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THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AGE DISCRIMINATION BILL 2003

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

AGE DISCRIMINATION BILL 2003

OUTLINE

This Bill prohibits discrimination on the basis of age in key areas of public life including:

- Employment;
- Education;
- Access to premises;
- Access to goods, services and facilities;
- Accommodation;
- Land;
- Administration of Commonwealth laws and programs; and
- Requests for information.

The Bill also provides a balanced package of exemptions including:

- Positive discrimination;
- Superannuation, insurance and credit;
- Pensions, allowances and benefits;
- Acts done in compliance with specified Commonwealth laws;
- Acts done in compliance with State and Territory laws; and
- Acts done in compliance with awards and agreements.

The Bill binds the States and Territories.

FINANCIAL IMPACT STATEMENT

While these amendments may have cost implications for the Human Rights and Equal Opportunity Commission, these are not expected to be significant.

Impacts on Government agencies from the legislation are difficult to predict and based on existing experiences in States which have legislation of this sort are not expected to be significant and should occur over time.

REGULATION IMPACT STATEMENT (RIS)

The following information is provided in accordance with the Guidelines issued by the Office of Regulation Review, Productivity Commission.

INTRODUCTION

The Government condemns discrimination in all its forms. The Government recognises the need for Australians of all ages to be able to participate fully in our society, particularly in light of the fiscal and economic impact of the ageing population. In light of these concerns the Government made a commitment in its 2001 election statement *Better Law More Options* to develop age discrimination legislation.

Discrimination on the basis of age has become an increasingly significant problem for older Australians, as well as for children and young people. However, age discrimination is not currently prohibited by Commonwealth legislation. Other kinds of discrimination are already unlawful under the existing suite of Commonwealth anti-discrimination laws, namely, the *Racial Discrimination Act 1975* (Racial Discrimination Act), the *Sex Discrimination Act 1984* (Sex Discrimination Act) and the *Disability Discrimination Act 1992* (Disability Discrimination Act). While age discrimination has been prohibited by State and Territory anti-discrimination laws for a number of years, the Government's commitment to develop Commonwealth laws signals the level of national importance of preventing age discrimination.

A key aspect of this commitment was that the Government would work with business and the community to ensure that the legislation strikes the right balance between the need to eliminate unfair discrimination on the basis of age and the need to ensure sufficient flexibility to allow for situations where age requirements have particular policy significance. In its election commitment the Government identified youth wages, job training and social security as areas in relation to which the legislation would make allowances. As discussed below, the Attorney-General's Department has conducted detailed consultations with business and the community, including the Core Consultative Group (CCG) which was established by the Attorney-General to consider proposals for age discrimination legislation (see 'Consultation' below).

The CCG's comprehensive proposals for age discrimination legislation are set out in an Information Paper at Attachment E to the covering Cabinet submission of this RIS.

The proposed new age discrimination legislation will be an integral part of a wide range of key Government policy priorities to respond to the ageing workforce and population, and the important social and economic contribution that older and younger Australians make to the community. These priorities include: the *National Strategy for an Ageing Australia*; the issues arising from the Treasurer's *Intergenerational Report*; the development of government policy in the area of demographics, continuing welfare reform, and the new Ministerial portfolio responsibilities for Ageing, and for Children and Youth Affairs.

Overview of key features of anti-discrimination laws

Over the last two decades, anti-discrimination laws have become an accepted part of the legal landscape. The existing suite of Commonwealth, State and Territory anti-discrimination laws have many common features. Generally, such laws:

- cover both ‘direct’ and ‘indirect’ discrimination (definitions of these terms are set out below),
- prohibit discrimination on certain grounds (for example, race, sex, disability, age) in key areas of public life (such as work, access to goods, services and facilities, access to premises, places and transport, and education),
- provide for a range of exemptions to ensure that the legislation strikes the right balance between preventing inappropriate discrimination on the one hand while making allowances for legitimate distinctions on the other hand (for example, discrimination in employment is prohibited subject to exemptions for conditions that are inherent requirements of the particular job),
- emphasise public awareness and education as critical elements in overcoming discrimination,
- confer functions on the relevant government human rights institution to inquire into possible infringements, a well as policy development and education/awareness-raising functions (for example, the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) and State and Territory anti-discrimination boards or equal opportunity tribunals), and
- include provisions which deal with the interaction between Commonwealth anti-discrimination laws on the one hand and State and Territory anti-discrimination laws on the other hand.

Direct discrimination occurs where, because of a person’s age, the discriminator treats the aggrieved person less favourably than they would treat a person of a different age. Indirect discrimination occurs where a person of a particular age is disadvantaged because the person cannot meet a condition, requirement or practice, that is neutral as to age on its face, but is more difficult for people of that age to meet than people of another age. In such situations, the imposition of an apparently neutral condition, requirement or practice has, or is likely to have, the effect of unfairly disadvantaging people of the same age as the aggrieved person. However, if such a condition is reasonable in the circumstances it will not be unlawful discrimination.

As noted above, anti-discrimination laws prohibit discrimination on certain grounds in certain specific areas of public life. The range of areas that may be covered by Commonwealth age discrimination legislation is limited by the Constitution.

The Age Discrimination Bill 2003 covers the following areas:

- Work — including recruitment, training, promotion, redundancy/retirement.
- Access to goods, services and facilities — which would cover specific areas such as superannuation, insurance, financial services and health services.

- Access to premises including places and transport — discrimination when allowing or refusing access, when providing such access or in the imposition of terms and conditions on access.
- Commonwealth laws and programs — the performance of functions or exercise of power under a Commonwealth law or for the purposes of a Commonwealth program.
- Education — discrimination by educational authorities in relation to admission of students, access to benefits, or expulsion of students.
- Accommodation — discrimination in providing, renewing or refusing access to accommodation, limiting access to benefits or evicting from accommodation.
- Land — discrimination in refusing or failing to dispose of an estate or interest in land, or in the terms or conditions on which an estate or interest in land is offered.
- Requests for information on which unlawful age discrimination might be based.

The nature and scope of exemptions to prohibitions of discrimination is a key area of consideration in the development of any new anti-discrimination laws. The nature and scope of exemptions for the proposed age discrimination legislation have been considered in detail by the CCG and are discussed in detail under Option 3 below.

ISSUES

Age discrimination is clearly a problem for both younger and older Australians. In relation to older Australians, in particular, many recent reports have emphasised the negative consequences of age discrimination on the wellbeing of older Australians and the broader consequences for the community. There is also evidence that the ageing of Australia's population will lead to an increase in the problem of age discrimination if Government action is not taken to address this issue. Government action is needed to address the generally unfounded negative stereotypes that employers and policy makers may have about both younger and older Australians, which limit their contribution to the community and the economy. These issues are discussed in detail below.

Need for age discrimination legislation

Issues arising from a number of recent studies and reports demonstrate the need for age discrimination legislation and the negative consequences of age discrimination on both the economy and on the financial, health and psychological wellbeing of individuals. Key recent studies and reports include the following:

- the Treasurer's *Intergenerational Report*, 2002-03 Budget Paper No. 5 (the *Intergenerational Report*),
- the House of Representatives Standing Committee on Employment, Education and Workplace Relations Report, *Age Counts – An Inquiry into issues specific to mature-age workers*, June 2002 (the Nelson report),
- *Population Ageing and the Economy* Jan 2001, by Access Economics Pty Ltd (the Access Economics Report),
- the report by HREOC, *Age Matters: A Report on Age Discrimination*,
- the Social Policy Research Centre *The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry* (December 2001) (The Social Policy Research Centre report),
- the *Political Declaration* and the *Madrid International Plan of Action 2002*, adopted by the 2nd World Assembly on Ageing,
- Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, August 1998,
- *Detailed Regulation Impact Assessment (DRIA)* United Kingdom Department of Trade and Industry, regarding implementation of Council of the European Union Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *Official Journal L 303, 02/12/2000 P. 0016 - 0022*

In April 1999, HREOC commenced an inquiry into the need for federal age discrimination legislation. HREOC's findings and recommendations are contained in

its report *Age Matters*. The *Age Matters* report found age discrimination is a significant problem in a range of areas including employment, income support, immigration, health care, accommodation, insurance, financial services and concessions. The Commission found that age discrimination is a major barrier to the full participation of both older and younger people in Australian society. The *Age Matters* report concluded that federal laws were inadequate, and that the Commonwealth should 'enact a more rigorous and effective legal regime to prevent and remedy acts of discrimination based on age'. HREOC suggested options for achieving this, which focus on federal legislation to prohibit age discrimination. The Age Discrimination Bill 2003 will broadly implement this key recommendation.

The Nelson report, *Age Counts*, found that unemployment for older workers, which is caused in many cases by age discrimination, is psychologically and financially devastating (para 2.68). Loss of self esteem and confidence in particular were found to be more pronounced in older unemployed persons, leading to a range of serious general health problems for the individuals and their families. (see for eg para 2.42).

Age discrimination against older workers that results in unemployment has a broad negative impact that extends far beyond the individual. The Social Policy Research Centre report found that 'the loss of employment causes serious emotional, financial and social stress to individuals, families and the wider community' (p19). The report found that the social and economic implications of the exclusion and marginalisation of older workers from the labour market are wide-ranging. Economic and social effects include increases in health and welfare costs, the possibility of poverty among older persons, and exclusion from the community. The Social Policy Research Centre report also noted that the personal impact of unemployment for older persons is often more severe than for young people and may have debilitating psychological and health effects (SPRC, 11). In this regard, the Social Policy Research Centre report cited findings of the Senate Employment, Education and Training References Committee (1995) *Report on the Inquiry into Long Term Unemployment*, Commonwealth of Australia, Canberra.; 2000.

Age discrimination has particularly serious consequences for older people attempting to re-enter the job market. Older males who lose their jobs appear to have great difficulty finding another job. They are under-represented in new hirings and are at great risk of entering long-term unemployment or of withdrawing from the labour force, usually into early retirement (Organisation for Economic Co-operation and Development, (1999) *OECD Economic Surveys 1998-99 Australia*, OECD, Paris.136).

Addressing the decline in labour force participation is an important priority for Government. The *Intergenerational Report* found that higher full-time labour force participation of older men would reduce projected government spending by 0.25 per cent of GDP by 2041-42. This reduced spending would be mainly in health and Age Pensions. The *Intergenerational Report* stated that key priorities for ensuring fiscal sustainability should include preserving a well-targeted social safety net that encourages working-age people to find jobs and remain employed; and encouraging mature age participation in the labour force. The *Intergenerational Report* predicted a decrease in labour force participation, mainly reflecting Australia's ageing population.

The Access Economics Report noted that, given the already high workforce participation by people aged 20–54, the only avenue for ensuring sufficient supply of labour is to encourage higher participation by the population aged 55 –70. There is little scope to increase the already-high workforce participation of those aged less than 55. By contrast, the population aged 55 –70 will be a massive untapped source of productive capacity enabling the economy to continue growing, providing wealth and prosperity well into coming decades. The Report notes that, unless employers change negative attitudes about older workers, an alarming potential slowdown in working age population growth looms. The Report found that increased workforce participation by older workers would have a positive effect on the economy by increasing national income and reducing the costs to government of ageing. The Report goes on to note that “[t]here is much to be gained from initiatives to encourage increased employment and workforce participation of older Australians. A modest and eminently achievable increase in workforce participation of 10 percentage points by Australians aged 55 –70 would largely cancel out any negative effects of an ageing population.”

The Access Economics Report also considers the impact of increased workforce participation on growth, noting that “[w]ages earned and demand generated by working older Australians (who would have been retired under current trends) increases the growth rate of the economy, generating more jobs – enough jobs in fact to employ all the working older Australians and to reduce unemployment among younger Australians. The older Australians who would keep working would also keep paying taxes instead of receiving pensions (... increasing revenues and reducing outlays). The impact on the public sector balance is significant.”

The negative consequences of age discrimination have been noted by HREOC on a number of occasions since its *Age Matters* report. In November 2001, HREOC stated that older workers form a disproportionately high percentage of the long-term unemployed. HREOC quoted recent OECD figures that show ‘Australia has the highest unemployment rate among 55-59 year old men of any OECD country. Forty six per cent of people in the 50-64 age group do not have paid employment. Thirty three per cent rely on some form of social security payment.’
(http://www.hreoc.gov.au/media_releases/op_ed/age.html)

Age discrimination is an issue not only of concern to Australia but also of concern to the international community. Australia participated in the Second World Assembly on Ageing which was held in Madrid from 8–12 April 2002. The outcomes of the Assembly are aimed at addressing a range of issues faced by older persons, including discrimination on the basis of age. The Second World Assembly on Ageing adopted the *Political Declaration* and the *Madrid International Plan of Action 2002*, which address various legal, social and economic aspects of ageing.

Article 5 of the *Political Declaration* declares that, ‘we commit ourselves to eliminate all forms of discrimination, including age discrimination.’ This article strongly states the need to strengthen the rule of law, to promote and protect human rights, and to recognise the right of older persons to ‘fulfilment, health, security and active participation in the economic, social, cultural and political life of their societies’. The *Plan of Action* includes a number of proposed measures consistent with the elimination of age discrimination against older persons.

The Second World Assembly on Ageing's *Political Declaration* was premised on the recognition of the negative consequences of age discrimination and the need, on a global level, to work to prohibit age discrimination to ensure the full and active participation in public life by older persons.

The Joint Standing Committee on Treaties (JSCOT) report, *United Nations Convention on the Rights of the Child (CROC)* was tabled in August 1998. It noted evidence submitted to it relating to discrimination against children in a range of areas of public life. The JSCOT report on CROC also noted that it is not unlawful to discriminate on the ground of age at the federal level. JSCOT recommended (Rec.9) that the Standing Committee of Attorneys-General review legislation "to ensure that there is no exploitation of children on the basis of age." The Report noted that the Government had made a commitment to develop new legislation to prohibit discrimination on the basis of age which would protect Australians of all ages, including children and young people, from age discrimination in a range of areas of public life.

Ageing of the population and increases in age discrimination

Age discrimination is already a significant problem. The HREOC Report, *Age Matters*, stated that 'in many cases older workers are able to identify clearly that their age is the primary reason they failed to obtain employment, promotion or training' (p11).

Under State and Territory anti-discrimination laws, which make age discrimination unlawful, complaints of age discrimination constitute a significant percentage of the total number of complaints under all possible grounds of discrimination. (see [Annexure A](#)).

In 2000-2001, age discrimination was the fourth most common ground of complaint to the NSW Anti-discrimination Board, after race, sex and disability and comprised 9% of complaints. (<http://www.lawlink.nsw.gov.au/adb.nsf/pages/ar00-01table1>)

The *Intergenerational Report* shows that the ageing of the population will dramatically increase the number of older people, with significant implications for the economy. While the total population of labour force age is projected to grow by just 14 per cent, the number of people aged 55 to 64 is projected to increase by more than 50 per cent over the next two decades. This is expected to be the fastest growing group of labour force age (p22). As discussed above, people in older age groups commonly experience age discrimination, preventing them from finding and keeping employment. Such figures show that the proportion of the population that experiences age discrimination in employment is likely to dramatically increase unless such discrimination is outlawed.

