Outlawing age discrimination

Foreign lessons, UK choices

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Foreword

This report brings together evidence of the operation and impact of legislation to prohibit age discrimination in those countries that have such laws. It also looks at the choices facing the United Kingdom now that it is committed to introducing age discrimination legislation under a new European Council Directive.

The study, described in the introduction below, was carried out by Zmira Hornstein as part of the Joseph Rowntree Foundation's Transitions After 50 Programme. It has brought together detailed papers from experts in three countries (published as Chapters 2-4), and further basic information on other countries. This evidence was discussed at a workshop in March 2001, which helped refine the study's findings.

The authors would like to thank the many people who helped with and contributed to this report and, in particular, the valuable contribution made by all participants at the workshop (listed in Appendix B). Special thanks are due to Donald Hirsch and Mark Hinman from the Joseph Rowntree Foundation. Donald identified the need for this project, suggested a fruitful approach and provided much appreciated help and support throughout. Mark made useful comments on the draft report and dealt with the organisation of the workshop. Responsibility for any errors, opinions and interpretations in the report rests with the authors.

Introduction and summary findings

The context

Age discrimination, defined as the different treatment of people solely because of their age, can and does have harmful effects. There is extensive evidence that age discrimination in the labour market damages workers (see for example, Performance and Innovation Unit, 2000). It harms useful older workers by limiting their training and progression opportunities and keeps older people who wish to work out of employment. It can also lead to deprivation resulting from an inadequate income. It can damage businesses and the economy by wasting a useful and needed resource. The existence and effects of age discrimination generally and in the UK are well documented (Walker, 1997; Hirsch, 2000; Performance and Innovation Unit, 2000). There is evidence that many older people leaving employment do not do so voluntarily, and that they encounter much greater difficulties than prime age workers in getting back into employment. There is also evidence that employers often make false assumptions about the productivity and flexibility of older people and therefore wrongly discriminate against them.

At a time when populations are ageing – as they presently are in most OECD countries – the economic cost of age discrimination increases and a larger proportion of the population is affected by such unfair treatment. Also, the burden on the working population of supporting age groups with low employment rates (for example, through publicly-funded pensions or disability benefits) increases as the population of these older groups rises relative to that of younger adults. The pressure on the labour market, with a decreasing supply of prime age workers and an increasing supply of older workers, may bring about some change in employers' attitudes, but there is little reason to expect market forces to eliminate all age discrimination. However, a period when the population is ageing may be considered an appropriate time to introduce policies that work with the current climate and encourage positive working practices.

Various actions and policies have been considered or adopted by the UK government to combat age discrimination generally, and particularly in the labour market. They range from government interventions in the market, for example, by providing information to employers on the value of older workers or helping older workers to find jobs, to more prescriptive approaches including the provision of an official Code of Practice on age diversity. A step further from these, mostly voluntary, policies will be the introduction of legislation prohibiting certain forms of age discrimination. Raised as an eventual possibility at the time of the introduction of the voluntary Code of Practice, such legislation is now a commitment following the UK's recent acceptance of a new European Council (EC) Directive, as explained in more detail below.

The need to address age discrimination has been recognised for quite some time and, in several countries, policies to assist older workers date back to the 1920s and before. Legislation against age discrimination, however, is more recent and has been in operation longest in the United States (US), where it was introduced some 30 years ago. It is interesting to note that, while the problem of age discrimination has been acknowledged for some time, only a few countries have introduced legislation to prohibit such behaviour. Even in these countries, the introduction of this legislation came some years after the introduction of legislation prohibiting gender and race

discrimination. This was the case in the US, Australia and the Republic of Ireland.

The project

This project, which is part of the Joseph Rowntree Foundation's Transitions After 50 Programme, has collected information on the content and operation of age discrimination legislation in countries where such legislation exists. This was done, mainly, to inform policy decisions in the UK.

In June 1999 the UK government introduced a non-statutory Code of Practice – *Age diversity in employment* (DfEE, 1999) – promoting equal treatment of workers of all ages and the removal of age restrictions in the recruitment, training and promotion of workers. When the present project started, in mid-2000, there was still a question about whether the UK would introduce legislation to combat age discrimination. The effects of the Code of Practice were evaluated by the Department for Education and Employment (DfEE, 2001). These interim findings appeared to show some limited change in employers' behaviour, although not, apparently, as a direct result of the Code; the full results are not expected to be published until the summer of 2001. The need for further government action, including the step of introducing age discrimination legislation, was to be considered in light of this evaluation (see the second recommendation in Performance and Innovation Unit, 2000).

Since the launch of the Code, however, the situation has changed. In October 2000 the European Council passed a new Directive (Council Directive 2000/78/EC) establishing the general framework for equal treatment in employment and occupation, addressing not only employment, but also training and involvement in occupational organisations. To comply with the Directive the UK government will need to introduce new equality legislation. A period of three years from the publication of the Directive was allowed for the introduction of new age discrimination legislation in EU member countries. If a case is made to the European Commission, the deadline can be extended to 2006 – a maximum implementation period of six years.

In this new situation, knowledge about the operation of existing age discrimination legislation is even more timely. Such information could help UK legislators to select an appropriate and effective form of age discrimination legislation within the framework of the new EC Directive. Although somewhat limiting, the Directive still allows quite a wide range of options in the content and method of enforcement of the required legislation, and this choice can be informed by experience abroad.

We identified seven OECD countries with extensive age discrimination legislation: the US, Canada, Australia, New Zealand, Spain, Finland and the Republic of Ireland. The Netherlands already has some, limited, age discrimination laws and is in the process of introducing more extensive legislation. This process, however, has stalled since the country must now align the proposed legislation with the new EC Directive. Some other countries have a few laws prohibiting some specific aspects of age discrimination: the project identified such limited legislation in Belgium, France, Germany, Greece, Portugal and Sweden. It was difficult to find information about such laws, so this list may not be comprehensive. Labour market measures to help older workers (which are not laws) operate in many countries. These are not within the remit of this study.

Only in a very few countries has the legislation been in force for long enough to allow a close examination of its effectiveness. The three countries with the longest history of age discrimination legislation are the US, Canada and Australia. In these three countries work was commissioned from experts in the field to describe the existing legislation, concentrating mainly on age discrimination in the labour market, and to review available research and other evidence on its effects. These country papers comprise Chapter 2 on Australia by Professor Sol Encel, Chapter 3 on Canada by Professor Morley Gunderson and Chapter 4 on the US by Professor David Neumark. Appendix A provides short descriptions, in a schematic framework, of existing age discrimination legislation in all countries where such laws have been identified, and a description of the new EC Directive on Equal Treatment in Employment and Occupation.

Based on the information regarding the experience of other countries with age discrimination legislation, Chapter 1 examines the options facing the UK in introducing new age discrimination legislation, compliant with the requirements of the EC Directive.

The workshop

An integral part of the project was the plan to hold a workshop when the draft report was available. The workshop brought together an international group of people specialising in this field. The group included economists, lawyers, sociologists and people working in research, government and other stakeholder organisations. The purpose of the workshop was to discuss the report and the issues that the UK and other countries need to consider in the process of forming new legislation to combat age discrimination.

