Title Registrar	65	76
	Special Prosecutors	65	87, 88
Aboriginal and Torres Strait Islander Commission	Chief Executive Officer Director of Evaluation and Audit General Manager, Torres Strait Regional Authority Indigenous Business Australia Director Indigenous Business Australia General Manager	65	1 2 3 4 5
Administrative Appeals Tribunal	Full-time Deputy Presidents who are not Judges	70	6, 7
Administrative Appeals Tribunal	Full-time senior members Full-time members Registrar	65	6, 7 6, 7 8
Australia Council	Full-time Chairperson General Manager	65	9 10
Australian Bureau of Statistics	Australian Statistician	65	11
Australian Centre for International Agricultural Research	Director	65	13
Australian Customs Service	Chief Executive Officer	65	37
Australian Electoral Commission	Electoral Commissioner Deputy Electoral Commissioner State Australian Electoral Officers	65	35
Australian Film, Television and Radio School	Director or Acting Director	70	14
Australian Industrial Registry	Industrial Registrar	65	96

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Australian Institute of Aboriginal and Torres Strait Islander Studies	Principal	65	15
Australian Institute of Criminology	Director	65	36
Australian Institute of Family Studies	Director	65	56
Australian Institute of Health and Welfare	Full-time members	65	16
Australian Institute of Marine Science	Director or Acting Director	65	17, 18, 19
Australian Institute of Sport	Director	65	28
Australian Maritime College	Principal	65	65, 66
Australian National Maritime Museum	Director	65	20
Australian Nuclear Science and Technology Organisation	Full-Time Board members Executive Director	65	21 22
Australian Safeguards Office	Director of Safeguards	65	77
Australian Securities and Investments Commission	Members	65	23
Australian Security Intelligence Organisation	Director-General	65	25, 26
Australian Sports Commission	Executive Director	65	27
Australian Sports Drug Agency	Chief Executive	65	29
Australian Taxation Office	Commissioner of Taxation Second Commissioners of Taxation	65	90, 91
Australian Tourist Commission	Managing Director	65	30, 31
Australian Trade Commission	Managing Director Deputy Managing Director	65	32
Australian War Memorial	Director	65	33
Australian Wine and Brandy Corporation	Members	65	34
Commissioner for Superannuation	Commissioner	65	89
Commonwealth Ombudsman	Ombudsman	65	80

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Commonwealth Scientific Industrial Research Organisation	Chief Executive	65	85
Corporations and Securities Panel	Members	65	24
Defence Force Retirement Death Benefits Authority	Deputy Chairman Members Deputies of members	65	39 39 40
Defence Housing Authority	Appointed members Managing Director	65	41, 42 43, 44
Development Allowance Authority	Development Allowance Authority (single person statutory office)	65	45
Director of Public Prosecutions	Director Associate Director	65	46 47
Equal Opportunity for Women in the Workplace Agency	Director	65	48
Export Finance and Insurance Corporation Board	Appointed members Managing Director Deputy Managing Director	65	49, 50 51 51
Family Court of Australia	Judicial Registrars Chief Executive Officer	65	52, 53, 54 55
Federal Court of Australia	Registrar Full-time native title assessors	65	57 58
Great Barrier Reef Marine Park Authority	Members	65	59, 60
Health Insurance Commission	Managing Director	65	61
High Court of Australia	Chief Executive and Principal Registrar	65	62
Inspector-General of Intelligence and Security	Inspector-General	65	64
National Capital Authority	Full-time members	65	12
National Crime Authority	Members	65	67
National Gallery of Australia	Director	65	68
National Institute of Occupational Health and Safety	Director	65	75
National Library of Australia	Director-General	65	71

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National Museum of Australia	Director	65	73
National Occupational Health and Safety Commission	Chief Executive Officer	65	74
National Standards Commission	Executive Director	65	72
Office of National Assessments	Director-General	65	78, 79
Office of the Privacy Commissioner	Privacy Commissioner	65	82, 83
Officer Parliamentary Counsel	First Parliamentary Counsel Second Parliamentary Counsel	65	81
Privacy Advisory Committee	Members	65	84
Private Health Insurance Administration Council	Chief Executive Officer	65	69, 70
Repatriation Commission	Commissioners	65	94
Snowy Mountains Hydro-Electric Authority	Commissioner Associate Commissioners	65	86
Veterans' Review Board	Full-time members	65	92, 93