The *Intergenerational Report* concludes that an increase in the labour force participation of older workers (or any group of workers) would decrease future fiscal pressures because of the reduced need for income support and increases GDP. The ageing of Australia's population suggests that the costs of age discrimination may increase in the decades ahead if nothing is done.

In addition to employment, the ageing population will clearly have an impact in other areas of public life. In particular, older persons will represent a much greater percentage of people wanting to access goods and services. The barriers that negative stereotypes based on age create will be an increasingly significant problem. The Treasurer's *Intergenerational Report* noted that in 2002, the proportion of people aged over 65 to people of traditional labour force age, (15 to 64) was 19 per cent. This is projected to rise to almost 41 per cent by 2042 (p23).

The 2001 Report *Population Ageing and the Economy* prepared for the Department of Health and Aged Care by Access Economics Pty Ltd (the Access Economics Report) found that the over 55 age group already accounts for 25% of all disposable income (p54). The Access Economics report estimates that this age group will account for more than half the growth in retail spending in many categories in the next decade (p49-51). A consequence of this growth will be that businesses will be faced more often with situations where discrimination against older persons can occur – both in terms of the way their products are created and marketed, and the way retail outlets provide service to older customers. (see p51).

The growth in retail spending by the over 55 age group will also impact on other areas of public life. For example, in the next decade, over 55s will account for 49% of the total growth in holiday spending, which will dramatically increase the degree to which older people will need to access accommodation, premises, places and transport without facing age discrimination (p62).

Why is Government action needed?

Both the *Age Counts* and *Age Matters* reports found that age discrimination against older workers is prevalent and caused by 'negative stereotyping' of older workers (AC para 3.111). Common perceptions found were that older workers had out-dated skills, were hard to train (para 3.109), were inflexible and unwilling to change (AC 3.117), and were lacking in technological experience (AC 3.119). However, the report cited findings that these perceptions are unfounded, from studies such as the Drake Executive Survey in October 1999 (submission 165) (AC para 3.117) (see AM p12).

The Access Economics Report found that negative stereotypes often associated with mature age workers are accepted all too readily by many employees with little regard to the findings of current research.

Studies released after the *Age Counts* report have also found that age discrimination in employment is both widespread and caused by employer misconceptions about older workers. For example, the Social Policy Research Centre Report found that 'employers actually often prefer qualities assumed to be part of the negative stereotype of older workers. Despite their reputation for favouring younger, risk-taking innovators, the study revealed a preference for a diverse workforce of intelligent, reliable, team workers with industry rather than computing experience'.(vii)

While employment issues have been the focus of most of the reports discussed above, discrimination in other areas is also of significance. See, in particular, the statistics at

Annexure A on age discrimination complaints under State and Territory age discrimination laws. It can be seen from the experience of State and Territory laws that the most complaints about age discrimination are made in relation to employment matters. However, the second highest number of complaints under State and Territory age discrimination laws are made in relation to the provision of goods and services.

These problems have shown no sign of abating in the absence of Government action.

OBJECTIVES

There are several objectives of Government action to prevent age discrimination. A key objective is to promote attitudinal change across society. This attitudinal change is needed so that people are judged on their actual capacity rather than age being used as a blunt proxy for capacity. Attitudinal change is also needed so that people are not unfairly excluded from access to the whole range of social goods and activities. A specific objective flowing from this general objective is to reduce the incidence of discrimination in the workplace. Given the ageing of Australia's population, the promotion of the mature age workforce is a priority for the Government.

The experience of similar types of legislation in Australia and abroad shows that the desired changes take a long time — hence the objectives need to be seen as long term goals.

Commonwealth Government action is required despite the existence of State and Territory age discrimination legislation. Given the Commonwealth Government's commitment to ensuring that older and younger Australians can participate fully in public life, it is important that the Commonwealth Government take a national leadership role to prohibit age discrimination. The increased profile and public awareness flowing from the enactment of Commonwealth age discrimination legislation will promote attitudinal change throughout the community about the capacity of older and younger Australians.

OPTIONS

There are a variety of possible options to address the problems identified. Three viable options have been identified and are discussed below. The first option is that the status quo could be maintained. A second option is to take a self-regulatory approach which could involve a voluntary code of conduct for industry and business. The third option is the introduction of a new piece of Commonwealth anti-discrimination legislation.

OPTION ONE: RETAIN STATUS QUO

As noted above, there is already age discrimination legislation in all the States and Territories. Also, age discrimination complaints in relation to employment can be made under the Commonwealth HREOC Act, although without access to any binding remedy.

However, there are gaps in the coverage of the existing State and Territory anti-discrimination laws. They do not cover Commonwealth laws, employment in the Commonwealth public sector or acts done under Commonwealth laws and programs.

Commonwealth Government action is also required to strengthen the limited provisions for age discrimination complaints that are currently in Commonwealth legislation. Under the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act), individuals can make complaints to HREOC about age discrimination in employment only. In the event that the complaint cannot be conciliated, the person making the complaint cannot take their complaint to a court for resolution. If an age discrimination complaint cannot be conciliated under the HREOC Act, HREOC prepares a report of the matter and submits it to the Attorney-General for tabling in Parliament. Although this approach draws public attention to matters of age discrimination, complainants have no legal rights to seek a remedy, such as exists in relation to discrimination on the grounds of sex, race, or disability.

The absence of national age discrimination legislation also means that age discrimination has a lower profile and may be perceived as less important than other forms of discrimination.

As such there are significant gaps in the coverage of existing Commonwealth, State and Territory anti-discrimination laws.

OPTION TWO: SELF-REGULATION

The second option for addressing the problems of age discrimination identified above is to introduce a self-regulation regime. Examples of self-regulatory arrangements that seek to address age discrimination would include a voluntary code of practice on age diversity in conjunction with an advertising campaign to raise public awareness of the problem and reduce the incidence of negative stereotyping.

Anti-discrimination laws have become an accepted part of the legal landscape. In part, these laws are a response to the failure of non-legislative means to address discrimination in key areas of public life. Anti-discrimination laws not only provide complainants with a legal remedy but also ensures that HREOC plays a key role in educating business and the community through many of its functions. Experience has shown that in the absence of anti-discrimination laws, the provision of information only and improved awareness of the value of older workers would be insufficient to address the problems identified at the start of the RIS.

OPTION THREE: INTRODUCTION OF COMMONWEALTH AGE DISCRIMINATION LEGISLATION

The third option is to introduce comprehensive new Commonwealth age discrimination legislation along the lines of the proposals put forward to Government by the CCG. This proposed new age discrimination legislation would have the same key features as outlined in the dot points under the section ‘Overview of key features of anti-discrimination laws’ above.

Substantial information is provided in relation to Option 3. This reflects the fact that age discrimination legislation has been the subject of intensive consideration by the CCG and there is considerable experience of age discrimination legislation in the States and Territories.

As noted above, the exemptions for anti-discrimination legislation are of critical importance in the development of new anti-discrimination legislation. Exemptions are proposed for certain acts and practices, in recognition of the fact that there are circumstances where distinctions are legitimately based on age. The proposed exemptions, and a statement of the issue being addressed by each such exemption, are set out below. The costs and benefits of the exemptions are analysed for each impact group in the section on “Estimating Costs and Benefits”.

Proposed exemptions:

- inherent requirements of the job

Issue: In consultation, business raised concerns about their exposure to complaints of age discrimination if particular positions required people of a certain age or required the performance of duties that were difficult for people of some ages to perform. There would be costs for business if employers were prevented by the risk of discrimination complaints from employing people who were able to do the work actually required in a position. To address these concerns, it is proposed that the age discrimination legislation include an exemption for age discrimination in relation to employment that is based on the ‘inherent requirements’ of the job. State and Territory anti-discrimination laws all include exemptions of this sort.

- youth wages

Issue: The Government considers that youth wages are necessary to protect young people’s competitive position in the labour market. Employers are also strongly supportive of youth wages. Unless exempt, the payment of different rates to young people could be challenged under the age discrimination legislation. It is proposed that the age discrimination legislation include an exemption for age discrimination in relation to youth wages under awards and agreements. Similar exemptions are in all State and Territory legislation.

- Superannuation, insurance, credit

Issue: Many aspects of superannuation, insurance and credit are informed by age criteria.

Superannuation is fundamentally an age-based system, as it is structured to ensure that retirement savings are accumulated throughout the normal range of working age life and used in the years after retirement. Superannuation funds operate to achieve these outcomes, under a range of requirements and taxation incentives set by Commonwealth legislation concerning superannuation. Distinctions based on age also occur in relation to data which is used in determining life insurance policies and pension payments linked to superannuation.

In relation to insurance, the development of commercially viable insurance products involves the assessment of risks for particular groups of people, an assessment that includes age where relevant. For example, there is data about the risks of driving accidents at different ages that is relevant to the assessment of risk for motor vehicle insurance, and data about the risks of various health problems at

different ages that is relevant to accident insurance and travel insurance. Similar issues arise in relation to the provision of credit. There is data relating to age, among other factors, that is predictive of capacity to repay loans and other forms of credit. There would be costs to the providers of superannuation, insurance, and credit if these age factors could not be included in the provision of these financial services.

To address these concerns, it is proposed that the age discrimination legislation include an exemption for discrimination in superannuation that arises from the requirements of Commonwealth superannuation legislation. In relation to the data about age that is used in superannuation and insurance, such as in relation to life expectancy or risk factors, it is proposed that the age discrimination legislation include an exemption for discrimination that is reasonably based on actuarial or statistical data and other relevant factors. Similarly, in relation to the provision of credit, it is proposed that the age discrimination legislation include an exemption for discrimination that is reasonably based on actuarial or statistical data. All State and Territory anti-discrimination laws provide exemptions for discrimination in superannuation and insurance along these lines. Some also provide exemptions for discrimination in credit along the same lines as proposed for the Commonwealth legislation.

- health

Issue: Age is sometimes relevant to decisions or practices in the health field. For example, clinical evidence about the safety and effectiveness of particular treatments may only be available for some age groups. People of some ages may be at more risk of health complications if they contract certain diseases than people of other ages. Many Commonwealth health programs include age criteria, such as subsidising certain pharmaceuticals for particular age groups or offering free screening for, or immunisation against, certain health conditions for particular age groups. Age may also be used as a legitimate factor in individual clinical decisions, for example where a health practitioner knows that people of the patient's age are more at risk in certain surgical procedures or have greater or lesser prospects of benefiting from certain treatment.

Another area where age is significant is that of health insurance. As discussed above in relation to insurance generally, it is proposed that discrimination that arises from reasonable reliance on actuarial and statistical data will be exempt. This will exempt such age-based distinctions in health-related insurance products such as the medical expenses component of travel insurance. However, in relation to health insurance per se, fee structures are significantly influenced by public policy considerations other than simple risk profiling, in particular the need to keep health insurance premiums affordable and to maintain a high level of health insurance in the population.

Two policies that seek to achieve these aims are Community Rating and Lifetime Health Cover. Community Rating seeks to remove the effect that age-based risk factors would otherwise have on insurance premiums and keep health insurance affordable and accessible for all. The different health needs of different age groups, if applied to the fee structure of health insurance, would give rise to

significant premium differentials between younger and older people, potentially making health insurance unaffordable for most older people.

Similarly, the Lifetime Health Cover requirements are determined in accordance with public policy considerations in order to keep premiums affordable for all by creating a broad pool of insured people. Although the requirements of Lifetime Health Cover are related to the age at which health insurance is taken out, this goes to the purpose of the scheme which is to encourage people to take out and maintain health insurance throughout their lifetime. In order to ensure that these policies are maintained, it is proposed that compliance with the legislation that implements these policies be exempt from the age discrimination legislation.

- acts done under statutory or other legal authority

Issue: In the consultative process, business raised concerns about the interaction of the proposed age discrimination legislation with other legal requirements. There would be a cost to business if compliance with requirements in State legislation, court orders, or industrial awards and agreements exposed complying businesses to complaints of age discrimination. To address these concerns, it is proposed that the age discrimination legislation include exemptions for acts done in compliance with provisions in State laws, awards and agreements, and orders of courts and tribunals. These exemptions are consistent with those in most State and Territory anti-discrimination laws.

- Compliance with Commonwealth legislation: migration, social security and taxation.

Issue: Migration: there are many age requirements in migration laws, including upper age limits for skilled migration, student and child visa arrangements, minimum age requirements related to legal capacity, and protective provisions for children. Immigration policies are intended to balance social, economic, humanitarian and environmental factors in order to achieve migration outcomes of benefit to the Australian community as a whole. An integral component of setting the migration program is to balance the costs of the migration program as a whole, including the pressure on national resources, against the contribution of a particular age group during stay or settlement in Australia. There would be costs to government if these legitimate policy aims were compromised by compliance with a prohibition on age discrimination. To address these concerns, it is proposed that the age discrimination legislation include an exemption for age discrimination that occurs in compliance with the *Migration Act 1958* and the *Migration Regulations 1994*.

Social security: significant aspects of social security and related legislation use age as one factor in determining eligibility for payments or services, including the age pension, newstart allowance, youth allowance, parenting payment, family tax benefit, maternity allowance, and child care benefit. The objective of such assistance is generally to provide support for people with particular needs and to encourage them to engage in economic and social participation. These payments recognise the differing needs and circumstances of different age groups, such as young children, youth, parents with children below certain ages and people over the age where they would be eligible for the aged pension. Government policies

designed to provide appropriate assistance to people of different ages would be compromised if age discrimination legislation prevented age-based targeting of social security and family assistance payments. To address these concerns, it is proposed that the age discrimination legislation include an exemption for age discrimination that occurs in compliance with the *Social Security Act 1991* and related legislation including family assistance payments. As similar issues arise in relation to pensions and other assistance for veterans and their dependents, it is proposed that the legislation include an exemption for age discrimination that occurs in compliance with the *Veterans' Entitlements Act* and related legislation.

Taxation: Distinctions based on age can legitimately feature in a number of ways in taxation legislation including in rebates and other concessions. To ensure this flexibility is retained it is appropriate that taxation laws be exempt.

- Compliance with Commonwealth legislation: other Commonwealth laws

Issue: a range of Commonwealth laws include age criteria for various policy reasons. For example, Commonwealth criminal laws include provisions that relate to the age of criminal responsibility, and there are age limits in various model laws on licensing and safety requirements concerning such matters as the transport of dangerous goods or the operation of heavy vehicles. Where there are legitimate policy justifications for such age restrictions, it would compromise the delivery of those policy outcomes if age discrimination legislation prevented the use of the age restrictions or criteria. All Commonwealth Departments have been reviewing the age requirements in their laws and programs. That review has found that age criteria in Commonwealth laws identified to date are generally either consistent with the principles of the age discrimination legislation or justified on other policy grounds. To ensure their continued operation, it is proposed that age discrimination arising from compliance with the laws so identified be exempt, but that the list of exempted legislation be reviewed two years from the commencement of the legislation. To enable the identification of any other laws that should be subject to an ongoing exemption, all other Commonwealth laws will be exempted for two years after the legislation commences.