The workshop was held on the 16 March 2001; a list of participants is attached in Appendix B. David Neumark, Sol Encel and Reema Khawja gave short presentations but the expert participants spent much of the day in open discussion.

The conclusions from this project, expanded below, are based on the experience of countries with age discrimination legislation analysed in this report and on the input by the participants of the workshop.

Lessons and choices in introducing age discrimination legislation

The following summary of the findings of this project looks successively at:

- The objectives and cultural context of age discrimination legislation, which plays a large part in each country in determining what type of legislation is deemed to be appropriate.
- The effectiveness or impact of the legislation, in terms of progress towards these objectives.
- Some key issues where choices of emphasis will need to be made in the introduction of new legislation to combat age discrimination.

Context and objectives of age discrimination legislation

Discrimination legislation generally, including laws prohibiting age discrimination, is motivated by ideals of equality and individuals' human rights. However, these aims are tempered by other considerations of economic efficiency and of the overall welfare of the community. It is the cultural context in each country that determines how the balance is struck between the rights of the individual on the one hand, and economic and other objectives of society on the other. These things will not always conflict, but when they do, a country's laws should reflect its views on this balance.

However, while age discrimination legislation has to fit in with the specific cultural context of each country it can also be viewed as a tool which, in the long run, can help change that culture. In the case of age discrimination legislation an important objective is to change the attitudes of employers and others and to ensure equality to people of all ages.

Evidence

What evidence do we have that age discrimination legislation makes a difference? The study of the three countries with some history of legislation in this area indicates that legislation has had some impact. The most comprehensive evidence comes from the US (see Chapter 4), where the legislation has operated longest, but there is also evidence of the impact of legislation in Canada and Australia, although, in the latter, it was only introduced in the 1990s.

In the US:

- The legislation has significantly increased the employment rates of older workers. This is mostly due to older workers staying on in work until an older age rather than any evidence of an increase in hiring of older workers.
- There is some evidence that employers may be a little less likely to hire older workers now that they are protected by age discrimination legislation and do not have a mandatory retirement age.
- The legislation has strengthened the relationship between employees and employers, because it has increased the trust between the parties and ensures that employers cannot renege on their obligations to their older workers.
- So far, there is no clear evidence of the overall effect of age discrimination legislation on the economic welfare of society, as against the relatively clear evidence that the legislation has helped older workers.

More generally, in Australia, Canada and the US, it is fair to conclude from the evidence that:

- Legislation prohibiting age discrimination has had some effect on employers' practices, particularly in terms of processes, for example, in advertising vacancies or in the process of selection for promotion.
- However, there has been little shift in the attitude of employers and society to older workers. This contrasts with the changes observed in the attitudes to gender and race discrimination, where legislation has been operating for a longer period of time.

In the US chapter, the evidence on the beneficial effects of age discrimination legislation does not rely on the abolition of the mandatory retirement age in 1986, since much of the data on which the research is based is from before that time (see Chapter 4, page 56; and research by Neumark and Stock, 1999; Adams, 2000).

A clear observation on the effectiveness of age discrimination legislation, based on the experience in several countries, is that it is greatly helped by operating in conjunction with other policies to promote equal rights and educate employers and workers about their obligations and rights. There is no real choice between legislation and other methods of promoting non-discriminatory behaviour. The various approaches interact and enhance the overall impact. Certainly legislation on its own is unlikely to change the employment culture.

Choices for the legislator

Looking at both existing age discrimination legislations in countries abroad and at the range of options presented by the EC Directive, it is important to note that there are different ways of legislating to prohibit age discrimination and that the choices influence the outcomes. The UK is now faced with the task of making such choices and implementing new legislation that is effective and suited to its cultural and economic contexts. Most of the choices involve striking the appropriate balance between multiple objectives, between the rights of older workers, the possible costs to employers and the rights of other groups in society.

This study identified some key choices, mainly of balance and emphasis, which will have to be made in drawing up the new age discrimination legislation in the UK. These are:

- the choice between a comprehensive approach to all forms of discrimination and a distinct approach to age discrimination;
- the choice between a clear and prescriptive legislation and one that is more flexible;
- the balance between the rights of individuals in particular age groups and economic efficiency;
- whether or not to constrain arrangements for retirement;
- the structure and powers of the enforcement authorities.

Each of these choices is discussed in more detail below.

Comprehensive approach to anti-discrimination on several grounds

There are advantages and disadvantages to consolidating the legislation on discrimination, either including all grounds or several grounds in one piece of legislation (see Chapter 1, pages 9-10). If an important objective of age discrimination legislation is to change culture and attitudes to age, there are distinct advantages in legally putting age discrimination on a par with gender and race discrimination. If the enforcement institutions are also unified into one commission this could increase the efficiency of such as a commission (see Chapter 1, pages 10-11), and the impact of promotional and educational work can also be expected to be greater. Possible disadvantages are that legislation could be overly complex and the possibility that, in a unified commission, age discrimination may take a back seat relative to gender and race.

Prescriptive versus flexible legislation

Prescriptive legislation has the advantage of clarifying both obligations and rights under the law. Employers and workers know how to behave and what to expect and the enforcement authorities can operate more efficiently. The relatively new Employment Equality Act in the Republic of Ireland is an example of detailed and prescriptive legislation. However, some would argue that it is better to have some flexibility in legislation that sets out the principles of what it aims to achieve but leaves the detailed

interpretation to the courts. The US legislation is more flexible, prohibiting 'arbitrary discrimination' and leaving more of the detailed interpretation to the judiciary. This has undoubtedly limited and delayed the impact of the legislation since individuals need to take legal action in order to clarify their rights.

In the UK the legislation is most likely to be more prescriptive than in the US, if only in order to be compliant with the EC Directive. The prescriptive approach is also likely to be more effective in the short term. The legislators will need to strike a balance by passing new legislation that is sufficiently clear but that can also evolve through time allowing case law decisions to reflect changes in attitudes and culture.

The rights of individuals in particular age groups versus economic considerations

While the objective of age discrimination legislation is to reduce or eliminate differential treatment of individuals because of their age, it is not intended to reach this objective with no consideration for cost. It is this consideration, often closely intertwining economic and equity effects, which is the cause for exceptions and exemptions from the legislation in those countries that have adopted it.

All age discrimination legislation allows an exception on the grounds of genuine occupational qualification or the similar concept of bona fide occupational qualification. Discrimination is allowed if an age requirement is objectively justified by the requirements of the job; a classic example is allowing the choice of an actor with an age to match the character he has to portray.

But the harder question is whether, if employers reasonably believe that members of an age group are *on average* less likely to be able to do a job than other age groups, it is permissible to discriminate against individuals. In other words, should the use of stereotypes reflecting some qualitative judgement that might be justified for a group as a whole, be permitted in some circumstances and, hence, put economic efficiency above the right of an individual to equal consideration? Defence forces, the police and other emergency services are allowed to have mandatory retirement ages much below the usual age at which workers retire. This is because some jobs in these services require a high level of physical fitness and, *on average*, fitness declines after a certain age. Considerations of economic efficiency are involved in allowing a fixed low age of retirement for all, rather than a check of fitness of each individual regardless of age. Consideration of the rights of the general population to a highly efficient defence force and emergency services also plays a part in making such an exception generally acceptable. Similar arguments are used to justify annual testing of drivers beyond a certain age.