Endnotes

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- 1 **Items 6, 7 and 8** repeal sections of the *Administrative Appeals Tribunal Act 1975*. If the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2001 has been passed and section 4 has commenced, this Act will already have been repealed, so items 6, 7 and 8 will be redundant. **Item 86** repeals subsection 9(4) of the *Snowy Mountains Hydro-Electric Power Act 1949*. If section 59 of the *Snowy Hydro Corporatisation Act 1997* has commenced, this Act will already have been repealed, so item 86 will be redundant.
 - 2 Bronwyn Bishop, 'Population ageing and the economy', *CEDA Bulletin*, July 2001, p. 42.
 - 3 Bronwyn Bishop, 'Population ageing and the economy', *CEDA Bulletin*, July 2001, p. 44.
 - 4 *Discrimination Act 1991* (ACT), paragraph 7(1)(ib); *Anti-Discrimination Act 1977* (NSW) Part 4G; *Anti-Discrimination Act 1992* (NT), paragraph 19(1)(d); *Anti-Discrimination Act 1991* (Qld), paragraph 7(1)(f); *Equal Opportunity Act 1984* (SA), Part VA; *Anti-Discrimination Act 1998* (Tas), paragraph 16(b); *Equal Opportunity Act 1995* (Vic), paragraph 6(a); *Equal Opportunity Act 1984* (WA), section 4.

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- 5 *Public Sector Employment and Management Act 1993* (NT), section 36. Tasmania only recently removed its compulsory age retirement provision, with the enactment of the *State Service Act 2000*.
- 6 *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*.
- 7 The Commonwealth has no direct constitutional power to legislate with respect to human rights issues. The external affairs power, section 51(xxix), gives the Commonwealth the ability to implement international treaties and instruments to which Australia is a party. However, there is as yet no international instrument specifically covering age discrimination, although some instruments may be interpreted as including the matter.
- 8 This was originally contained in section 170DF of the *Industrial Relations Act 1988*. Currently, this prohibition is contained in paragraph 170CK(2)(f) of the *Workplace Relations Act 1996*.
- 9 The Hon. Daryl Williams QC MP, Second reading speech on the Abolition of Compulsory Age Retirement (Statutory Officeholders) Bill 2001, House of Representatives, *Hansard*, p. 30231, 29 August 2001.
- 10 Chris Sidoti, Human Rights Commissioner, 'Launch of Age Matters: A report on Age Discrimination', Speech to the Council on the Ageing (Australia), Melbourne, 18 July 2000, at http://www.hreoc.gov.au/speeches/human_rights/launch_age_matters.html (6 September 2001).
- 11 Articles 6 and 7 of the ICESCR.
- 12 Article 2 of the ICCPR, Article 2 of the ICESCR.
- 13 The text of this Convention, but not the accompanying recommendation, is annexed as Schedule 10 to the *Workplace Relations Act 1996*.
- 14 Regulation 21 and Schedule 3 of the Defence Forces Retirement Benefits Regulations. See section 17 of the *Naval Defence Act 1910*, section 27 of the *Defence Act 1903*.
- 15 The Hon. Daryl Williams QC MP, Second reading speech on the Abolition of Compulsory Age Retirement (Statutory Officeholders) Bill 2001, House of Representatives, *Hansard*, p. 30231, 29 August 2001.
- 16 Section 72. Under that section, the Parliament has power to make a law requiring judges of federal courts other than the High Court to retire at an age less than 70, but not to extend the age requirement or abolish it altogether. This can only be done by constitutional referendum.
- 17 Subsections 201C(8) and (9) of the *Corporations Act 2001*. It has previously been held that this restriction may be overridden by State or Territory legislation that clearly expresses such an intention. In *Castle Hill RSL Ltd v O'Brien* (1994) 12 ACLC 984 the Supreme Court of NSW considered section 73A of the *Registered Clubs Act 1976* (NSW), which provided that nothing in the Companies Code (a predecessor of the *Corporations Act 2001*) prevented a person over the age of 72 becoming or being a member of the governing body of a registered club. The Court held that that permission prevailed over the restriction (corresponding to the current section 201C) in the Companies Code. It was not necessary to decide whether State anti-discrimination legislation would have a similar effect.

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However, because the *Corporations Act 2001* is a Commonwealth statute, in contrast to the State Companies Codes, it may be doubted whether that reasoning would be applicable to the current age restriction on directors. *Castle Hill RSL Ltd v O'Brien* (1994) 12 ACLC 984 concerned a difference between two New South Wales provisions, one applicable to public companies and the other to registered clubs. Now that the public company provision is contained in the Commonwealth *Corporations Act 2001*, section 109 of the Constitution would apply to any inconsistency. That section provides that Commonwealth laws prevail over inconsistent State laws. However, the operation of section 109 is modified by two provisions of the *Corporations Act 2001*.

Section 5F of the *Corporations Act 2001* permits a State or Territory to declare a matter to be an 'excluded matter', in which case all or some specified provisions of the *Corporations Act 2001* will not apply to that matter. This power could be used to preserve provisions permitting directors to continue to serve beyond the age of 72.

Section 5G of the *Corporations Act 2001* also contains complex rules governing possible inconsistencies between Commonwealth and State or Territory laws.

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