- 'positive' discrimination

Issue: Some age discrimination has a beneficial purpose, such as to alleviate disadvantage or to meet the special needs of a particular age group. There are many Commonwealth programs that are of this nature, such as youth homelessness programs and labour market participation programs. Private sector service providers also offer various services to particular age groups, such as over 50s travel tours. As age discrimination legislation is intended to be beneficial legislation, it is not desirable to override such positive measures. To address these concerns, it is proposed that the age discrimination legislation include an exemption for 'positive' age discrimination, to allow acts that are consistent with the purposes of the legislation, in order to provide bona fide measures for the benefit of persons of a particular age or age group; or to meet a need that arises out of the age or ages of those persons; or to prevent or reduce a disadvantage experienced by people of a particular age or age group. Similar exemptions are provided in all State and Territory anti-discrimination laws.

IMPACTS

IMPACT GROUP IDENTIFICATION

The groups affected by each of these options can be described as follows:

- the Commonwealth Government and its agencies, as well as State and Territory Governments ('government');
- Australian businesses and other employers ('business'); and
- The consumers of goods and services, employees and the Australian community generally ('the community')

The following analysis considers the potential costs and benefits for these three identified groups in respect of each of the three options. Some quantitative data is available for this analysis, although a qualitative assessment is provided for each of the options. Considerably more data and analysis is provided in relation to Option 3, reflecting the fact that age discrimination legislation has been the subject of intensive consideration by the CCG and that there is considerable experience of age discrimination legislation in the States and Territories. There is relatively less data available in relation to Option 2 as self-regulation is not a common method of dealing with age discrimination – indeed in Australia it is not used in any jurisdiction.

ESTIMATING COSTS AND BENEFITS

OPTION ONE: RETAIN STATUS QUO

Government

Costs

As noted above, the proposed new age discrimination legislation would be an integral part of a wide range of key Government policy priorities to respond to the ageing workforce and population, and the important social and economic contribution that older and younger Australians make to the community. These priorities include: the *National Strategy for an Ageing Australia*; the issues arising from the Treasurer's *Intergenerational Report*; the development of government policy in the area of demographics, continuing welfare reform, and the new Ministerial portfolio responsibilities for Ageing, and for Children and Youth Affairs. Given the importance of these whole-of-Government priorities, retaining the status quo would be disadvantageous to the Government as it would not assist the Government to deliver on these important cross-portfolio priorities of responding to the ageing workforce and population.

There would be no direct additional cost for the Government in continuing to maintain the limited role of HREOC under the HREOC Act in handling complaints in relation Commonwealth employment, while leaving the prohibition of age discrimination to the States and Territories.

As discussed earlier, there would be costs to Government arising from the ageing population and particularly from the increased number of older people no longer

participating in the workforce, if older workers experience difficulty in finding and retaining employment because of negative stereotypes and assumptions. That is, the costs to Government of this status quo option include the potential for additional Government spending being needed to cover an increasing number of social security payments that would need to be made to older workers who leave the workforce due to discrimination faced at work.

Benefits

By maintaining the status quo, the Commonwealth Government would not have to fund the development and implementation of a legislative regime to prohibit age discrimination, nor the administration of such legislation. As an employer and a provider of services under Commonwealth programs, the Government would avoid any compliance costs occasioned by having to eliminate age discrimination from its practices.

Business

Costs

Currently, many Australians make decisions about employment and the provision of services based on stereotyped views of older and younger people. The benefits of using the skills of mature age workers and fully accessing the market power of older Australians would be lost. The benefits of an age-diverse workforce would be foregone.

As noted above, the *Intergenerational Report* shows that the ageing of the population will dramatically increase the number of older people, with significant implications for the economy. While the total population of labour force age is projected to grow by just 14 per cent, the number of people aged 55 to 64 is projected to increase by more than 50 per cent over the next two decades (p22). As discussed above, people in older age groups commonly experience age discrimination, preventing them from finding and keeping employment. Such figures show that, unless the Government intervenes to positively influence attitudes and remove barriers, the proportion of the population that experiences age discrimination in employment may increase, and businesses could fail to capitalise on the opportunities provided by this growing and experienced segment of the workforce.

Benefits

If the status quo is retained, business would not have to bear the costs of familiarising themselves with new legislation, but would be able to continue with existing practices.

As noted above, the HREOC Act does not provide for legal remedies for age discrimination, such as exists in relation to discrimination on the grounds of sex, race, or disability. An individual who makes a complaint of age discrimination under the HREOC Act cannot take their complaint to a federal court if conciliation of their complaint is unsuccessful. As such, the status quo would benefit business as it would mean that complaints against business could not be litigated. Against this, business is already subject to age discrimination legislation at the State and Territory level, and

so, in fact, the extent of the benefit of retaining the status quo would be limited in practice.

The Community

Costs

If the status quo is retained, older Australians and younger Australians would bear the cost of ongoing discrimination, suffering the effects of marginalisation, unemployment or under-employment, damage to self-esteem, reduced social participation and reduced access to goods and services. The community would also lose the benefits of diverse contributions to society by people of different age groups.

The costs to the community on ongoing age discrimination in employment and other areas would flow from the deficiency in the effectiveness of Commonwealth coverage of age discrimination. As noted above, the HREOC Act does not provide for legal remedies for age discrimination, such as exists in relation to discrimination on the grounds of sex, race, or disability. An individual who makes a complaint of age discrimination under the HREOC Act cannot take their complaint to a federal court if conciliation of their complaint is unsuccessful.

The absence of national age discrimination legislation also means that age discrimination has a lower profile and may be perceived as less important than other forms of discrimination – thus perpetuating negative stereotypes about the capacity of older and younger Australians to the detriment of the community which would lose the benefits of the diversity of their contribution.

Benefits

There is no net benefit to the community of retaining the status quo.

OPTION TWO: SELF-REGULATION

Government

Costs

Government agencies would need to ensure that appropriate age diversity codes of practice were in place and were subject to regular monitoring, evaluation and reporting requirements.

There is no quantitative evidence that such age diversity codes of practice would address the problems identified earlier in the RIS, ie addressing the generally unfounded negative stereotypes that employers and policy makers can have about both younger and older Australians. As such, there is no evidence that self-regulation would result in meeting the Government's objectives to ensure that Australians of all ages are able to participate fully in our society.

The costs to Government for this option would be similar to some of the costs to Government arising from Option 1. However, unlike legislation, a self-regulation model would not assist the Government to deliver on important cross-portfolio priorities of responding to the ageing workforce and population, including the

National Strategy for an Ageing Australia; the issues arising from the Treasurer's *Intergenerational Report*; the development of government policy in the area of demographics, continuing welfare reform, and the new Ministerial portfolio responsibilities for Ageing, and for Children and Youth Affairs.

Benefits

Self-regulatory models, such as codes of conduct, have some potential to result in a more diverse workforce or greater participation in social endeavours. As a potential respondent to complaints of age discrimination in Commonwealth employment or in the administration of Commonwealth laws and programs, the Government would avoid potential litigation brought against it as codes of conduct would not be enforceable.

Business

Costs

The content of self-regulatory age discrimination standards would involve compliance costs for business. These include costs of designing and implementing systems and procedures to promote age diversity in the workforce and training management and employees about age diversity principles.

As noted above, under the discussion of the costs to Government of Option 2, there is no quantitative evidence that such age diversity codes of practice would address the problems identified earlier in the RIS, ie addressing the generally unfounded negative stereotypes that employers and policy makers can have about both younger and older Australians. As such, there is no evidence that self-regulation would result in business changing its unfounded negative stereotypes. This could result in business failing to capitalise on the skills and experience of the mature age workforce. For further information, see the discussion of the costs to business of Option 1.

Benefits

Business could develop codes of practice tailored to their own business circumstances, subject to some minimum standards that could be set by Government.

The Community

Costs

Even allowing for minimum standards set by Government, self-regulation is more likely to result in inconsistencies between the standards established by business and different age diversity regimes applying in different industries. HREOC would have no jurisdiction over the acts or practices of business and would not be able to assist to conciliate acts and practices that breached the self-regulatory codes of practice. People affected by age discrimination would not have access to any binding remedy.

As such, the kinds of costs to the community set out under the discussion of the costs to the community of Option 1 would also apply to this option of self-regulation. The costs to the community would flow from the deficiency in the effectiveness of Commonwealth coverage of age discrimination. As noted above, the HREOC Act

does not provide for legal remedies for age discrimination, such as exists in relation to discrimination on the grounds of sex, race, or disability. An individual who makes a complaint of age discrimination under the HREOC Act cannot take their complaint to a federal court if conciliation of their complaint is unsuccessful.

Benefits

Diversity is about encouraging the participation of, and reflecting the differences of, different groups in society. Discrimination in employment occurs when decision-making is based on factors other than merit. As such, older and younger Australians may experience a decrease in discrimination and in negative stereotyping if age diversity codes of practice were widely adopted and implemented.

OPTION THREE: INTRODUCTION OF COMMONWEALTH AGE DISCRIMINATION LEGISLATION

Government

Costs

Government will be subject to increased regulation as an employer and service provider, as State and Territory anti-discrimination legislation does not apply to the activities of the Commonwealth Government. Similarly, there will be costs for the Government in assessing the consistency of a range of Commonwealth programs and services with the age discrimination legislation, having regard to the exemptions. For example, many Commonwealth programs are likely to be ‘positive discrimination’, but each age-based program will need to be examined to ascertain whether it falls within the legislative exemption for positive discrimination.

The exemption for a range of Commonwealth laws containing age criteria will involve a cost for Government in reviewing the list of laws exempted two years after the commencement of the legislation (with the exception of the exemptions for migration, social security, veterans’ affairs, superannuation, taxation and citizenship laws).

Resources will be required to administer the education/awareness activities relating to the commencement of the proposed legislation; to manage the implementation and operation of the legislation; and to provide advice to Government, business and the community. Actual costs of the education, awareness and general implementation initiatives will depend on the nature and scope of the activities conducted.

Costs to the Government will be minimised by the exemption for health programs as it will enable the continued provision of health goods and services to those age groups most likely to benefit from them. Costs to the Government also will be minimised by the maintenance of its policies on Community Rating and Lifetime Health Cover, which contribute to ensuring that health insurance is affordable and accessible and to ensuring choice and sustainability in Australia’s health system.

Costs to the Government will be minimised by the exemption for superannuation schemes operating under Commonwealth legislation, as it will enable the continuation

of policies designed to ensure that superannuation makes its contribution to retirement incomes, thus containing welfare costs.

Costs to the Government will be minimised by the exemptions for migration and social security and related laws, which will allow the continued achievement of the policy objectives of the migration program and the continued provision of appropriate and targeted financial support to age groups with different needs. Government will benefit from the exemption for specified laws with age criteria as the exemption will allow the maintenance of age restrictions where there are policy justifications for these.

Costs to the Government will be minimised by the exemption for positive discrimination, as it will enable Government to target various programs to age groups with particular needs and thereby achieve a range of social policy goals across portfolios.

Benefits

This legislation will have broad positive effects on the economy and on the achievement of social policy objectives. It will complement the Government's wider priority to encourage Australians to stay in the workforce. As noted above, there are significant social and economic implications of the exclusion and marginalisation of older workers from the labour market. Increased labour force participation will give rise to savings for Government in the areas of health and welfare. Increased expenditure on goods and services as a result of a reduction in discrimination will have positive impacts on the economy.

The experience of other countries in implementing age discrimination legislation in relation to employment appears positive. The Detailed Regulation Impact Assessment (DRIA) made by the United Kingdom Department of Trade and Industry, regarding implementation of the EU Employment Directive by enactment of age discrimination legislation, concludes that 'In total there are net benefits to the proposed legislation. Even considering employers only this is the case.'
(<http://www.dti.gov.uk/er/equality/ria.pdf>)

It is likely that broad social benefits would accrue early after commencement, particularly as education and community awareness improved. The associated increase in knowledge by possible complainants about their rights (which would increase the proportion of instances of discrimination that result in complaints) can be expected to be balanced by more sophisticated and compliant behaviour by actors (such as employers).

Business

Costs

Representatives of business consulted on the proposal did not provide any specific information on likely costs to their sectors. However, during the consultative process, some business representatives questioned the need for Commonwealth age discrimination legislation, given that all the States and Territories prohibit age discrimination. Business raised concerns about the added regulatory burden of having

to comply with two sets of laws on the same subject of age discrimination. Given these concerns, the CCG process endeavoured to ensure as far as possible that the provisions in the proposed Commonwealth legislation were adapted to business needs and broadly consistent with the comparable provisions in State and Territory laws.

There will be some compliance costs for business in respect of training management and employees about the age discrimination obligations under the Act, and in cooperating with HREOC in relation to any complaints made against them. Complying with the outcomes of a conciliated complaint or court action in the event of a substantiated complaint would have some costs, but these are preferable to the discriminatory conduct of the business, which cost would otherwise be borne solely by the person the subject of the discrimination.

However, additional costs borne by business are likely to be marginal as they are already required to comply with the obligations in age discrimination laws in their respective State or Territory. These costs will also be minimised by the effect of the proposed education campaign in changing attitudes and providing guidance.

The exemption for the use of age as a factor in individual clinical decisions will involve some costs for health professionals in ascertaining the scope of the exemption and its application to their activities, as there is no similar exemption in State and Territory anti-discrimination laws. However, these costs will be reduced by the Government's education campaign which will provide guidance on the legislation.

The exemptions for health services will allow health service providers to continue to use age as a factor in treatment decisions where it is appropriate taking into account clinical, medical and scientific evidence concerning matters that affect people of different ages differently. The exemptions will provide health service providers with more certainty about the allowable range of age discrimination in the provision of health and medical services than is currently provided under State and Territory age discrimination laws, which do not provide for such exemptions.

There will be no costs to business arising from the exemptions for acts done to comply with statutory or other legal authority, including the specific exemptions for certain Commonwealth laws, as these exemptions remove the possibility of conflict between the age discrimination legislation and other legal requirements.

There will be no costs to business arising from the exemptions for Community Rating and Lifetime Health Cover as these exemptions allow the continuation of existing policy and practices.

As noted above, it is proposed that the legislation include specific exemptions for age discrimination in certain aspects of employment. Consistent with the Government's election commitment, it is proposed that this legislation not affect youth wages and job training (including 'Work for the Dole'). Costs to business will be minimised as the retention of these policies will enable business to access and train up young workers. Costs to business also will be minimised by the exemption for inherent requirements of the job. This exemption will allow the actual requirements of particular positions to form the basis for decisions about recruitment and performance of duties.

Costs to business will be minimised by the exemptions for superannuation, insurance and credit by ensuring that compliance with Commonwealth superannuation requirements will not expose them to age discrimination complaints and by allowing appropriate risk assessments involving data on age to continue to be used as a tool in superannuation, insurance and credit decisions.

The exemptions for acts done under statutory or other legal authority will minimise costs for business as they will ensure that businesses are free to comply with other legal requirements and are not subject either to uncertainty about which regime to comply with, or to penalty/liability for possible non-compliance with one or the other regime. The specific exemption for age discrimination in relation to migration laws will minimise the costs for business as it will allow the continuation of the migration program, particularly in relation to skilled migration.