In some countries considerations of economic efficiency are applied more extensively than in others. For example in the Republic of Ireland (and in the EC Directive) discrimination in the provision of training to older workers is allowed where it can be shown that the returns to the employer's investment is inadequate. In Canada, on the other hand, this is not likely to be allowed (see Chapter 3, page 39 for a similar case). In the US, economic efficiency provides support to the exemption of all businesses with less than 20 employees, but this is not accepted in any other country.

The EC Directive recognises some arguments of economic efficiency as objective justification for allowing discriminatory behaviour. This provides UK legislators with a choice of where to strike a balance in circumstances where the human rights of young and old may conflict with the performance of businesses and the economy. But international experience seems to point to a relatively cautious starting-point to allowing exemptions. Too wide a framework for exemptions would make a mockery of the spirit of the legislation. In the UK context a useful and positive starting assumption should be that stopping discrimination against older workers is in everyone's long-term economic interest, even if it constrains some companies' flexibility in the short term.

Constraints on arrangements for retirement

An important facet of the treatment of older workers is whether they are obliged to leave the workforce at a particular age. Most UK employers set a mandatory retirement age, which effectively discriminates in the sense that it removes employment protection when one reaches a particular age. Should the UK, like some other countries, prohibit employers from requiring retirement at a given age?

There are some important justifications for mandatory retirement. It allows both employers and employees to plan. It allows forecasting of manpower and the structure of pension plans. If mandatory retirement is abolished it may affect the opportunities of other workers by, for example, blocking promotion for younger workers, at least in the short term. It may also impose extra burdens on employers and/or reduce economic efficiency. It is such considerations that lead some countries to allow mandatory retirement.

It may also be the case, although the evidence is weak, that the abolition of mandatory retirement affects the willingness of employers to hire older workers. If that is the case, the protection of human rights of older workers in employment – allowing them to work for as long as they wish – is potentially at the expense of other older people who are looking for work.

If mandatory retirement is allowed, it is fairer to older workers to make it a specific exception to any legislation (a discriminatory practice which is allowed) rather than impose an upper age limit on the operation of the legislation, thereby depriving older workers in employment of protection from discriminatory behaviour. This was initially the case in the US and the Republic of Ireland, and is still the case in some provinces in Canada.

There is also some evidence that what older workers require is not only the right to work for as long as they want and can perform satisfactorily, but also the option of flexible retirement, combining part-time work with part-time pension. This requires policies that also modify pension arrangements. The abolition of mandatory retirement alone will not provide the flexibility many older workers want.

Legislation may potentially not only affect mandatory retirement ages but also conditions encouraging early exit from the workforce. For example, to what extent will employers be permitted to offer carrots or sticks designed to shed workers in their 50s? In principle, if the different treatment is based only on age, it could be prohibited. In Australia, more favourable redundancy packages for older workers have been permitted in one state and in the federal 1996 Workplace Relations Act as a form of 'affirmative discrimination', although in two states better packages for *younger* workers were found to be discriminatory (see Chapter 2, page 21).

In drawing up new age discrimination legislation, the UK government will need to consider what weight to give to the rights and aspirations of different social groups and different age groups in the labour market.

The structure and powers of the enforcement authorities

It is clear from the available evidence that the structure, responsibilities and powers of the enforcement authorities make a significant difference to the effectiveness of the legislation.

Commissions set up to implement age discrimination legislation usually have the responsibility of dealing with individuals' complaints. They have the powers to investigate complaints and refer them to mediation or tribunals and the courts. Most commissions also have the duty to promote equal opportunity and to educate employers, workers and the general public about their rights and responsibilities. Commissions can also be entrusted with wider responsibilities of monitoring the operation of the legislation, including the collection of data and carrying out research, and advising government if changes in the legislation are required.

The Republic of Ireland's Equality Authority is a good example of a strong enforcement agency. Its powers are wide, including the initiation of investigations of individual cases or of industries, the power to instruct businesses and the ability to produce codes of practice (the latter requiring government approval to become legally binding). In Ontario, Canada and the US powers are narrower and the commissions can only deal with individuals' complaints or complaints initiated by the commissions regarding individuals working for a specific employer. The effectiveness and efficiency of a commission is greatly enhanced if it has the powers to initiate investigations and if these can deal, not only with individual cases, but also with whole industries or geographical areas.

The ultimate power that can be given to a commission is the power to regulate. Such legislative powers are very rare, and perhaps rightly so since commissions are appointed rather than elected. In almost all cases commissions can only recommend new regulations which can only become binding if they are approved by government.

It is for the government to decide how much power to give to the commission which will implement and enforce the new age discrimination legislation in the UK.

The key choices for the UK presented above need to be made soon. While each choice on its own is important, the effectiveness of the new legislation will also depend on the internal consistency of the legislation and the overall stance of government policies to promote, monitor and enforce non-discriminatory behaviour.

1

Options for the UK: implementing the EC Directive

Zmira Hornstein

To implement the EC Directive on Equal Treatment in Employment and Occupation the UK government will have to introduce legislation prohibiting age discrimination in employment. First of all, this legislation will need to comply with the minimum requirements of the new Directive, however, there is considerable scope to design its details in ways that build on previous experience of discrimination legislation in the UK and on age discrimination legislation in other countries.

In a recent paper Helen Meenan (2000) examined the models of previous UK discrimination legislation – the 1975 Sex Discrimination Act (as amended) and the 1976 Race Relations Act (as amended) – as models for new age discrimination legislation. She also examined the age discrimination legislation in the US and the Republic of Ireland. This study was undertaken before the new Directive came into force. This report concentrates on identifying the choices still open to the UK in introducing age discrimination legislation after the introduction of the Directive and how this choice can be informed by the experience of age discrimination legislation in other countries.

UK legislation will have to comply with the EC Directive and this requires a clear understanding of what is required by the Directive. This is not a simple task since this Directive, as all others, is the result of extended negotiations and the resulting requirements are sometimes not entirely clear from the wording. The only authoritative interpretation is that of the European Court of Justice when, eventually, they are asked to adjudicate. The interpretation in this report is that of the author after consultation with others working in this area.

Discrimination grounds included in the new legislation

The new Directive on Equal Treatment in Employment and Occupation (described more fully in Appendix A) relates only to activities in the labour market and addresses several grounds of discrimination. These are discrimination on the grounds of religion or belief, disability, age and sexual orientation. Prohibition of gender discrimination and race discrimination were addressed in earlier Directives and the grounds included in this new Directive are those where agreement by all countries could be reached. There is, as usual, no stipulation in the new Directive regarding the form of legislation in the member countries.