The exemption for positive discrimination will minimise costs for business as it will enable employers to provide targeted measures such as training programs for younger or older workers and will enable service providers to direct their goods or services to the needs of particular age groups.

Benefits

A tolerant workplace, which promotes diversity, will lead to a more productive business environment.

The Access Economics report concluded that: '[a]t the individual company level, adopting more enlightened employment policies for mature workers will provide that company with greater capacity to achieve future growth. Further, to the extent all other firms ditch misconceived policies or attitudes with respect to the aged, then the individual firm will benefit through a positive impact on the macroeconomy.'

As noted above, the Detailed Regulation Impact Assessment (DRIA) made by the United Kingdom Government regarding implementation of the EU Employment Directive by enactment of age discrimination legislation, concluded that there was a net benefit of its age discrimination legislation (which albeit only covers employment) even if only employers are considered.

The DRIA states that the main benefit to employers of a prohibition on age discrimination in relation to recruitment will be an increased pool of potential applicants, due to the increased participation rate of less well-represented age groups, as well as increased mobility of individuals. Employers further gain from retaining skills and experience within their organisation, due to lower turnover of older employees, and save on recruitment costs. Employers also benefit from the productivity increases which are due to ensuring that the most suitable people are promoted and trained without regard for their age.

The Community

Costs

No additional costs to the community have been identified in relation to the introduction of Commonwealth age discrimination legislation. The exemptions proposed are designed to minimise the costs.

Benefits

The community, particularly older and younger Australians, will benefit from proposed age discrimination legislation. In the CCG consultative process, groups such as the Council on the Ageing and the Australian Youth Affairs Coalition (AYAC) were strong supporters of Commonwealth age discrimination legislation.

The community will benefit from HREOC's enhanced role in promoting community awareness and attitudinal change, as well as its role in conciliating age discrimination complaints.

The specific exemptions in relation to health services and health programs will delineate the area of acceptable age-based distinctions in relation to health issues, preventing inaccurate stereotypes or arbitrary judgments being the basis of health decisions. This will benefit both older and younger Australians in ensuring appropriate health care is not impeded by age discrimination. The community as a whole will also benefit by ensuring that health resources can be directed (if appropriate) to those age groups where they will provide the greatest benefit.

It is proposed that the age discrimination legislation include an exemption for 'positive' age discrimination that is consistent with the purposes of the legislation to allow measures for the benefit or need of a particular age group (eg over 50s travel tours), or to prevent or reduce a disadvantage because of age. This exemption will mean that services and concessions that are currently provided to older and younger Australians will be permitted under the legislation and recognised as addressing the needs of particular age groups.

As the age discrimination legislation will not affect Community Rating and Lifetime Health Cover, the benefits flowing from these Government policies to the whole community will not be impeded by the introduction of age discrimination legislation.

It is proposed that voluntary bodies and charitable benefits be exempted from the age discrimination legislation. This will ensure that this proposed legislation does not cut across the valuable contribution made by voluntary bodies throughout Australia.

EFFECTS ON SMALL BUSINESS

It is expected that Commonwealth age discrimination legislation, as proposed in Option 3, would impact on small business in a similar way to that outlined above for business in general. As noted earlier, compliance costs to business are unable to be specified at this time. As noted under the consultation section, business representatives (both large and small) were unable to identify the costs of the preferred option to them. However, it is likely that any initial costs of the introduction of age discrimination legislation may have a proportionately greater impact on small

business than larger firms. This might be the case as larger businesses are more likely than smaller businesses to have dedicated resources, such as a personnel division, which keep up to date with changes in legislative requirements.

The purpose of a public awareness and education campaign, run in conjunction with the passage of the age discrimination legislation, would lessen the impact of costs to small business. This is the case as a key purpose of such an information campaign would be to assist business to understand its rights and responsibilities under the age discrimination legislation and adjust their practices as needed, consistently with the requirements of the legislation.

CONSULTATION

At the request of the Attorney-General, the Attorney-General's Department conducted widespread consultations with business and community organisations in early 2002. The Department consulted over 90 organisations representing business, employers and employees, older persons, children and young people, to seek their views about important issues regarding age discrimination, and wrote to a further 180 organisations (see [Annexure B](#)).

The Attorney-General established the CCG in July 2002 to assist the Department to develop the legislation. The CCG comprised a wide range of organisations including those representing business, employees, financial services, health services, youth, older people, social welfare groups, families, and other community organisations (see [Annexure C](#)).

The CCG was a diverse group representing a wide range of community interests. On many matters, members held differing views. Most organisations welcomed the development of age discrimination legislation. These organisations included peak bodies for older and younger Australians. In contrast, others groups, such as industry groups (eg, the Australian Chamber of Commerce and Industry), were not necessarily convinced that it was needed. During the CCG process, the Australian Chamber of Commerce (ACCI) and the Australian Industry Group (AIG) noted that they were not convinced that a case exists for national legislation. Further ACCI and AIG were of the view that if national legislation is to be introduced it should be in substitution for State legislation not in addition to it. ACCI and AIG acknowledged the Government's commitment to legislation and participated to ensure that proposals as to the content of the legislation were adapted to business needs.

Nevertheless, the CCG members worked constructively together, taking account of all the views expressed, in order to work as a group toward consensus on the matters that would be covered by the legislation. While particular outcomes were not always specifically endorsed by all members of the Group and some members reserved their position on certain issues, members agreed to move forward in order to achieve an overall acceptable proposal which was submitted to Government for its consideration.

The CCG established five Working Groups to examine key issues in relation to the proposed age discrimination legislation and to develop proposals on behalf of the CCG as a whole. The Working Groups examined work (including employment, training and unpaid work); superannuation, insurance and financial services; health

and medical services; children and youth; and Commonwealth laws and programs not covered by other working groups.

The work of the CCG and its Working Groups ensured that the concerns of key sectors of the community were considered in the development of the legislative proposal.

The Attorney-General's Department worked closely with other Government Departments to ensure the legislation will operate appropriately in relation to Commonwealth laws and programs, and will complement relevant provisions in existing Commonwealth legislation. Many Departments actively participated in CCG and Working Group deliberations.

CONCLUSION AND RECOMMENDED OPTION

Considering the costs and benefits set out above and in view of the Government's objective of reducing age discrimination, particularly for older and younger Australians, it is recommended that Option 3 be endorsed.

The introduction of a new piece of Commonwealth age discrimination legislation will have an impact on business. The extent of this impact will be modified by the fact that all the States and Territories already have age discrimination legislation and most of the proposed new Commonwealth obligations will be consistent with the obligations that business are already required to comply with under State and Territory laws. As noted above, a key aspect of the CCG consultative process was to ensure as far as possible that the proposed new Commonwealth law would be broadly consistent with the approach of the State and Territory age discrimination laws to minimise the cost to business of complying with this legislation.

In assessing the economic benefits of reducing age discrimination, the Government considered the results of the regulation impact assessment carried out in the UK in relation to the introduction of legislation which prohibited age discrimination in the area of employment. That regulation impact assessment concluded that there was a net benefit from the age discrimination legislation, even if only employers were considered. Given the concerns raised by business about proposals to introduce Commonwealth age discrimination in Australia, it seems that employers are either not necessarily aware of the overall benefits due to the information problems identified earlier in the RIS, or are concerned about the interaction of the proposed new Commonwealth age discrimination with existing age discrimination legislation in the States and Territories. However, mechanisms are proposed to reduce this potential problem. It is proposed that the Commonwealth legislation provide that a matter that has already been the subject of complaint under State or Territory anti-discrimination legislation cannot be brought under the Commonwealth legislation. This will ensure that business, for example, could not face complaints for the same act of discrimination under the Commonwealth legislation where a complaint has already been brought under the relevant State or Territory legislation.

The self-regulatory measures suggested in Option 2 are not appropriate for the problem of age discrimination as they do not provide an adequate remedy. Legislative mechanisms for providing protection against age discrimination would appear to be the optimum way of dealing with the problem.

Similarly, simply retaining the status quo, as suggested in Option 1, is not an appropriate option in this case. As noted above, there are gaps in the existing coverage of Commonwealth, State and Territory laws which would not be rectified by simply retaining the status quo.

IMPLEMENTATION AND REVIEW

The Attorney-General will be responsible for administering the proposed new age discrimination legislation. The Attorney-General's Department will be responsible for the ongoing monitoring of its operation. As with all other Commonwealth anti-discrimination legislation, HREOC will also have a role in relation to public awareness and education, inquiring into possible human rights infringements and policy and legislative development.

The CCG proposed that the Attorney-General's Department and HREOC consult following the enactment of the legislation about the possibility of HREOC undertaking a review of the legislation after a suitable period.

It is proposed that certain identified Commonwealth laws be exempt from the proposed age discrimination legislation, but that the list of exempted laws (save for certain areas of superannuation, health, migration, social security and taxation) be reviewed two years after the commencement of the legislation, to ascertain whether all laws identified to date are appropriate for continuing exemption and to ascertain whether there are other laws that should be exempt.

ANNEXURE A

Complaints of age discrimination under state and territory jurisdictions

(Provided by HREOC)

1999-2000

Jurisdn	No.	Edu.	Laws/ Progs	Work	Accom.	G&S	Access	Sport	Clubs	Insur/ Super.	Local Govt.	%age
Federal	24											0.02
NSW	112	1		72	10	27			1			8
Vic	217	11		167	7	26		4	2			5.5
Qld	99	1	4	75	4	11				3	1	12.21
SA	40			31	3	3			3			21.4
WA	34	*	*	*	*	*	*	*	*	*	*	8.1
ACT	6			4		1	1					19.35
NT	37	3		24	0	6			0	0		10.2
Tas	13	*	*	*	*	*	*	*	*	*	*	6.7

2000-2001

Jurisdn	No	Edu.	Laws/ Progs	Work	Accom	G&S	Access	Sport	Clubs	Insur/ Super	Local Govt	%age
Federal	34											2.7
NSW	139	4		91	7	35			2			9
Vic	156	3		123	4	24			2			4.54
Qld	122	2	5	76	10	13			1	7	1	8.57
SA	14			12		2						11.3
WA	41	*	*	*	*	*	*	*	*	*	*	8
ACT	7			5		1						4.86
NT	23	6		15	1	1						9.45
Tas	*	*	*	*	*	*	*	*	*	*	*	

* - Statistics not available

ANNEXURE B

Age Discrimination Legislation — Initial Consultations

In early 2002, AGD consulted 91 organisations, which are listed below

1. Aged and Community Services Australia
2. Association of Independent Retirees
3. Association of Superannuation Funds of Australia
4. Australian Bankers' Association
5. Australian Chamber of Commerce and Industry
6. Australian Council for Rehabilitation of the Disabled
7. Australian Council of Social Services
8. Australian Council of Trade Unions
9. Australian Federation of Homelessness Organisations
10. Australian Finance Conference
11. Australian Health Insurance Association
12. Australian Human Resources Institute
13. Australian Industry Group
14. Australian Institute of Family Studies
15. Australian Multicultural Foundation
16. Over 50s Association
17. Australian Youth Affairs Coalition
18. Business Council of Australia
19. Consumers' Health Forum
20. Council for Equal Opportunity in Employment
21. Council of Small Business Organisations of Australia
22. Council on the Ageing (Australia)
23. Create Foundation
24. Credit Union Services Corporation (Australia) Limited
25. Families Australia
26. Federation of Ethnic Communities Councils of Australia Inc
27. Human Rights and Equal Opportunity Commission
28. Insurance Advisers Association of Australia
29. Insurance Council of Australia
30. Investment and Financial Services Association Limited
31. Law Council of Australia
32. National Children's and Youth Law Centre
33. National Disability Advisory Council
34. National Employment Services Association
35. National Insurance Brokers Association
36. National Seniors Association
37. Older Women's Network
38. The Positive Ageing Foundation of Australia
39. Private Health Insurance Administration Council
40. Returned Services League

41. Royal Australian College of General Practitioners
42. The Grey Army
43. UNICEF Australia
44. Youth Action and Policy Association (NSW)
45. Youth Affairs Council of Victoria Inc.
46. Youth Affairs Council of WA
47. NGO Forum held on 15 March 2002: (22 organisations in addition to above)
 - Aboriginal and Torres Strait Islander Commission
 - Amnesty International Australia
 - Association of NESB Women of Australia
 - Australian Baha'i Community
 - Australian Council of Social Services
 - Australian Federation of Business and Professional Women Inc
 - Australian Federation of Homelessness Organisations
 - Australian Lawyers for Human Rights
 - Australian Red Cross
 - Australian Section of the International Commission of Jurists
 - Australian Women Lawyers
 - Coalition of Australian Peak Organisations of Women
 - Executive Council of Australian Jewry
 - Federation of Ethnic Community Councils of Australia
 - Foundation for Aboriginal and Islander Research Action
 - Human Rights and Equal Opportunity Commission
 - National Aboriginal and Torres Strait Islander Legal Services Secretariat
 - National Association of Community Legal Centres
 - National Ethnic Disability Alliance
 - National Council of Churches
 - National Council of Women
 - Older Women's Network
 - Public Interest Advocacy Centre
 - Quaker Service Australia
 - Refugee Council of Australia
 - Women's Electoral Lobby
 - Women's Services Network
 - Young Women's Christian Association
48. Disability Education Standards Meeting (in addition to the above)
 - State and Territory Departments of Education
 - National Council of Independent Schools
 - National Catholic Education Commission
 - Australian Vice Chancellors' Committee

49. Australian Forum of Youth Organisations (9 organisations in addition to above)
- Australian Council of YMCA
 - Australian Red Cross
 - Australian Rural Youth
 - Duke of Edinburgh's Award in Australia
 - Guides Australia
 - Lions Clubs of Australia
 - Police and Community Youth Clubs NSW Ltd
 - St John Ambulance Australia
 - The Boys' Brigade in Australia
 - The Scout Association of Australia
 - YWCA of Australia
50. National Children's Services Forum (9 organisations in addition to above)
- Australian Federation of Child Care Associations
 - Australian Early Childhood Association
 - National Association of Community Based Children's Services
 - National Family Day Care Council of Australia
 - National Peak Ethnic Children's Services Network
 - National Out of School Hours Services Association
 - Occasional Child Care Association – National
 - Playgroup Council of Australia
 - National Alliance of Disability, Resource and Training Agencies

Organisations written to by the Attorney-General's Department on 2 May 2002 regarding age discrimination reforms