The UK has the choice of introducing a separate Act to prohibit age discrimination, and each of the other grounds, or of introducing a new Act prohibiting discrimination on several grounds. This second, radical option would mean consolidating all existing grounds – gender, race and disability – and the new grounds required by the Directive – age, religion or belief and sexual orientation – into one new anti-discrimination or equal opportunity Act. The recent Hepple Report, which examined the framework of anti-discrimination legislation, recommended such a single equality Act in Britain (Hepple et al, 2000). This new Act or Acts could prohibit discrimination in the labour market, or could prohibit discrimination more widely, including discrimination in the provision of goods and services. The areas where discrimination is prohibited will be considered under the next heading (pages 2-3).

There are working examples in other countries of a variety of models of age discrimination legislation. In most of the countries with such legislation – including New Zealand, Australia, Canada and the Republic of Ireland – one Act prohibits discrimination on a wide range of grounds, including age. In contrast, in the US, age discrimination is prohibited at the federal level by a separate Act, the 1967 Age Discrimination in Employment Act.

There are some advantages of consolidating all discrimination or equality legislation into a single Act:

- it would facilitate greater consistency in the treatment of discrimination on various grounds;
- it would facilitate the work of industrial tribunals by allowing them to deal with fewer Acts and more consistent legislation;
- it would help deal with cases, which are quite common and sometimes the majority of cases, where the complaint is on more than one ground;
- it would provide a 'one-stop shop' for all discrimination issues.

Consolidation of existing discrimination legislation can also provide an opportunity for introducing improvements in existing legislation. (There is documentation by the Equal Opportunities Commision [EOC] [in a letter by the chairwoman of the EOC to the Secretary of State for Education and Employment accompanying the 1997 EOC Annual Report] stating a commitment to make changes in the current gender discrimination legislation.)

There are, however, disadvantages in having a single Act for all, or several, grounds of discrimination:

- the exception and justification for some forms of discrimination allowed under the legislation are likely to differ for different grounds;
- the legislation is bound to be complex since all grounds cannot be treated exactly the same.

In this context, it is interesting to note that The Law Society (1996) recommended that legislation prohibiting age discrimination in employment in Britain should be modelled on existing gender and race discrimination, but did not specifically recommend a single Act covering all grounds of discrimination. However, it did recommended that all forms of discrimination should be dealt with by one commission, as in the US.

Activities and services where age discrimination is prohibited

The UK has some choice about the scope of the age discrimination legislation that it introduces. To comply with the EC Directive for Equal Treatment the legislation must prohibit age discrimination in the labour market, but there is the option to cast the prohibition of age discrimination wider, and also include discrimination in the provision of all or some goods and services.

Experience in other countries is split. In the US discrimination legislation applies mostly to the labour market. In the Republic of Ireland the initial equality legislation in 1998 – the Employment Equality Act – applied only to employment and occupation, but subsequent legislation in 2000 – the Equal Status Act – extended the scope to discrimination in the provision of goods and services. In Spain most of the legislation is focused on the labour market. Discrimination legislation with wider scope, applying to the provision of goods and services as well as employment, operates in Australia, New Zealand and Canada.

There will, undoubtedly, be pressure from some quarters to introduce age discrimination legislation in the UK with a wider coverage from the outset. Although both the Sex Discrimination Act and Race Relations Act in the UK focus on the labour market, these Acts do include some protection from discrimination in the provision of goods and services. However, it may be more prudent to follow the example of some other countries, such as the Republic of Ireland, and prohibit age discrimination in stages, starting with the labour market. A note of caution is indicated by the experience in New South Wales (NSW), Australia. In its report reviewing the operation of equality legislation, the NSW Law Reform Commission expressed a preference for restricting the operation of age discrimination legislation to the labour market, since the more comprehensive legislation was too complex and involved many exemptions (Chapter 2, page 18). In all events, in all counties with relevant legislation, the labour market is the area in which the majority of

complaints regarding age discrimination originate and should therefore be a priority area for policy action.

The following discussion focuses on age discrimination legislation in the labour market only. In the introduction of new legislation prohibiting age discrimination in the UK, there is a wide range of options for the detail of the legislation and the institutional structure for its promotion and enforcement.

Concept and definition of age discrimination in the labour market

The EC Directive prohibits direct and indirect age discrimination, harassment and victimisation. This is quite a wide and clearly spelt out prohibition, similar to the prohibition in the recent legislation in the Republic of Ireland. In several countries the whole of this range is not covered. For example, in New Zealand, harassment is not specifically mentioned in the legislation. In other countries the types of discrimination prohibited are not spelt out and are left to the courts to interpret. An example here is the legislation in the US where the federal legislation simply prohibits arbitrary age discrimination, and the interpretation of this blanket prohibition is left to the judiciary.

The EC Directive provides detailed definitions of the four types of prohibited discriminatory behaviours but in some cases member countries can further refine these definitions to fit in with national conditions. They may even provide for a higher level of protection against discrimination than that stipulated by the Directive.

The definitions provided in the Directive are:

- *Direct discrimination:* when one person is treated less favourably than another is, had been or would be treated in a comparable situation.
- *Indirect discrimination:* when an apparently neutral provision, criterion or practice, would put persons of a particular age at a particular disadvantage compared to other persons – unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- *Harassment:* when unwanted conduct related to age takes place with the purpose or effect of violating the dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practices of the member state.
- *Victimisation:* protection against reprisal, in other words, dismissal or adverse treatment of an employee by an employer as a reaction to a complaint or legal proceedings regarding age discrimination.
- An instruction to discriminate is also deemed to be discrimination.

The definitions in the Directive are comprehensive and will have to be used in the UK legislation but there are still a few options in their exact details. In the case of harassment for example, the definition can be narrow, holding the employer responsible only for his own action and instructions, or it can be cast wider with the employer also having vicarious liability for the actions of its other employees, customers and so on. In the Republic of Ireland the definition of harassment is very wide. This is also the case in Ontario, Canada, but, in some other countries, it refers to, or is interpreted by the courts to refer to, employers' action only.

The crux of the matter, however, is the way these definitions are interpreted and applied. In practice, proving age discrimination has turned out to be significantly more problematic than providing proof in cases of gender or race discrimination. Proving age discrimination, either direct or indirect (also referred to as disparate impact or treatment in the US), depends on the type of evidence that is available and is allowed to support a case of age discrimination. As illustrated very clearly in the three country reports included in this study and in other work, there are serious difficulties involved in proving direct age discrimination and even more so in proving indirect age discrimination. We shall return to this topic at the end of this chapter when the enforcement of age discrimination legislation is examined.

Groups in the labour market to which the law applies

The EC Directive states that age discrimination law should apply to all persons. This is a rather general statement, but certain groups in the labour market are mentioned specifically. The law should apply to all persons both in the private and public sectors. This obviously includes employees and job seekers but also specifically includes access to self-employment and to occupation. It should apply to all persons training or looking for training opportunities and to organisations offering training and vocational guidance. The law should also apply to all workers' organisations, employers' organisations and professional organisations. Specific exceptions are allowed and can be important. These exceptions are discussed below (pages 7-9), but, in general, any legislation conforming to the Directive will have to apply to virtually everyone, including contract workers, partnerships, voluntary workers (as in New Zealand and Canada), and to every organisation in the labour market.