1. Aboriginal Children's Advancement Society
2. ACT Multicultural Council Youth Network
3. Adult Learning Australia Inc (ALA)
4. Alzheimer's Association of NSW
5. Anglicare Australia
6. Association for Competitive Employment (ACE)
7. Association of Children's Welfare Agencies (ACWA)
8. Association of Professional Engineers, Scientists and Managers Australia
9. Auburn Migrant Resource Centre
10. Audiology Society of Australia
11. Australian Association of the Deaf
12. Australian Businesswomen's Network
13. Australian Catholic Social Justice Commission
14. Australian Centre for Adult Literacy
15. Australian Consumers Association
16. Australian Council for Education
17. Australian Council of Deans of Education
18. Australian Council of Women and Policing
19. Australian Council on Healthcare Standards
20. Australian Dental Association
21. Australian Federation of AIDS Organisations
22. Australian Federation of University Women
23. Australian Forum of Human Rights Organisations
24. Australian Hoteliers Association
25. Australian Institute of Aboriginal and Torres Strait Islander Studies
26. Australian Institute of Actuaries
27. Australian Institute of Engineers
28. Australian Institute of Health and Welfare
29. Australian Insurance Institute
30. Australian Insurance Law Association
31. Australian Local Government Association
32. Australian Medical Association
33. Australian National Committee on Refugee Women
34. Australian National Youth Roundtable
35. Australian Nursing Federation
36. Australian Pensioners' and Superannuants' League, QLD Inc (APSL)
37. Australian Pensioners Insurance Agency
38. Australian Retailers Association
39. Australian Retirement Income Streams Association (ARISA)
40. Australian Secondary Principals Association
41. Australian Vocational Education and Training Research Association
42. Australian Women's Health Network
43. Australian Youth Affairs Coalition
44. Banking Industry Ombudsman

45. Barnados Australia
46. Baulkham Hills/Holroyd/Parramatta Migrant Resource Centre
47. Blacktown Migrant Resource Centre
48. Blind Citizens Australia
49. Botany Multicultural Resource Centre
50. Boystown Foundation
51. Brisbane Migrant Service Agency (MSA)
52. Brotherhood of St Laurence
53. Burnside
54. Canterbury/Bankstown Migrant Resource Centre
55. Carers Australia
56. Catholic Welfare Australia
57. Centacare
58. Centre for Health Law, Ethics and Policy
59. Centre for Multicultural Youth Issues
60. Coalition Against Racism
61. Combined Pensioners and Superannuants Association (CPSA)
62. Corporate Super Association
63. Council for a Multicultural Australia
64. Council for Equal Opportunity in Employment
65. Country Women's Association of Australia
66. Deafness Forum of Australia
67. Doctors Reform Society (Australia)
68. Eastern Area Service for Youth
69. Endeavour Forum
70. Ethnic Child Care, Family and Community Services Co-operative
71. Fairfield Migrant Resource Centre (Cabramatta Community Centre)
72. Family Services Australia
73. Females in Information Technology and Telecommunications
74. Financial Industry Complaints Service
75. Financial Planning Association (FPA)
76. Fred Hollows Foundation
77. Fusion Australia
78. Geelong Migrant Resource Centre
79. Gippsland Migrant Resource Centre
80. Head Injury Council Of Australia (HICOA)
81. Health Insurance Restricted Membership Association of Australia
82. Hoppers Crossing Outreach Service
83. Illawarra Migrant Resource Centre
84. Independent Schools Group
85. Indigenous Disability Network
86. Inner West (Ashfield) Migrant Resource Centre
87. Inner Western Region (Footscray) Migrant Resource Centre
88. Institute of Company Directors
89. Insurance Enquiries and Complaints
90. International Women's Development Agency (IWDA)
91. Jobs Australia
92. Liverpool Migrant Resource Centre
93. Logan and Beenleigh Migrant Resource Centre (Access Inc)
94. Lumbu Indigenous Community Foundation

95. Macarthur Migrant Resource Centre
96. Mental Health Foundation of Australia
97. Migrant Information Centre (East Melbourne) Ltd
98. Migrant Network Services (Northern Sydney Ltd)
99. Migrant Resource Centre North East (Preston/Reservoir)
100. Migrant Resource Centre of Canberra and Queanbeyan
101. Migrant Resource Centre of Central Australia
102. Migrant Resource Centre of Northern Tasmania
103. Migrant Resource Centre of South Australia
104. Migrant Resource Centre of Southern Tasmania
105. Migrant Settlement Services (Cairns)
106. Mortgage Industry Association of Australia
107. National Aboriginal Community Controlled Health Organisation
108. National Aged Care Alliance
109. National Association for the Prevention of Child Abuse and Neglect
110. National Association of People Living with HIV/AIDS (NAPWA)
111. National Council of Single Mothers and Their Children (NCSMC)
112. National Council On Intellectual Disability (NCID)
113. National Foster Care Forum
114. National Foundation of Australian Women (NFAW)
115. National Indigenous Youth Movement of Australia (NIYMA)
116. National Secretariat of Torres Strait Islander Organisations
117. National Union of Students
118. National Women's Justice Coalition (NWJC)
119. National Women's Media Centre (NWMC)
120. National Youth Coalition for Housing Inc
121. New South Wales Law Society Children's Legal Issues Committee
122. New South Wales Young Lawyers Human Rights Committee
123. Newcastle and the Hunter Region Migrant Resource Centre
124. North West Region (St Albans) Migrant Resource Centre
125. Northern Territory Youth Affairs Network
126. Northern Metropolitan Migrant Resource Centre
127. Northern Suburbs Migrant Resource Centre (WA)
128. Nursing Mothers' Association of Australia (NMAA)
129. Oakleigh Outreach Service
130. Office for Seniors Interests
131. Office of the Employment Advocate
132. Older People Speak Out
133. Palliative Care Australia
134. Pan Pacific and South East Asia Women's Association of Australia
135. Pharmacy Guild of Australia
136. Physical Disability Council of Australia Ltd
137. Private Health Insurance Complaints Commissioner
138. Refugee Resettlement Advisory Council
139. Rotary Australia
140. Royal Australian and New Zealand College of Psychiatrists
141. Royal Australian College of Physicians
142. Royal Australian College of Surgeons
143. Secretariat of National Aboriginal and Islander Child Care (SNAICC)
144. Securities Institute of Australia

145. Small Independent Superannuation Funds Association (SISFA)
146. Sole Parent's Union (SPU)
147. South Central Region (Pahran) Migrant Resource Centre
148. South Eastern Region (Dandenong) Migrant Resource Centre
149. South Metropolitan Migrant Resource Centre (WA)
150. Speech Pathology Association of Australia
151. St George Migrant Resource Centre
152. St Luke's Anglicare
153. Superannuated Commonwealth Officers' Association (SCOA)
154. Telecommunications Industry Ombudsman
155. The Centre For Positive Ageing
156. The Gerontology Foundation of Australia Inc
157. Townsville Migrant Resource Centre
158. UNIFEM Australia Inc
159. United Nations Association of Australia Status of Women Network
160. United Nations Youth Association Australia
161. Uniting Church in Australia
162. Victorian Centre for Multicultural and Youth Issues
163. Victorian Health Promotion Foundation
164. Voice Interest and Education for Women (VIEW)
165. Volunteering Australia
166. Westgate Region (Altona) Migrant Resource Centre
167. Women Chiefs of Enterprises International
168. Women in Super
169. Women with Disabilities (Australia)
170. Women's Action Alliance (Australia) Inc (WAA)
171. Women's International League for Peace and Freedom (WILPF)
172. Women's Legal Services Network
173. Women's Rights Action Network Australia (WRANA)
174. Young Media Australia
175. Youth Advocacy Centre Inc
176. Youth Affairs Council of South Australia (YACSA)
177. Youth Affairs Council of Western Australia (YACWA)
178. Youth Affairs Network of Queensland
179. Youth Network of Tasmania (YNOT)
180. Zonta International

ANNEXURE C

Members of the Core Consultative Group on age discrimination reforms

1. National Seniors Association
2. Association of Independent Retirees
3. Australian Pensioners' and Superannuants' Federation
4. Council on the Ageing (Australia)
5. Over 50s Association
6. Positive Ageing Foundation of Australia
7. Australian Council of Social Services
8. UNICEF Australia
9. Families Australia
10. National Children's and Youth Law Centre
11. Australian Forum of Youth Organisations
12. Australian Youth Affairs Coalition
13. Federation of Ethnic Communities' Councils of Australia
14. Aboriginal and Torres Strait Islander Commission
15. National Disability Advisory Council
16. Consumers Health Forum
17. Human Rights and Equal Opportunity Commission
18. Australian Council of Trade Unions
19. Australian Chamber of Commerce and Industry
20. Australian Industry Group
21. Council of Small Business Organisations of Australia
22. Australian Bankers Association
23. Australian Finance Conference
24. Credit Union Services Corporation (Australia) Limited
25. Investment and Financial Services Association Limited
26. Association of Superannuation Funds of Australia
27. Insurance Council of Australia
28. Australian Health Insurance Association
29. Royal Australian College of General Practitioners
30. Law Council of Australia

NOTES ON CLAUSES

Abbreviations

1. The following abbreviations are used throughout these notes:

DDA	<i>Disability Discrimination Act 1992</i>
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	<i>Human Rights and Equal Opportunity Commission Act 1986</i>
RDA	<i>Racial Discrimination Act 1975</i>
SDA	<i>Sex Discrimination Act 1984</i>

Part 1

Preliminary

1. This Part sets out the introductory sections of the Bill and deals with a number of machinery provisions. The first two clauses deal with what the legislation will be called and when it is to take effect.
2. This Part also sets out the objects of the Bill which state what it is hoped the legislation will achieve (clause 3). There is a major provision which defines, in detail, a number of terms used later in the Bill (clause 5).
3. This Part also deals with the interaction between this legislation and the DDA (clause 6).

Clause 1 - Short title

4. Clause 1 is a formal provision specifying that the legislation will be called the *Age Discrimination Act 2003*.

Clause 2 - Commencement

5. The Bill will commence on the day after it receives Royal Assent.

Clause 3 - Objects

6. This clause sets out what the legislation aims to achieve. The clause is designed to promote community awareness that people of all ages have the same fundamental rights. The clause indicates that the Bill is designed to eliminate, as far as possible, age discrimination in the areas of public life set out in Part 4 of the Bill. The Act also responds to demographic changes and the ageing of the population, aiming to change negative stereotypes about older people and to remove barriers to workforce participation by older people.

Clause 4 - Simplified outline

7. This clause provides a simplified outline of the Bill to assist the reader. The outline notes that the Bill makes age discrimination unlawful, whether direct or indirect discrimination, subject to various exemptions. The outline also notes that some acts related to age discrimination are criminal offences.

Clause 5 - Definitions

8. This clause defines many of the terms that are used elsewhere in the Bill. Some of the more significant ones are:

“Age”

9. Age is defined to include age group, so that an act of discrimination need not be linked to a specific age but can, as is often the case, be related to the age group of a person.

“Employment”

10. This definition is not meant to set out all that is meant by the term employment, for example, employment in the private sector is covered although it is not expressly mentioned in the definition.

11. The definition is designed to ensure that certain special kinds of employment, such as part-time and temporary work, are included for the purposes of this Bill.

“Premises”

12. Premises are defined to include places and forms of transport. This definition is significant for Division 3 of Part 4 which makes age discrimination in access to premises unlawful.

“Services”

13. This definition is not meant to include all possible services expressly but to ensure that certain services are contained within the definition. This provision is designed to indicate the broad range of services that are included when considering discrimination on the grounds of age in the provision of goods, services and facilities in clause 28 of the Bill.

Clause 6 - Age discrimination not to include disability discrimination

14. Clause 6 deals with the situation where there is an overlap between the operation of this Act and the DDA. For example, an overlap could occur where a person has a disability that is or could be related to their age (such as impaired hearing or mobility). This provision ensures that the Act does not create a second or alternative avenue for complaints of disability discrimination where such complaints are properly covered by the DDA. Complaints of age discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act.

15. There are a number of significant differences between this Bill and the DDA. The DDA has specific tests to deal with disability issues that do not apply to other forms of discrimination. The DDA imposes requirements on alleged discriminators to accommodate the needs of a person with a disability unless this would result in an unjustifiable hardship. The DDA contains specific provisions to cover discrimination that is based on matters auxiliary to a disability (such as being accompanied by a guide dog or using a walking stick). The DDA also provides for the making of standards on such matters as public transport, education, and access to premises, compliance with which will preclude a finding of disability discrimination. Different results might therefore follow if similar complaints were brought under both the DDA and this Act, as different tests would apply to the same set of facts. The purpose of clause 6 is to make it clear that, where a complaint of discrimination arises from a person's disability, as defined in the DDA, the complaint should be considered under that Act.

16. However, this Bill is not designed to limit a person's rights if they are the subject of discrimination. If particular circumstances or actions result in a person being discriminated against both on the ground of age (in a way that is not related to disability) and also on the ground of disability, then the person may still initiate a complaint about unlawful discrimination on the grounds of age and disability.

Clause 7 - Meaning of act – failure or refusal to act

17. This clause defines an act to include a refusal or a failure to do an act.

Clause 8 - Commonwealth taken to be employer

18. This clause is self-explanatory.

Part 2

Application and constitutional provisions

19. This Part is an important provision which sets out how certain provisions apply and is intended to make it clear that the legislation operates to the extent of Commonwealth constitutional power.

20. This Part also contains provisions which deal with how State and Territory laws about discrimination are intended to operate after this legislation is in force (Clause 12) and a provision which sets out how the Act is intended to affect Governments at Federal, State and Territory levels (Clause 13).

Clause 9 - Geographical application of Bill

21. This provision provides that the legislation is to apply throughout Australia. That is, it applies to all States, all internal Territories and all external Territories of Australia. The prohibitions on discrimination also apply where acts of discrimination that occur in Australia involve people, things, or event events outside of Australia.

Clause 10 - Application of Act – constitutional powers

22. The provision is designed to ensure that the validity of the Act is supported to the maximum extent possible by all available Commonwealth Constitutional power and that the legislation does not purport to operate in areas where the Commonwealth does not have constitutional power. The subclauses give the legislation effect in the following areas:

- the provisions on discrimination in work apply to Commonwealth employment (subclause 3)
- the provision dealing with discrimination by qualifying bodies applies to qualifying bodies operating under Commonwealth laws (subclause 4)
- the prohibitions on discrimination and the associated exemptions apply
 - to acts done within a Territory (noting, that for the purposes of this legislation, the Territories do not include the Australian Capital Territory or Northern Territory) (subclause 5)
 - to acts done under Commonwealth or Territory laws by Commonwealth or Territory governments, administrators or public bodies (subclause 6)
 - in relation to certain international obligations and other matters covered by the constitutional power to legislate about ‘external affairs’ (see below for more detail) (subclause 7)
 - to discrimination by corporations (subclause 8 and 9)
 - to discrimination in banking (subclause 10)
 - to discrimination in international or inter-state trade and commerce (subclause 11)

1. Subclause 7 indicates that certain provisions of the legislation have effect in relation to discrimination against people on the grounds of age to the extent that the provisions implement Australia’s responsibilities under certain international instruments. Most notably these are the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958 (ILO 111); the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Rights of the Child.

2. In relation to ILO 111 Australia it is clear that age would be regarded as a distinction, exclusion or preference for the purposes of Article 1(b) of that Convention. This means that Australia has international obligations to promote equality of opportunity and treatment in employment with a view to eliminating discrimination on the ground of age. Australia has given some legislative effect to that determination by enacting regulations under the HREOC Act giving HREOC authority to investigate complaints in relation to discrimination on the basis of age in employment.

3. The provisions in clause 10 which rely on various constitutional powers, are intended to enable the legislation to operate to the extent of those powers as they may be from time to time.