How do these requirements compare to existing age discrimination legislation in other countries? In the US, for example, the legislation is in some respects more limited in its coverage than the EC Directive requires, exempting employers with less than 20 employees and not covering institutions providing vocational training. Age discrimination legislation in the Republic of Ireland does not cover access to self-employment.

Age discrimination legislation tends, however, to have many exemptions and so the application of the general legislation can be significantly limited by permitted exceptions and justification for different treatment. But, before examining the options for exempting certain groups from certain features of the legislation, we look at the possible range of prohibited discriminatory behaviour.

Scope of protection from age discrimination in employment

The EC Directive prohibits age discrimination in the following activities in the labour market:

- access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion at all levels;
- access at all levels to vocational guidance, vocational training, retraining, including practical work experience;
- employment and working conditions, including dismissal and pay;
- membership of and involvement in any organisation of workers or employers or a professional organisation including the benefits provided by such organisations.

The scope of the Directive is relatively detailed and quite wide-ranging, specifically mentioning most activities in the labour market. Prohibition of age discrimination in certain activities and situations is not completely spelt out. For instance, there is no specific prohibition of including age limits in advertisements of vacancies, but any interpretation of the more general prohibition of discrimination in access to employment will reasonably include such behaviour. Also, the blanket reference to employment and working conditions only specifically includes dismissal and pay, with no specific mention of activities such as overtime, transfers, fringe benefits and superannuation. It will be up to the national legislators and the courts, and ultimately the European Court of Justice, to decide what exactly should be included in those terms and conditions. Direct mention of age limits within the required age discrimination legislation, and the related subject of mandatory retirement, are conspicuously absent from the Directive. The next section examines this more closely.

In general, the scope of the Directive is similar to that of the recently introduced age discrimination legislation in the Republic of Ireland, although the Irish law provides much more detail and guidance. For example, in the Republic of Ireland, terms and conditions in employment specifically include overtime. The scope of protection in the Directive is wider than that proposed for the Dutch legislation, where terms and conditions in employment, such as pay and dismissal, were not included, and the proposed Dutch bill would have to be amended to meet the Directive's requirements.

The experience of the US, Canada and Australia does not provide particularly clear guidance as to the scope of proscribed discriminatory activities in the labour market. The two-tier (federal and state/provincial) structure of age discrimination legislation in these countries can result in uneven

scope of protection within each country (see Chapter 2, page 21, and Chapter 3, page 33-4). In these three countries the scope of protection from age discrimination in employment generally includes recruitment and advertising of posts, selection, terms and conditions of employment, training, promotion, termination and dismissal, but much depends on the interpretation of the courts. The more controversial aspect of the scope of protection in the three countries, and in some others, is the imposition of age limits when protection starts and ends, to which we now turn.

Age limits and mandatory retirement

Age discrimination legislation when applied to the labour market prohibits, with some exceptions, differentiation by age in employment and training. The two groups particularly protected by such legislation are younger and older workers. The lower age limit for the operation of the legislation tends to reflect the lowest age at which general education can stop and work and/or vocational education can start. It is 16 in New Zealand and in the Republic of Ireland protection in employment starts at age 18 and for training at 15. In the US the legislation is directed only at employment and only at older workers and the lower age limit of 40 reflects the narrower objective of the law. Since in the UK the legislation will have to cover the provision of training (see scope of protection above) the lower age limit could be as low as 16.

One problem created by a low age limit in an age equality bill providing for equal pay, is that lower rates of pay for young people and particularly for young people in training posts can be challenged as discriminatory. This is often addressed by making the pay of young people below a specified age and/or in training one of the exemptions – this is how it is dealt with in the Directive (see section on exemptions below). Differences for young people in pay, and sometimes other conditions, are allowed if they can be justified by appropriate labour market objectives. This has been done in Australia, but not without considerable contention (see Chapter 2, pages 18-19, regarding the issue of youth wages in NSW) and also in New Zealand. In the Republic of Ireland, where the age limit for training is 15 to 65 and for employment 18 to 65, age-related pay in employment was to be phased out over three years, although there is an exemption for differences in pay and conditions based on seniority.

The issue of whether there should be an upper age limit in age discrimination legislation is currently very controversial. Stopping protection at, say, 65 would allow mandatory retirement, and also remove protection from discrimination from older workers in employment. Conversely, without such an age limit it would be illegal to oblige people to retire because of their age (unless a specific exemption were made). This aspect of age discrimination legislation has also attracted a fair amount of research.

In several countries, notably the US and more recently Australia, New Zealand and some provinces of Canada, there is no upper age limit to the application of age discrimination legislation. This is another way of saying that in these countries mandatory retirement is against the law unless a justification, acceptable to the courts, is provided. In most of the above countries the abolition of mandatory retirement and of an upper age limit was not part of their original age discrimination legislation. The upper age limit was most often abolished later and sometimes in more than one step. In the US, the federal 1967 Age Discrimination in Employment Act stipulated an age range of 40 to 65. The upper limit was extended in the 1978 amendment to the age of 70, and in 1986 it was removed. In some states, however, state law abolished mandatory retirement at an earlier stage (see Chapter 4, pages 43-5, for a more detailed description of the evolution of age discrimination legislation in the US). In Australia, compulsory retirement was first abolished in NSW in 1990 and other states followed (see Chapter 2, page 13, Table 2.2). In New Zealand the 1993 Act stipulated an upper age limit at the age when national pension comes into affect (age 60, later raised to 65), but this upper limit was removed from February 1999. In Canada, where the responsibility for employment legislation is mostly at province level, some provinces have abolished mandatory retirement while others have not, and about half of the workforce is covered by some form of mandatory retirement. The federal Supreme Court in Canada has concluded that, while mandatory retirement is discriminatory, it can be allowed as it can be objectively justified by the social policies it serves (see Chapter 3, page 35).

The need for mandatory retirement is still a matter for discussion and evaluation in the US although the upper age limit in age discrimination legislation was abolished 15 years ago. In Canada there is a hot debate regarding the policy of abolishing the upper age limit; Gunderson (Chapter 3, pages 35-8) analyses in detail the issues in this complex debate. A simplified and incomplete summary is that those in favour of banning mandatory retirement base their argument on the right of older workers not to be discriminated against. Their case is that there is no reason to terminate the employment of workers willing and able to do their job simply because of their age, and allowing mandatory retirement is discriminatory. If a worker, of any age, is not able to meet the requirements of the job, there are other legal remedies such as dismissal on the grounds of unsatisfactory performance.

The arguments for allowing mandatory retirement rely on justifications of the practice despite it being discriminatory. Mandatory retirement facilitates planning both by employers and employees and can help to create promotion opportunities for younger workers. Mandatory retirement also facilitates retiring with dignity rather than facing the possibility of being dismissed for under-performance and, in this context, it also reduces the need for constant monitoring and evaluation.