Clause 11 - Compensation—constitutional safety net

4. This provision is designed to ensure that this Bill does not interfere with a person's property rights in a way that contravenes section 51(xxxi) of the Constitution. It ensures that property is acquired on just terms.

5. The provision confers jurisdiction on the Federal Court to determine the compensation that might be necessary so as to ensure that the acquisition does take place on just terms.

Clause 12 - Operation of State and Territory laws

6. This provision is designed to ensure that State and Territory legislation about age discrimination can continue to operate concurrently with this legislation after it becomes law.

7. Subclause 4 provides that if a person has made, for example, a complaint under a State or Territory anti-discrimination law about a particular matter they will not be able to make a complaint under this Act about the same matter. A person will have to make a choice between State or Territory law and Commonwealth law.

8. Subclauses 5 and 6 provide that a person can be prosecuted and convicted for a particular matter under either a State or Territory anti-discrimination law or this Act, but a person cannot be penalised twice.

Clause 13 - Extent to which Act binds the Crown

9. This provision sets out that this Act is intended to bind the executive governments of the Commonwealth, of each of the States (which in this Act includes the Australian Capital Territory and Northern Territory) and of Norfolk Island and the Administrators of the Territories.

10. This means, for example, that government employees will be able to make complaints under this legislation concerning discrimination by Commonwealth or State employers including government departments.

Part 3

Concept of age discrimination

11. This Part sets out what is meant by both direct and indirect discrimination (clauses 14 and 15).

Clause 14 - Discrimination on the ground of age—direct discrimination

12. This provision defines what is meant by direct discrimination against a person on the ground of age. Direct discrimination occurs where a person is treated less favourably because of their age in circumstances that are the same or not materially different than a person of another age.

13. Such discrimination covers acts done because of:

- a person's age; or
- a characteristic that generally appertains to a person of that age; or
- a characteristic that is generally imputed to a person of that age.

14. An example of a characteristic that is generally imputed to an older person could be lack of computer skills. Thus discrimination based on an assumption that an older person would not have adequate computer skills could be discrimination on the ground of age.

15. An example of a characteristic that generally appertains to an older person could be that older people have grey hair. Thus discrimination against people with grey hair could be discrimination on the ground of age.

16. An example of direct discrimination would be if an employer refused to employ someone simply because of their age.

Clause 15 - Discrimination on the ground of age—indirect discrimination

17. This provision defines what is meant by indirect discrimination against a person on the ground of age. Indirect discrimination occurs where a person of a particular age is disadvantaged because the person cannot meet a condition, requirement or practice, that is neutral as to age on its face, but is more difficult for people of that age to meet than people of another age. In such situations, the imposition of an apparently neutral condition, requirement or practice has, or is likely to have, the effect of unfairly disadvantaging people of the same age as the aggrieved person. However, if such a condition is reasonable in the circumstances it will not be unlawful discrimination.

18. An example of indirect discrimination would be a condition of employment in a particular job that required a person to satisfy a demanding physical fitness test which more young people than older people could do. If the level of fitness required by the fitness test was not reasonable for the job in question, this could be indirect discrimination. For example, a demanding physical fitness test would probably not be reasonable if the job was a standard office job. A requirement that employees do a demanding fitness test is not direct discrimination – because it does not actually relate to age. But, if the impact of such a test is that it effectively discriminates against people because of their age (in this example – such a test would probably disadvantage more older people) then it could be indirect discrimination.

19. On the other hand, it may be reasonable for an adventure tour company to require its tour leaders to do a demanding fitness test – even if that disadvantaged older

people. This could be the case where a tour leader was required to lead long hiking tours and other physically demanding tasks.

20. The person who imposes the condition, requirement or practice is the one who has the responsibility of showing that the condition, requirement or practice is reasonable, if there is a complaint of indirect discrimination. This is because the person who is imposing or proposing to impose such a requirement is in the best position to explain or justify the reasons for it in the particular circumstances. For example, where an employer's business context requires certain productivity standards for competitiveness or to meet external requirements, the employer understands the reasons for requiring those standards and is therefore best placed to show that they are reasonable. An employee or prospective employee, on the other hand, is less likely to have access to all the information about the overall needs of and demands on the business in question.

21. Where particular productivity requirements are reasonable in a business, it will not be discrimination to require all workers, of whatever age, to meet those requirements.

Clause 16 - Act done because of age and for other reason

22. This clause provides that age must be the dominant reason for an act before the act could substantiate a complaint of age discrimination.

23. This is different from tests in the other Commonwealth anti-discrimination legislation, which provide that the act is taken to have been done for the relevant reason if that reason is one of a number of reasons.

24. However, in this case, 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.

Part 4

Unlawful age discrimination

25. This Part of the Bill, amongst other things, sets out those areas of discrimination which are to be covered by this legislation.

26. This is the Part of the Bill that makes it unlawful to discriminate based on age. The provisions in this Part together with the complaint provisions in the HREOC Act jointly provide the mechanism by which discrimination based on age can be addressed, by either conciliation, or if conciliation is unsuccessful or inappropriate, by action in a court.

27. This Part covers discrimination in work, education, access to premises (including public places and public transport), goods, services and facilities, accommodation, the disposal of land, administration of Commonwealth laws and programs, and requests

for information. This Bill does not deal with all areas of possible discrimination. Only those areas set out in this Part are covered. Consultation with the broader community has indicated that these are the major areas of concern. These are also the areas generally covered in existing anti-discrimination laws in Australia.

28. This Part also contains a number of exemptions which set out areas where discrimination will be permitted to continue, notwithstanding this Act.

29. The provision of exemptions is intended to provide a balance protecting the general right of people of a particular age to have the same rights as other citizens while 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).

30. An important exemption relates to positive discrimination. Essentially, positive discrimination means actions, often by government, but also by others, which relate to the special needs and circumstances of people of a particular age, for example to overcome disadvantages experienced particularly by older or younger age groups. Clearly, these positive measures should be allowed to continue.

31. The Age Discrimination (Consequential Provisions) Bill 2003 makes various amendments to the HREOC Act including amending the definition of 'unlawful discrimination' in section 3 of the HREOC Act. This will mean any act that is unlawful under this Part could give rise to a complaint of 'unlawful discrimination' under the HREOC Act.

Division 1 - Simplified outline

Clause 17 - Simplified outline

32. This clause provides a simplified outline of Part 4 to assist the reader. The outline sets out the areas in which age discrimination is unlawful, unless one of the exemptions in this Part applies.

Division 2 - Discrimination in work

Clause 18 - Discrimination in employment

33. This provision states that it is unlawful for an employer (or person acting or apparently acting on behalf of an employer) to discriminate against a person on the ground of that person's age in relation to employment. The areas of employment that are covered include those relating to recruitment and to offers of employment to a person, and also include the actual terms and conditions of employment with the employer, access to promotion and training, dismissal of the employee, or the subjecting of an employee to any other detriment.

34. There are two exemptions created by subclauses 3, 4 and 5. Subclause 3 exempts employment to perform domestic duties in a private household where the person against whom a complaint might be made actually lives. This exemption reflects the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised.

35. Subclauses 4 and 5 provide an exemption of broader application. These clauses provide that a person can not succeed in a complaint of discrimination alleging that they were not given a job which they in fact cannot do, taking into account the training, qualifications, experience, performance standards and other matters relevant to the particular job. The Bill talks about a person not being able to carry out the inherent requirements of a particular job. The exemption related to the inherent requirements of the job applies to recruitment arrangements, offers of employment and dismissal from employment.

Clause 19 - Discrimination against commission agents

36. This provision sets out that it is unlawful to discriminate against a person who is a commission agent on a similar basis to that established for employment generally under clause 18.

37. Again, subclauses 3 and 4 provide the person who engages a commission agent with similar exemptions in relation to the ability to carry out the inherent requirements of the work as is established in clause 18.

Clause 20 - Discrimination against contract workers

38. This provision is designed to make it unlawful to discriminate against a contract worker on the ground of that worker's age. "Contract worker" is defined in subclause 4 to mean a person who does work for another person under a contract between the employer of the first-mentioned person and that other person. An example of a contract worker is an employee of a labour hire/employment agency. This provision therefore makes it unlawful for a person using the services of someone provided by a labour hire agency, to discriminate against that person.

39. Subclauses 2 and 3 of this clause also provide similar exemptions relating to the inherent requirements of the contract work.

Clause 21 - Partnerships

40. This clause deals with discrimination against people on the ground of their age in relation to partnerships where there are more than six partners. It is made unlawful to discriminate against a person on the ground of a person's age in relation to who can become a partner and the terms and conditions upon which that partnership is offered. The provision also covers denying or limiting access to benefits, expelling a partner or subjecting a partner to any other detriment. As with clauses 18, 19 and 20, there is an exemption for discrimination where the complainant cannot carry out the inherent requirements of the work of a partner in the partnership.

Clause 22 - Qualifying bodies

41. This clause makes it unlawful for an authority or body which gives authorisations or qualifications needed for carrying on an occupation or profession or trade to discriminate against a person on the basis of that person's age, in conferring or withdrawing such an authorisation or qualification, or in the terms or conditions of granting the authorisation or qualification.

42. There is an exemption contained in subclauses 2 and 3 which provides that the particular authorising body can discriminate against a person on the basis of that person's age if that person is unable to carry out the inherent requirements of the particular profession, trade or occupation.

Clause 23 - Registered organisations under Schedule 1B to the *Workplace Relations Act 1996*

43. This clause provides that it is unlawful for an organisation registered under Schedule 1B to the *Workplace Relations Act 1996*, such as a union or employer body, to discriminate against a person on the basis of that person's age in relation to membership of the organisation or benefits provided by the organisation.

Clause 24 - Employment agencies

44. This clause makes it unlawful for an agency which organises employment for people to discriminate against a person on the grounds of the person's age by either refusing to provide its services or by the terms and conditions or the manner in which the services are provided. For example, an employment agency could not screen potential applicants by age for positions offered by employers through that agency unless that was permitted by an exemption that applied in the particular circumstances.

45. Subclauses 2 and 3 provide an exemption for an employment agency where the person concerned is unable to carry out the inherent requirements of the job that that person might be seeking.

Clause 25 - Exemption for youth wages

1. This clause provides an exemption for youth wages. Youth wages means the remuneration for persons under the age of 21. The exemption covers the actual payment of youth wages, the offering of youth wages, recruitment for work for which youth wages will be payable, and the selection of people for work for which youth wages will be payable. The exemption for youth wages parallels, and is consistent with, exemptions in the *Workplace Relations Act 1996* for junior rates and certain types of training wages, such as the national training wage. It will ensure that matters concerning remuneration of persons under 21 do not constitute unlawful discrimination under this Bill.

2. Youth wages are a well-recognised feature of workplace relations in Australia. This exemption will protect the competitive position of young people in the

workforce by allowing employers and the like to continue to recruit and employ young people and remunerate them on the basis of an appropriate youth wage.

Division 3 - Discrimination in other areas

Clause 26 - Education

3. This clause makes it unlawful for an educational authority to discriminate against a person on the ground of age in refusing or failing to accept the person's application for admission or in the terms and conditions upon which the authority is prepared to accept the person as a student. The prohibition applies in schools, colleges, universities or other institutions in which education or training is provided (see the definitions of educational authority and educational institution in subclause 4). It is also unlawful to deny or limit access to benefits provided by the educational institution, to expel the student or to subject the student to any other detriment on the basis of their age.

4. There is one exemption to this provision. Subclause 3 provides that it is not unlawful to discriminate against a person where an educational institution is established for persons above a particular age and the person is not above that age. For example, if a school only provided education for children over 5 it would not be unlawful to refuse admission to a 3 year old child.

Clause 27 - Access to premises

5. This provision makes it unlawful to discriminate against people on the ground of age in relation to the provision of access to, or the terms and conditions on which access is provided, to premises that the public or a section of the public is entitled to enter or use.

6. Premises are defined in clause 5 to include buildings, aircraft, vehicles or vessels, places and parts of premises. The provision also makes it unlawful to discriminate by not allowing the person to use certain facilities because of their age or in the terms and conditions on which those facilities are made available to people of a particular age.

Clause 28 - Goods, services and facilities

7. This provision makes it unlawful for someone who provides goods, services or facilities to discriminate against a person on the basis of the person's age by refusing to provide the goods, services or facilities or by the way in which, or the terms and conditions on which, those goods, services or facilities are offered.

8. Services are defined in clause 5 to include services relating to 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.

Clause 29 - Accommodation

9. This provision is designed to make unlawful discrimination against people based on age by refusing an application for accommodation, or in the terms and conditions on which accommodation is offered, or giving a person lower priority in accommodation waiting lists.

10. Subclause 2 also makes it unlawful to deny or limit access to benefits associated with accommodation or to evict the person or subject the person to any other detriment.

11. Subclause 3 provides an exemption where the accommodation is provided by a person who lives on the premises or whose near relative lives on the premises and where accommodation is offered for no more than three other persons. This exemption reflects the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised.

Clause 30 - Land

12. This provision provides that it will be unlawful to discriminate against a person based on age in relation to the selling of, or other dealings in, land. This includes refusing to sell land or applying discriminatory terms and conditions on which an interest in land is offered.

13. The only exception to this provision is provided in subclause 2 which provides that it is not unlawful to discriminate against a person based on age in relation to the giving of land under a will or as a gift.

Clause 31 - Administration of Commonwealth laws and programs

14. This provision sets out that it will be unlawful for a person who performs functions or exercises powers under Commonwealth laws or under Commonwealth programs or has any other responsibility for the administration of those programs or laws, to discriminate against a person on the basis of that person's age in the exercise of those powers or responsibilities. This covers the activities of Commonwealth Government administration such as programs run by Commonwealth Government departments and decisions made by Commonwealth officers under Commonwealth laws (Refer to specific exemptions discussed below).

Clause 32 - Requests for information

15. This provision makes it unlawful to ask a person of a particular age questions that are not asked of people of a different age, in situations that are covered by the prohibitions on discrimination.

16. This provision is a common feature of Commonwealth anti-discrimination legislation, and is based on equivalent provisions in sections 30 of the DDA and 27(1) of the SDA. However, it has been drafted in a more plain english style, making it easier to understand. The amended version of this provision is not intended to expand

or diminish the operation of the provision in this Act compared to the provisions currently in the DDA and SDA.

17. This new version of the provision clearly shows the three elements of the prohibition:

- the information must be requested or required in connection with an act;
- in doing that act it would be unlawful to discriminate against the person being asked for the information, on the grounds of the person's age; and
- people of a different age would not be asked for that information.

1. This provision is most commonly applicable in employment recruitment situations. However, the application of this provision is not limited to employment, but extends to any situation where a person requests information connected with some future act they will perform.

2. The following examples set out some common situations and how the provision would operate:

Example 1: An employer asks applicants for their age and, for applicants over a particular age, asks for information about their health and fitness.

In this example, the person requesting the information has breached this provision because:

- (a) it would be unlawful under the Act to discriminate against the applicant on the basis of age when determining who should be offered employment; and
- (b) the question was not asked of applicants of another age.