A less obvious role of mandatory retirement is in facilitating back-loaded remuneration systems, referred to as 'Lazear type contracts' (Lazear, 1979); this issue is examined in detail by Neumark (Chapter 4, pages 55-8, 61). In such seniority-based pay systems pay progresses more steeply than the increase in productivity due to experience; workers are underpaid when they are young and overpaid when they are older. Employers adopt this policy in order to motivate workers to work harder and to encourage workers' loyalty. With such systems, employers may rely on a mandatory retirement age to enforce the implicit employment contract under which the period of 'payback' to the worker for the earlier period of low pay is limited to a known period up to retirement age. Without mandatory retirement older workers may stay in employment for an indefinite period, so that the payback exceeds what the firm implicitly 'owes' them.

Lazear originally argued that if mandatory retirement is banned this will reduce the use of back-loaded pay systems and will result in an economic loss both to the employer and employee, since productivity would be lower without Lazear-type contracts. In later work, Lazear (1982, 1995) and others (Burkhauser and Quinn, 1983; Fields and Mitchell, 1984) found that employers can structure pensions and financial incentives to get employees to retire and that Lazear-type contracts can coexist with mandatory retirement. In Lazear-type contracts there is an incentive for the employer to renege on his implicit obligation and dismiss older workers once they reach the phase when their pay exceeds their contribution to the business. Age discrimination legislation, but not necessarily one that prohibits mandatory retirement, should help prevent such behaviour by employers. Another possible effect of Lazear-type contracts is that they may provide a disincentive for employers to hire older workers, particularly in situations where pay scales are rigid and it is difficult to give low pay to older workers.

Research by Neumark and Stock (1999, 2000), specifically trying to identify the effect of the abolition of mandatory retirement on employment rates of older workers, did not find a significant effect but that may be due to limited data. A more recent study by Ashenfelter and Card (2000), analysing retirement among university professors, shows that the removal of mandatory retirement led to a large increase in the proportion of teaching professors aged over 70.

In the circumstances, with strong arguments for and against mandatory retirement, and the prevalence of mandatory retirement in virtually all member countries, it is not surprising that the EC Directive has not addressed this subject directly. There is no mention in the Directive of age limits. Instead, a recital in the preamble to the Directive states: "This Directive shall be without prejudice to national provisions laying down retirement age" (paragraph 14). In the body of the Directive the reference is more oblique: Article 6(1) states:

> Not withstanding article 2 (2) [the article outlining definitions of discrimination] Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the

means of achieving that aim are appropriate and necessary.

This article was intended to provide member states with some choices, including the choice of either allowing or prohibiting mandatory retirement. If mandatory retirement is allowed it will probably have to be done as an exception to the requirements of the legislation, rather than the imposition of a higher age limit to protection in employment from age discrimination.

Should the UK ban mandatory retirement? Experience of age discrimination legislation in other countries highlights that this is an area where the effects of legislation are wide and significant, and can be both positive and negative. The abolition of mandatory retirement involves some basic and complex changes in pension schemes and superannuation arrangements, and this alone would require a long lead-time (see, for example, Chapter 2, page 22). While banning mandatory retirement may help older workers to stay in employment and, thereby, help reduce the increasing burden of an ageing population, this policy is often perceived to be at the expense of other age groups, at least in the short term, and sometimes at some cost to employers.

Following the example of other countries this is an area where there may be good reason to delay the decision until the initial legislation banning age discrimination, but allowing mandatory retirement as a specific exemption, is seen to be working. Note that this exemption need not (as for example initially in the US and still in some parts of Canada) be made by setting an upper age limit to the legislation, which would remove protection from those who work beyond normal retirement age. Instead, the exemption could be limited to setting mandatory retirement ages.

Exemptions and justifications for age discrimination in employment

There are generally more exemptions and exceptions in age discrimination legislation than in discrimination legislation on any other ground. This is mainly because age can be a relevant factor in the performance of some jobs and some limitations may arise with age. In certain jobs the relevance of age is obvious, such as the requirement for a young actress to play the ingénue, but in other occupations the relevance of age can be less clear. One possible reason for allowing differential treatment by age is to permit policies to help disadvantaged designated age groups, which constitute affirmative action or positive discrimination.

The EC Directive allows for a wide range of exceptions and justifications (see details in Appendix A). Many are similar to those appearing in existing age discrimination legislation elsewhere, but some are quite general allowing for some variability among member states and presenting options to UK legislators.

One exemption and justification in the Directive appears in all existing age discrimination legislation. This is the justification for different treatment by age due to 'genuine occupational qualification' (GOQ) or, in the US and Canada, 'bona fide occupational qualification' (BFOQ). This justification depends on making a case that the age differentiation is a reasonable requirement of the job or "reasonably necessary to the normal operation of the business" (see Chapter 4, page 46). The interpretation of this justification by the courts can be narrow or wide. In Canada and Australia GOQ has been used, not always successfully, as a justification for specifying a retirement age in certain occupations. The EC Directive, in the preamble, states that a justification of GOQ occurs in very limited circumstances, but under the Directive other justifications are also allowed.

Another usual exemption included in the Directive, is allowing positive age discrimination. The same exemption also appears in the legislation in Canada, Australia and the Republic of Ireland. The Directive also allows indirect age discrimination if it can be shown to be objectively justified, and if the discrimination is proportionate and necessary – a commonly acceptable justification in other countries with age discrimination laws.

There are usually exemptions for some aspects of occupational pension schemes and superannuation payments, allowing differentiation by age based on actuarial considerations. Some form of this type of exemption exists in Australia, Canada, New Zealand, the US and the Republic of Ireland. The Directive allows differentiation by age in admission or entitlement to retirement and invalidity benefits in occupational pension schemes, provided this does not also involve gender discrimination. This, however, is a very

complex area where, even more than usual, the devil is in the detail and the effect of such an exemption will depend on the exact form of the legislation in the UK.

The provisions of the Directive are without prejudice to laws necessary for public security, public order and the prevention of crime; this is similar to exemptions in some countries for the police and other emergency services. However, in other countries, such as the US, a case must be made, using the justification of GOQ, for unequal treatment by age of posts in these services. The Directive also allows states to exempt the armed forces from the prohibition of age discrimination.

Payments made by the state for state schemes, including social security and social protection schemes are specifically exempt in the EC Directive from the prohibition of age discrimination. This is not a common stated exemption in other countries, but it may well be justified by reasons of positive discrimination or state regulations not falling within the ambit of the age discrimination legislation.

The exceptional provision in the EC Directive is article 6 section 1. This article allows states to provide that differences in treatment on grounds of age shall not constitute discrimination if they can be:

> ... objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market or vocational training objective and if the means of achieving that aim are appropriate and necessary.

Three examples are given in the Directive. The first is allowing differentiated pay and conditions for young workers – an exemption that exists in several other countries (for example, Australia), but not in all (for example in the Republic of Ireland where the new legislation stipulates that any age-related pay is to be phased out). But, this example also allows discriminatory treatment of older people and persons with caring responsibilities "in order to promote their vocational integration or ensure their protection". This, if it operates in other countries, would have to be justified as positive discrimination.