Example 2: If all applicants (of all ages) in the example set out above were asked about their health and fitness, such a question would not breach this provision because it was asked of all applicants, not only those of a particular age.

Division 4 - General exemptions

Clause 33 - Positive discrimination

3. This provision allows certain beneficial treatment to be given to people based on age where that is consistent with the purposes of the legislation. While the objects of the Act (see clause 3) summarise the aims of the legislation, the overall purposes of the Bill can also be discerned from this Explanatory Memorandum and other extrinsic material and from the overall structure and content of the Bill. The legislation seeks to eliminate unfair discrimination while also recognising specific circumstances in which age-based distinctions are legitimate, broadly socially accepted, or justified by other strong policy interests. The legislation is beneficial legislation that aims to alleviate injustice and disadvantage experienced by particular age groups, particularly young people and older people. The precise ages to which these broad categories refer are not fixed and therefore any particular case or set of circumstances must be considered on their merits.

4. The legislation exempts “positive discrimination”, which refers to three different types of beneficial age-based treatment (which may in some circumstances overlap):
- (a) the provision of bona fide benefits to people of a particular age. This aspect of the positive discrimination provision recognises and permits a range of concessions and benefits that are provided in good faith to people of a particular age. The most common examples are discounts and concessions provided to older people using various services or facilities. Such benefits are not seeking to give older people an unfair advantage or to exclude or disadvantage people of other ages, and have broad social acceptance;
 - (b) measures intended to meet age-related needs. This aspect of the positive discrimination provision recognises and permits measures that seek to address the needs of people of particular ages that are different to or more acute than the needs of people of other ages. For example, teenagers, because of their age, may have less knowledge of community support services or access to independent accommodation, than adults. Accordingly, special assistance provided to homeless teenagers to meet their particular needs would not be unlawful. While this provision refers to the beneficial act in question being “intended” to meet an age-related need, it is not necessary to establish that the person actually doing the particular act has a certain intention at the time. While it will often be the case that the person extending the beneficial treatment will have that particular intention, the provision is also directed at situations where a beneficial program or facility is established by a person or body with the intention of meeting an age-related need, but is operated by another person or body who simply carries out the policies determined by those who established the beneficial program.
 - (c) measures intended to reduce disadvantage. This aspect of the positive discrimination provision recognises and permits measures that seek to overcome age-related disadvantage. Where a particular age group has been historically disadvantaged, or where social circumstances at the time are such that a particular age group has less access to certain social benefits or opportunities, measures that are aimed at alleviating these problems will be allowed. For example, where older people experience longer periods of unemployment, extra assistance to help them find work would be permitted. As with the needs-based exemption, the requisite intention to reduce disadvantage need not be held by the person actually providing the beneficial treatment.

Clause 34 - Charities

1. This exemption provides that it is not unlawful to discriminate against persons on the basis of age in an instrument that confers charitable benefits, wholly or in part, to people of a particular age. A charitable instrument is defined to include a deed, will or other document. Whether a benefit is charitable or not depends on the general law governing charities.

Clause 35 - Religious bodies

2. This provision provides an exemption for acts or practices of religious bodies where the act or practice conforms with the beliefs of the religion and is necessary to avoid injury to the religious sensitivities of adherents of the religion.

Clause 36 - Voluntary bodies

3. This clause provides an exemption for age discrimination by voluntary bodies, where the discrimination relates to admission to membership of the voluntary body or the provision of benefits, facilities or services to members of the body. The exemption does not extend to other possible acts of discrimination by voluntary bodies, such as in employment or in the provision of services to the public. Voluntary bodies are defined to mean not-for-profit organisations excluding: associations of employees or employers under the Workplace Relations Act 1996, government bodies and financial institutions.

Clause 37 - Superannuation, insurance and credit - actuarial data etc.

4. This clause provides an exemption for age discrimination in respect of the terms or conditions on which an annuity, insurance policy or membership of a superannuation fund or scheme may be offered or refused and in respect of the provision of credit.

5. Distinctions based on age frequently arise in respect of the terms and conditions on which superannuation and insurance policies may be offered and/or refused. For example, the use of age based criteria may affect the type of insurance policy offered or the type of pension payments linked to a superannuation scheme. Such criteria may be based upon actuarial or statistical data. An example would be the terms and conditions on which motor vehicle insurance for people under the age of 25 is offered, where there is actuarial or statistical data that demonstrates a higher accident rate for people in that age bracket

6. The exemption will only apply where the age discrimination is based upon actuarial or statistical data on which, in all the circumstances, it is reasonable to rely and where the different treatment is reasonable in light of that data and other relevant factors. In accordance with the *Privacy Act 1988* and the Information Privacy Principles and National Privacy Principles made under it, the data relied upon should be generic, aggregated and non-identifying statistical data.

7. In circumstances where there is no actuarial or statistical data available and such data cannot be reasonably obtained, then age discrimination in relation to the terms and conditions on which superannuation and insurance is offered or refused may be permitted where the discrimination is reasonable having regard to any other relevant factors.

8. This clause also provides an exemption for age based discrimination in relation to the terms and conditions on which credit is provided to a person. The exemption will apply where the refusal of credit or the terms or conditions on which credit is

provided, are based upon actuarial or statistical data on which it is reasonable to rely, and the refusal or the terms or conditions are reasonable having regard to that data.

9. HREOC, which would handle any complaints of unlawful discrimination in superannuation, insurance or credit under this Act, can require that the source of the actuarial or statistical data be disclosed under clause 54 of the Bill. A failure to provide actuarial or statistical data at the request of HREOC or the President within 28 days of receiving notice in writing of that request is an offence under this Act (see clause 52).

Clause 38 - Superannuation legislation

10. Age-based criteria are contained in some Commonwealth laws regulating superannuation to give effect to particular policy objectives. The purpose of superannuation, and Commonwealth superannuation policy, is to promote better incomes in retirement, to ensure that superannuation is appropriately used for retirement purposes and that the taxation concessions provided to superannuation are not abused. These purposes are reflected in the requirements in superannuation laws, for example, about the minimum age at which superannuation can be accessed and the maximum age at which superannuation contributions can continue to be made. Adjustments to the age provisions in superannuation laws are made as working and retirement patterns change. Where a person or a body such as an employer or superannuation fund is complying with requirements in Commonwealth superannuation legislation (including delegated legislation) in imposing certain age limits or age criteria, those acts will not be unlawful discrimination.

11. Some examples of superannuation legislation included in this provision are:

- the *Papua New Guinea (Staffing Assistance) (Superannuation) Act 1973* – in so far as it relates to retirement benefits and superannuation;
- the *Papua New Guinea (Staffing Assistance) Termination Act 1976*;
- the *Retirement Savings Accounts Act 1997*;
- the *Superannuation Act 1922*;
- the *Superannuation Act 1976*;
- the *Superannuation Act 1990* and *PSS Trust Deed and Rules*;
- the *Superannuation Guarantee (Administration) Act 1992*;
- the *Superannuation Guarantee Charge Act 1992*;
- the *Superannuation Industry (Supervision) Act 1993*;
- the *Superannuation (Productivity Benefit) Act 1988*; and
- the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

1. This exemption also extends to legislation that establishes Commonwealth superannuation schemes, such as the Public Sector Superannuation Scheme and the Commonwealth Superannuation Scheme. In addition, this provision provides an exemption for Exempt Public Sector Superannuation Schemes because, while they are not regulated under Commonwealth superannuation legislation, they agree to operate in accordance with broadly equivalent requirements. The Exempt Public Sector Superannuation Schemes are specified in regulations made under the Superannuation Industry (Supervision) Act. Acts by such schemes will not be unlawful if they are in accordance with the legislation, or trust deed, by or under which the scheme is established.

Clause 39 - Direct compliance with laws, orders, etc.

2. This clause provides an exemption for acts which would otherwise be unlawful under this Bill, if such acts are done in direct compliance with laws, court orders, and industrial awards and agreements.

3. Subclause 1 provides an exemption for acts done in direct compliance with an Act, regulation or instrument mentioned in Schedule 1 of this Bill.

4. There are often sound policy reasons for the use of age-based criteria in Commonwealth laws and programs. For example, such restrictions and criteria based on age may be used to target particular age groups for assistance or to impose appropriate age restrictions, such as in the case of the age of criminal responsibility.

5. Subclause 2 provides an exemption for acts done in direct compliance with any other Commonwealth Act or regulation, which is not included in Schedule 1, for a two year period after the commencement of this Act. This two year period will facilitate the identification of any other Commonwealth laws that contain age-based criteria and restrictions. Such Acts can then be assessed to ensure either that they are amended to remove inappropriate age-based distinctions or that consideration is given to seeking an exemption that is appropriate and justified.

6. Subclause 3 clarifies that subclause 2 does not impose a two year period on the other exemptions for laws and regulations provided by this Division. These exemptions relate to superannuation, pensions, allowances and benefits, health, and migration and citizenship.

7. Subclause 4 provides an exemption for acts done in direct compliance with State and Territory Acts, regulations and instruments. For example, acts which might discriminate on the basis of age but are done in compliance with specific State and Territory laws dealing with liquor licensing, tobacco sales and driving licences, would not be unlawful.

8. Subclause 5 provides that State or Territory Acts, regulations or instruments may be excluded from the exemption provided in subclause 4 by regulations made under this Act. Subclause 6 clarifies that, for the purposes of subclause 5, s. 49A of the *Acts Interpretation Act 1901* does not prevent a regulation being made under subclause 5

from specifying an Act, regulation or instrument as in force at a particular time or as in force from time to time.

9. Subclause 7 provides an exemption for age discrimination for acts which are done in direct compliance with an order of a Commonwealth, State or Territory court.

10. Subclause 8 provides an exemption for age discrimination for acts that are done in direct compliance with industrial instruments including an order or award of a court or tribunal having the power to fix minimum wages or a certified agreement or an Australian Workplace Agreement as defined in the Workplace Relations Act 1996.

Clause 40 - Taxation laws

11. This clause provides that anything done by a person in direct compliance with the requirements of the *Income Tax Assessment Act 1997* will not be unlawful under this Act.

Clause 41 - Pensions, allowances and benefits etc.

12. This clause exempts acts that are in direct compliance with specified laws providing for matters such as social security and other pensions and benefits. 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.

13. The Work for the Dole program is not affected by this Bill. This program is covered by the exemption for acts done in direct compliance with the Social Security Act 1991.

14. Similar policy issues also arise in respect of the age requirements for veterans' pensions. For example, the service pension age for veterans recognises that people who have served Australia in war are reasonably expected to have a shorter life expectancy.

15. The determination of entitlements or provision of services under legislation mentioned in this clause, which includes the Social Security Act 1991 and related legislation and the Veterans' Entitlements Act 1986 and related legislation, will not be affected by the coming into force of this Act. Subclauses 4 and 5 also exempt compliance with certain instruments under the Veterans' Entitlements Act, which relate to rates of pensions and to other entitlements.

16. Subclause 3 provides an exemption for acts done in direct compliance with the Community Development Employment Projects (CDEP) Scheme (within the meaning of the Social Security Act). The CDEP Scheme, which is administered by the Aboriginal and Torres Strait Islander Commission, provides employment and training opportunities to Indigenous participants in a range of activities that benefit them and their communities.

Clause 42 - Health

17. This clause is designed to ensure that this Act does not make unlawful legitimate age-based criteria used in the delivery of health and medical services. It does not permit the use of age as an arbitrary or inappropriate factor in the delivery of health and medical services in precluding a person's access to related goods and services.

18. The provision distinguishes between two different methods of delivery of health and medical services - subclauses 1 and 2 deal with the delivery of health programs targeted at certain groups of the community (exempted health programs) and subclauses 3 and 4 deal with clinical decisions about the treatment of a particular individual.

19. Exempted health programs are broadly defined so as to cover both public and private sector arrangements (see subclause 6). The provisions for exempted health programs (subclauses 1, 2 and 6) recognise that some health programs may be targeted at certain age groups based on data about particular age groups in the population. Accordingly, these subclauses exempt the development and implementation of such health programs as are reasonably based on evidence – such as clinical, medical or scientific evidence - concerning matters that affect people of different ages differently, including safety, effectiveness, risks, benefits and health needs. The evidence that is to be considered is the evidence that was reasonably available at the time the health program was established.

20. For example, the Pharmaceutical Benefits Scheme, which is established under the *National Health Act 1953*, provides for some pharmaceutical products to be available at reduced rates to people of certain ages. This may be because there is clinical evidence about the effectiveness of a particular drug for people of a particular group. Similarly, some treatments or screening programs may be available either free or at reduced rates to people in certain age groups. For example, influenza vaccine is available for free to people of those age groups who are at greatest risk of complication and death from influenza.

21. Subclauses 3 and 4 recognise that health service providers look at the individual circumstances of a patient in determining the patient's ability to benefit from a treatment, and that age may be a relevant factor where it is related to the suitability of a treatment for that patient. Accordingly, these subclauses exempt the consideration of a patient's age as a factor in medical treatment decisions if that consideration is reasonably based on evidence - such as medical, clinical and scientific evidence - and professional knowledge, about the safety, effectiveness, risks and benefits of a proposed treatment.

22. Subclause 5 provides an exemption for anything done in the administration of the *Therapeutic Goods Act 1989* or any instruments made under those Acts. The Therapeutic Goods Act establishes a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods that are used in Australia, whether produced in Australia or elsewhere, or exported from Australia. Subclause 5 also exempts actions that relate to information held by the Health Insurance Commission under the *Health Insurance Act 1973* or the *National Health Act 1953*. The Commission holds information about medical services for which claims have been made under the medicare system and about drugs prescribed under

the Pharmaceutical Benefits Scheme. Age criteria may be a factor in the release of, or access to, that information where it relates to medical services or pharmaceutical products provided to a child. The Commission also issues medicare cards. Subclause 5 exempts age discrimination where it relates to the age at which a medicare card is issued.

23. In addition to these health exemptions, this Bill also exempts Lifetime Health Cover and Community Rating from the operation of the Act. This is achieved by listing the National Health Act 1953 and the Health Insurance Act 1973 in Schedule 1 to this Bill.

Clause 43 - Migration and citizenship etc.

1. Subclause 1 exempts all actions under the Migration Act 1958 and the *Immigration (Guardianship of Children) Act 1946* and subsidiary instruments (including Regulations) under these Acts. Policies relating to immigration must balance social, economic, humanitarian and environmental factors to achieve migration outcomes of benefit to the Australian community as a whole. This includes a balance between the costs of Australia's immigration program (including the pressure placed on national resources) against the contribution of a particular age group during their stay or settlement in Australia. Further, there is considerable parliamentary and public scrutiny given to migration laws and regulations. The broad public interest being served by restrictions imposed in migration laws and regulations is such that it is appropriate that these laws are exempted from the application of this Act.

2. The provisions of the Immigration (Guardianship of Children) Act and the Immigration (Guardianship of Children) Act Regulations 2001 apply to certain non-citizen children under the age of 18 who are not accompanied by parents or relatives over the age of 21. The aim of this Act is to ensure that appropriate care arrangements are made for such children. In order for the Minister of Immigration and Multicultural and Indigenous Affairs to be able to fully discharge his or her duties as the non-citizen child's legal guardian, it is appropriate to exempt this legislation from the application of this Act.