Second, is the fixing of minimum age, professional experience or seniority in service for access to employment or certain advantages linked to employment. This would include allowing seniority pay systems, which are allowed in most other countries with age discrimination legislation, for example in the US and Republic of Ireland. Setting minimum age limits by professional organisations is also allowed in Australia and New Zealand.

The third example is allowing a maximum age for recruitment based on the training requirements of the post and the need for a reasonable period of employment before retirement. Only in the Republic of Ireland is there a similar exemption, which takes into account the cost of training to the business and the need for a sufficiently long period of payback. This is a purely economic argument, which is not consistently allowed in other countries with age discrimination legislation (see, for example, the case in Canada, Chapter 3, page 39).

Article 6 section 1 is interpreted to allow member states to have a mandatory retirement age, viewing it as a legitimate labour market objective. Other exemptions may also be possible. Could it be that the labour market policy of encouraging the formation of small businesses, or reducing the burdens on small businesses, would allow some countries to exempt such businesses from the burden of age discrimination legislation? This does not appear impossible although it is unlikely to pass muster with the community courts. Article 6 opens the door to options of exemptions that can be justified by "legitimate policies", and may be used to seriously limit the scope of the general prohibition of age discrimination.

One exemption that is prevalent in age discrimination law is for employment in private households. This exemption exists in Australia, New Zealand and the Republic of Ireland but is not specifically mentioned in the Directive or obviously covered by one of the general exemptions in it.

In all, the Directive allows a wide range of exemptions and justifications for differential treatment on grounds of age. The Directive includes a collection of virtually all exemptions and justifications in existing age discrimination legislation and some additional new ones. While this permits some flexibility in how the Directive will be implemented in the various member states, fitting in with their different legal systems and cultures, it may well create some problems in the operation of the legislation. In this context,

the experience in Australia may be relevant, where the NSW Law Reform Commission (1999) noted the difficulties associated with the general prohibition of age discrimination, due particularly to the numerous exceptions built into the legislation (see the discussion in Chapter 2, pages 17-8). So, just because the UK is *permitted* by the Directive to make certain exemptions, it does not follow that it should do so in every case. In general, the law is likely to be more effective with fewer exemptions.

Institutional framework for implementing the legislation

The EC Directive does not dictate the institutional framework for implementation. All that is required is a framework with judicial and administrative procedures including, where they are deemed appropriate, conciliation procedures. These procedures should be accessible by all persons and legitimate organisations, and should ensure that the provisions of the Directive are complied with. Member states are also required to disseminate information on the Directive's provisions and to encourage dialogue, in accordance with national practice, between the social partners and other non-governmental stakeholder organisations, with a view to fostering equal treatment.

The first choice open to UK legislators is whether to create a single institution to deal with several grounds of equality, or to continue in the current tradition of creating a separate commission or board to deal with age discrimination only, on the same lines as the Equal Opportunities Commission and the Commission for Racial Equality. In virtually all countries with age discrimination legislation implementation is through a unified equality organisation. This unified structure fits more naturally with the unified equality legislation in most other countries, but it also operates in the US where the age discrimination legislation is separate.

The pros and cons of a unified commission responsible for enforcement of all grounds of discrimination are somewhat similar to those of unified legislation. The advantages of a unified commission are greater consistency across the board, the ease of dealing with the frequent multiple-grounds discrimination cases and the provision of a 'one-stop shop' for all discrimination issues. In addition there may be some economies of scale in the provision of information, in the management of complaints and enforcement and in a single large commission promoting equal treatment across the board.

One concern about having a single commission is that age discrimination may be given less attention and weight than some other grounds, such as gender or race. There are clear indications in Canada, Australia and the US, that age discrimination is considered a lesser offence than discrimination on some other grounds, and a single commission may concentrate its efforts on those which it considers more important. This problem should not arise in a commission dealing only with age discrimination.

Another important choice for UK legislators is what powers and responsibilities to give the institution established to deal with age discrimination. Evidence from other countries indicates the need for a balance between the responsibilities of such an institution to educate, promote and help businesses to implement age equality policies, and the powers of the institution to enforce legislation.

The Hepple Report (Hepple et al, 2000) recommends a pyramid structure combining persuasion, information, voluntary action plans, investigation by the institution and the ability to serve compliance notices before proceeding to judicial enforcement and sanctions. The report also strongly supports the need for expecting businesses to carry responsibilities and take proactive action to promote equality. This recommendation is based on experience in the US and, within the UK, in Northern Ireland. In the US, in the context of race discrimination regulations, the Office of Federal Contract Compliance Programs required government contractors to take positive measures to increase the representation of ethnic minority groups in their workforce. A similar system operates in Northern Ireland, in the context of religious discrimination. In both countries businesses are expected to set targets of representation in the workforce. These targets can be audited and action can be taken by the commission to enforce the requirements. From the information available it appears that these systems are quite effective in reducing gender and race discrimination. It is difficult to envisage an identical system being applied to age discrimination, since representation

in the workforce of different age groups can be a function of the age of the business or of the nature of the work. It is possible, however, to require businesses to include some other relevant targets in their action plans, such as targets related to training or recruitment, and to provide the institution with the powers to audit and enforce such plans.

While in most countries anti-age discrimination commissions have a dual role of education and enforcement, the balance between these two broad functions varies. For example, in Australia the Human Rights and Equal Opportunity Commission can publish Codes of Practice, setting out what behaviour meets the requirements of the law, but such codes are not legally binding. In the Republic of Ireland the Equality Authority has the stronger power to develop codes and, after approval by government ministers, these codes have a legal basis.

Enforcement of the law is done in most countries by dealing with individual complaints. Commissions are usually expected, in the first instance, to mediate or conciliate between the parties. If conciliation fails and the case has merit it can be forwarded to a judicial body. In the Republic of Ireland this body is usually the Office of the Director of Equality Investigations, part of the Equality Authority; in Australia it can be an Equal Opportunity Tribunal and in the US it is the courts.

In the Republic of Ireland the Equality Authority also has the power to initiate its own investigations, conduct equality reviews and produce action plans in relation to a business or an industry, and to serve notice if the plans are not implemented satisfactorily. Such powers are not vested in most enforcing institutions, thereby significantly reducing their effectiveness and leading to long delays as complaints are dealt with only on an individual basis. In NSW, the Law Reform Commission report (NSW Law Reform Commission, 1999) noted that, without the power to initiate inquiries, the enforcement of the law was piecemeal and argued strongly for such powers to be given in order for the Anti-Discrimination Act to be more effective (see the discussion in Chapter 2, page 20). The same problems have also been experienced in other countries.

In creating the institutional framework to implement the new age discrimination legislation in the UK decisions will need to be taken on the width of responsibilities and the powers to carry them through. An interesting model to investigate closely would be the most recent legislation in the Republic of Ireland. The Equality Authority in Ireland has wide educational functions, an obligation to involve businesses in the process of implementation and considerable power to enforce the objectives of the legislation. It is, as yet, too early to evaluate the effectiveness of this legislation, but it incorporates many of the features considered to be useful in other countries.