3. Subclause 2 provides an exemption in respect of anything done by a person in direct compliance with the *Australian Citizenship Act 1948* or the *Immigration (Education) Act 1971*. These Acts deal with matters relating to citizenship and the provision of, and access to, English tuition.

Division 5 – Exemptions granted by Commission

Clause 44 - Commission may grant exemptions

4. This clause provides that HREOC has the power to grant temporary exemptions for acts that would otherwise constitute unlawful age discrimination under this Act. A similar provision can be found in Commonwealth anti-discrimination laws relating to sex and disability discrimination.

5. This clause is designed to provide flexibility in particular situations, which may involve potentially discriminatory conduct, but upon examination should be permitted on a temporary basis. An exemption may be granted by HREOC in respect of a provision in Division 2 (discrimination in work) or Division 3 (discrimination in other areas such as education, goods, services and facilities and accommodation) of Part 4 the Act. For example, an exemption might be given in circumstances where it is appropriate to allow discrimination (which would otherwise be unlawful) on a transitional basis, or where there is uncertainty about whether a beneficial measure falls within the positive discrimination exemption.

6. HREOC is able to grant an exemption on such terms and conditions as are appropriate in the circumstances. An exemption may be granted for a period not exceeding five years (subclause 3). HREOC can grant a further exemption if an application is made before the period of the original exemption expires (subclause 2).

Clause 45 - Review by Administrative Appeals Tribunal

7. This clause provides an opportunity for a person affected by a decision of HREOC in relation to a temporary exemption, to seek a review of that decision by the Administrative Appeals Tribunal.

Clause 46 - Notice of decisions to be published

8. To ensure that the community at large is aware of exemption decisions made by HREOC under clause 44, this clause requires HREOC to publish in the Commonwealth Gazette a notice of the making of such a decision.

9. The notice must be published within one month after the decision on an exemption is made. The notice must set out HREOC's findings on material questions of facts, the evidence on which those findings were based and the reasons for the decision. The notice must also indicate that an application to the Administrative Appeals Tribunal may be made for review of the decision.

Clause 47 - Effect of exemptions

10. This clause provides that actions taken in accordance with exemptions granted by HREOC under clause 44 are not unlawful under other provisions of this Act.

Part 5

Offences

11. This Part sets out a number of offences, such as victimisation of a person who takes action under this Act, which support the prohibition on unlawful discrimination and the procedures established under the HREOC Act for complaints of unlawful discrimination.

12. The offences created by this Part (other than the offence created by clause 52) fall under the definition of ‘unlawful discrimination’ in section 3 of the HREOC Act and may therefore give rise to a complaint of unlawful discrimination to HREOC.

Division 1 - General rules relating to offences

Clause 48 - Application of the Criminal Code

13. This clause provides that Part 2.5 of the *Criminal Code*, which deals with corporate criminal responsibility, does not apply in relation to an offence against this Act. The Bill imposes different arrangements for dealing with corporate criminal responsibility in keeping with the existing suite of Commonwealth anti-discrimination law (see clause 57).

Clause 49 - Unlawful act not offence unless expressly provided

14. This clause provides that an act that is unlawful under this Act will not be regarded as an offence unless express provision is made for this in the Act. This means a person who is found to have committed an unlawful act under Part 4 will not be criminally liable for such actions unless there is express provision making those unlawful acts an offence under the Act.

Division 2 – Specific offences

Clause 50 - Advertisements

15. This clause makes it an offence to for someone to publish or display an advertisement or notice or cause or permit such an advertisement or notice to be displayed, which indicates (or could be reasonably understood as indicating) an intention to discriminate on the basis of age in a way which is prohibited under Part 4 of the Act. Publication or display is defined broadly and includes publication and display in newspapers, by television or radio and by distribution of samples, circulars, catalogues or other material. The definition of publication or display is not exhaustive and will be able to take into account new media and technologies as and when they arise. The clause is applicable whether or not the publication or display is made to the public.

16. Subclause 2 provides that, in establishing that the advertisement indicates an intention to do an act that is unlawful, strict liability shall apply in establishing that the act would be unlawful under Part 4. A note has been included as a reminder that s. 6.1 of the Criminal Code, which sets out the elements required to prove a strict liability offence, is relevant. Strict liability is a mode of criminal responsibility defined by the absence of any requirement of proof of fault, whether for all or some of the physical elements of an offence. The general defences in Chapter 2, Part 2.3 of the Criminal Code are also available.

Example: A job advertisement that restricts eligibility to a certain age group where no relevant exemption applies. For example, if A advertises for a person to work in a call

centre answering telephones and in that advertisement indicates that persons over 40 should not apply, A could be guilty of an offence as there would be no relevant exemption to discriminate on the basis of age for this position. However, if A advertises for a person to work in a bar selling alcohol, and in that advertisement indicates that persons over 18 may apply, A would not be guilty of an offence under this provision where there are age restrictions imposed on those eligible to serve alcohol.

Clause 51 - Victimisation

17. This clause makes it an offence to commit an act of victimisation. This clause is designed to ensure that people can safely use the complaints procedures established for age discrimination, without being threatened or punished for doing so.

18. An act of victimisation occurs where a person subjects, or threatens to subject, another person to any harm because (or because they believe) the other person has or proposes to take some form of action under this Act. Such action (or proposed action) may be to make a complaint, commence proceedings, provide information or documents, attend conferences, appear as a witness or propose to make an allegation about discrimination.

Example: A dismisses B on the basis that B has given evidence as a witness in proceedings against A which concern an allegation that A has discriminated against C, a co-worker of B. It does not matter whether or not C's complaint of discrimination is proven. A's action to dismiss B (because he appeared as a witness) would be an offence under this provision.

Clause 52 - Failure to disclose actuarial or statistical data

19. Clause 54 gives HREOC power to require a person to present any data relied upon to justify discriminating against people on the ground of age under clause 37. Where that data is not presented and there is no reasonable excuse for not presenting it, then subclause 1 provides that the person is guilty of a criminal offence.

20. Subclause 2 provides that subsection 4K(2) of the Commonwealth Crimes Act does not apply to this section. That subsection essentially creates a separate offence for each day that a person does not comply with a notice of a sort HREOC can give under this clause. This would mean that for every day a person does not comply they could be charged with a separate offence. By making it clear that subsection 4K(1) does not apply there will be only one offence rather than a series of offences for each day an order is not complied with.

21. The offence created by this provision is treated in the same way as the offence created by clause 60. That is, this provision is excluded from the definition of unlawful discrimination in section 3 of the HREOC Act. Accordingly, an offence under this provision does not give rise to a complaint of unlawful discrimination with HREOC. It is also excluded from the operation of the civil action provision in clause 59 of this Bill. Therefore, a person aggrieved by this provision may institute civil proceedings in any court in respect of the offence committed.

Part 6

Functions of Human Rights and Equal Opportunity Commission

22. This Part sets out in detail the functions conferred on HREOC by this Bill. The mechanisms by which complaints of unlawful discrimination on the basis of age discrimination under this Bill may be made, and how those complaints are to be dealt with by HREOC are provided in Part IIB of the HREOC Act.

Clause 53 - Functions of the Commission

23. This provision sets out the functions that are conferred on HREOC by this Bill. It confers similar powers on HREOC as the RDA, SDA and DDA — that is, public awareness and education; inquiries and conciliation in relation to complaints of discrimination; and input to policy and legislative development.

Part 7

Miscellaneous

24. This Part brings together a number of provisions that aid the general operation of the legislation.

25. For example, there are provisions which are designed to assist HREOC in its day to day operations such as the power of delegation (clause 55) and the protecting of HREOC from civil actions (clause 58). Other provisions establish when a person or body will be liable for discrimination by others (clause 57) and extend responsibility for unlawful discrimination to those who aid or induce it (clause 56). There is also a provision to allow regulations to provide for things necessary for the operation of the legislation but which are not set out in the Bill (clause 61).

Clause 54 - Power to require actuarial data or statistical data

26. Under clause 37 it is unlawful to discriminate against people based on age in relation to the provision of superannuation or insurance unless that discrimination is based on actuarial data or statistical data on which it is reasonable to rely. For HREOC to be able to determine whether it is reasonable to rely on the actuarial data or statistical data it must have that data before it. This clause gives HREOC the power, by giving a notice in writing, to require someone to present that data to HREOC. Where that data is not presented and there is no reasonable excuse for not presenting it, then clause 52 provides that the person is guilty of a criminal offence.

Clause 55 - Delegation

27. This clause provides HREOC with a broad power to delegate to the persons set out in the clause.

28. Unlike the DDA, SDA and RDA this Act does not establish a Commissioner for age discrimination. Therefore, this provision does not contain a provision relating to the delegation of powers by the Commissioner.

Clause 56 - Liability of persons involved in unlawful acts

29. This clause provides that a person who aids another person in any way or induces or permits another person to do an act that is unlawful under Division 2 and 3 of Part 4 of the Act is also taken to have done the unlawful act. The effect of this provision is that a complaint of unlawful discrimination could be made against this person as well as that person who actually did the unlawful act.

Clause 57 - Conduct by directors, employees and agents

30. There are provisions in the existing Commonwealth anti-discrimination laws that make persons responsible for the acts or conduct of others which are unlawful under the relevant anti-discrimination law. This clause provides that a body corporate or a person other than a body corporate may be liable for acts of unlawful discrimination done by others and where relevant, liable for certain conduct which is a criminal offence under the Act.

31. This clause has been separated under three sub-headings. The first part of the clause concerns the liability of a body corporate for the conduct of a director, employee or agent. The second part of the clause concerns the liability of a person other than a body corporate (such as an individual or group of individuals) for the acts or conduct of employees or agents. The third sub-heading is to assist interpretation of the clause, and in particular to define the relevant states of mind required to establish that a body corporate or other person is liable for the conduct of another person which is an offence under this Act.

32. This clause refers to “conduct” rather than the “acts” of directors, employees and agents. The word “conduct”, for the purposes of this clause, is intended to include acts and omissions, and it is used because a body corporate or other person may be liable for a criminal offence in respect of certain unlawful conduct.

33. The word “employee” has been used in preference to “servant”. The choice was made because of current legal usage a reference to the “employer-employee” relationship has come to be regarded as a reference to the relationship traditionally described as the “master-servant” relationship, unless there is a definition in the legislation to the contrary. It is not intended that there should be a distinction made with this clause. Section 123 of the DDA, which is a similar provision, refers to the conduct of directors, servants and agents.

34. Subclause 1 provides that where it is necessary to establish a state of mind for a body corporate in relation to particular conduct, it is necessary to establish that the person (director, employee or agent) who engaged in the conduct was acting within the scope of his or her actual or apparent authority and had the relevant state of mind. “State of mind” includes a range of matters as defined in subclause 6.

35. Subclause 2 establishes that a body corporate will, for the purposes of this Act, be taken to have engaged in conduct by a director, employee or agent (who is acting on behalf of the body corporate as described in subclause 1) unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

36. Subclause 3 provides that it will be sufficient to establish that a person other than a body corporate has the relevant state of mind for particular conduct, if it is established that the employee or agent of the person other than a body corporate, who was engaged in the conduct, was acting within his or her actual or apparent authority and had the state of mind. “State of mind” includes a range of matters as defined in subclause 6.

37. Subclause 4 establishes that a person other than a body corporate will, for the purposes of this Act, be taken to have engaged in conduct by an employee or agent (acting on behalf of the person as described in subclause 3), unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

38. Subclause 5 provides that where a person who is not a body corporate is convicted of an offence because of the provisions of this clause (which essentially imputes a state of mind or conduct to someone whether he or she had that state of mind) then that person cannot be punished by imprisonment.

39. Subclause 6 provides the relevant definition for the term “state of mind” required to be established for the purposes of this section.

40. Subclauses 7 and 8 are self-explanatory.

Clause 58 - Protection from civil actions

1. Subclause 1 provides that a person may not take civil action against any of the following people in relation to any actions or omissions done in good faith in the course of their duties under this Act:

- (a) HREOC;
- (b) a member of HREOC;
- (c) a person acting for or on behalf of HREOC; and
- (d) a person acting for or on behalf of a member of HREOC.

1. Although this clause is worded differently to the equivalent provisions in the DDA, SDA and RDA, its scope is sufficiently broad to protect from civil actions those persons protected under those Acts.

2. Subclause 2 indicates that a person cannot bring a civil action against another person if the only reason they have suffered loss or damage is due to the making of a complaint, the lodging of a submission, or the giving of information in any form under this Act.

Clause 59 - Unlawful act not basis of civil action unless expressly so provided

3. The HREOC Act provides a mechanism for dealing with complaints about matters that are unlawful under this Act. It is not intended that rights created under this Act give rise to civil actions in the courts.
4. This clause provides that, notwithstanding that an act is unlawful under the provisions of Part 4, no separate right of action is created unless there is an express provision concerning such actions.
5. Subclause 2 refers to the offences created under Division 2 of Part 5, and indicates that for the purposes of this clause they are to be regarded as unlawful acts. That essentially means that the only action in relation to those matters is a complaint under the HREOC Act or the prosecution for an offence.

Clause 60 - Non-disclosure of private information

6. This clause provides for the approach to be taken by HREOC, its members and staff in respect of the use of private information.
7. Subclause 1 prohibits a person, who is or at any time has been, a Commissioner, a member of HREOC, or a staff member assisting HREOC from directly or indirectly making a record of, or divulging or communicating to anyone private information of another person if such information was acquired as a result of his or her office or employment with HREOC. The prohibition extends to making use of any such private information, or producing any documents which contain another person's private information to anyone, if they were given to HREOC for the purposes of this Act.
8. Subclause 2 provides a prohibition, to the same group of people as defined in subclause 1, from divulging or communicating any private information of another person (which was acquired because of his or her office or employment with HREOC), or from producing a document containing private information of another person to a court, except where it is necessary to do so for the purposes of this Act.
9. Subclause 3 makes exclusions to the general prohibitions in subclauses 1 and 2. First, a record of information may be made if it is required or permitted by an Act to be recorded, or is made for the purposes of this Act. Secondly, information may also be divulged or communicated in accordance with an arrangement under s 16 of the HREOC Act 1986, which concerns arrangements between the Commonwealth and a State anti-discrimination body. Thirdly, an exception is made for information divulged or communicated or documents produced, if such actions are required or permitted to be done by an Act and such actions are done for the purposes of that Act.
10. This provision is excluded from the definition of unlawful discrimination in section 3 of the HREOC Act. Accordingly, an offence under this provision does not give rise to a complaint of unlawful discrimination to HREOC. However, this provision is also excluded from the operation of the civil action provision in clause 59. Therefore a person aggrieved by this provision may institute civil proceedings in any court in respect of the offence committed.

Clause 61 – Regulations

11. This clause provides the Governor-General with the power to make regulations under this Act.

Schedule 1

12. This Schedule sets out the list of laws mentioned in paragraph 39(1)(a). Anything done by a person in direct compliance with the laws listed in this Schedule is not made unlawful by Part 4.