Remedies and enforcement

In almost every country with a commission overseeing the enforcement of the legislation, the process of dealing with complaints involves similar steps. An initial investigation by the commission to ascertain that the case has merit is followed, wherever appropriate, by efforts to mediate between the complainant and their employer and, if possible, resolve the dispute. Only in a small minority of cases do complaints reach the next step – a judicial process – of being referred to the appropriate court by the commission or lodged directly by the individual concerned.

A recurring theme in the work in this project on Australia, Canada and the US is the many difficulties in proving age discrimination. While some of the reasons for these difficulties are common to other grounds of discrimination, such as the asymmetry of power between employer and employee, other reasons are more specific to age discrimination. It is easy for employers to mask age-related discriminatory behaviour behind other reasons, more easily than in cases of race and gender discrimination. It is difficult to prove intent on the part of the employer, or to go through the necessary stages to prove indirect age discrimination (for examples see Chapter 3, pages 40-1, and Chapter 2, page 23). The wide range of exemptions and accepted justifications of age discrimination adds to the difficulties, although there is often sensible reasoning behind some exemptions. It would help to overcome some of these difficulties if the legislation is made clear and prescriptive, providing examples and, preferably, binding guidelines on what is acceptable, and if a commission is given wider powers to investigate and direct employers. The

Equality Authority in the Republic of Ireland is an example of a commission with such wider powers.

There is one stipulation in the EC Directive regarding the burden of proof, which should help complainants once they reach a judicial process. With the exception of criminal cases and some investigative processes, the burden of proof is on the respondent to show that there has *not* been a breach of the legislation. This is not the case in several other countries, which adds to the difficulties of proving age discrimination (see, for example, the reported review in Australia, Chapter 2, page 24).

Remedies available in mediated cases can include the reversal of a dismissal decision, payment of back pay or an agreed settlement. If the case reaches a tribunal or court and findings are for the plaintiff, in most countries, the award to the worker is likely to be closely related to loss. Even in countries where punitive awards are allowed they tend to be low. This is in contrast to awards on grounds of gender or race discrimination where punitive awards can be significant.

The process of taking a complaint further is complex and the help provided by commissions is very important if not crucial. It is better for workers and employers if they can get all the information and assistance they need in one place – the so-called 'one-stop shop'. Many complainants abandon their claim simply because of the necessarily cumbersome process. This is particularly the case with complaints of age discrimination by young people. For example, in NSW Australia, young people make only a minority of total complaints – some 20% – but virtually none proceed beyond the initial stage.

The resolution of individuals' complaints takes time and absorbs a considerable amount of a commission's resources. Delays occur quite frequently. Savings in resources can be made if a commission is given the power to initiate investigations covering a large number of actual or potential complaints, by examining whole industries or particular practices across the board.

It is interesting to note that in Australia the majority of complaints are related to recruitment, while in the US the majority are related to discharges. One possible explanation is that, in the US, the losses due to discharge are higher, since they involve not just the loss of income but usually also the loss of medical cover and other benefits. There is also no welfare state to provide a safety net as there is in Australia.

Conclusions: four key decisions

Reviewing the options open to the UK in implementing the EC Directive has identified many possible choices but, in the light of experience in the operation and effectiveness of such legislation in other countries, there are four key decisions:

1. Whether age discrimination should be dealt with through separate legislation and enforcement, or jointly with other forms of discrimination.
2. What powers should be vested in the commission that will enforce the legislation.
3. How mandatory retirement should be dealt with.
4. What to exempt from the legislation.

2

Age discrimination in Australia: law and practice

Sol Encel

This chapter deals initially with the background to age discrimination legislation in Australia, and relates it to the wider introduction of anti-discrimination legislation since the 1970s. It then reviews the findings of three recent official inquiries into anti-discrimination law and practice, which provide detailed insights into the working of the system. Further insights are provided by a review of recent cases dealt with by the various tribunals that administer the law and deal with complaints. Finally, there is a brief section dealing with assessment and evaluation of the system.

Background

Legislation to ban discrimination on a variety of grounds – gender, race, disability, marital status, religion, age and so on – has developed in Australia since the 1970s (Encel and Campbell, 1991, pp 154-9). Because of the limited constitutional responsibilities of the Commonwealth (Australian) government, most of the legislative action has been at the level of the constituent states and the two self-governing territories (the Australian Capital Territory and the Northern Territory). Although the legislative framework is generally similar, there are significant differences in detail between the various jurisdictions, which are referred to in succeeding sections of this report.

Age discrimination, especially in employment, can be approached through two legal channels. First, anti-discrimination laws are enforced through statutory boards and commissions to which complaints are directed. Second, the Australian system of industrial tribunals, both State and Commonwealth, provides opportunities to take action against cases of workplace discrimination. Examples are cited in this report.

Age discrimination has a much lower public profile than gender discrimination, which attracts many more complaints than those based on age. In a sense, the pressure to act against gender discrimination has been the motive force in this area of public policy, and the recognition of gender discrimination, especially in employment, occurred considerably earlier than action against age discrimination (Encel and Campbell, 1991).

The issue of age discrimination was raised in a major report on poverty, produced by a team under the direction of the late Professor Ronald Henderson in 1976. The report drew attention to the connection between poverty and enforced unemployment due to age (Henderson et al, 1976, p 242). A decade later, another major review of the social security system recommended that age should be introduced as a ground for complaint against discrimination into existing state legislation (Australian Government, 1988).

The first general piece of legislation to ban discrimination in employment and other areas was passed by the New South Wales (NSW) State Parliament in 1977. The original Bill, which included age as a prohibited ground of discrimination, was passed by the lower house of Parliament, but an amendment in the upper house (where the government did not have a majority) removed this provision. Instead, the Anti-Discrimination Board (ADB) set up under the legislation was required to conduct an assessment of the impact of age discrimination. In 1980, the ADB supported the introduction of age into the legislation, but recommended the retention of compulsory retirement. Ironically, a subsequent state government acted first to outlaw compulsory

retirement, and only later, in 1993, to amend the Anti-Discrimination Act and add age as a ground for complaint against discrimination.

The matter rested for a number of years, until action was taken in other Australian states. The first was South Australia, which had passed the Sex Discrimination Act in 1975, prohibiting gender discrimination in public employment. This was replaced in 1984 by the Equal Opportunity Act, and, in 1990, the new Act was amended to prohibit age discrimination. Although the course of events has differed from state to state, the outcomes have been broadly similar. The dates of relevant legislation are given in the tables below.

Following action in some other states, the NSW government published a discussion paper (New South Wales, Attorney-General's Department, 1992), which recommended similar action. In 1993, legislation was introduced to amend the Anti-Discrimination Act. It passed through both houses of Parliament after some last-minute lobbying by employers' organisations (which had also lobbied, successfully, against the legislation in 1977). The amendments came into force on 1 July 1994. Part 4G of the Act makes it unlawful to discriminate, directly or indirectly, on the basis of age in work, access to places and vehicles, education, provision of goods and services, accommodation and registered clubs, although there are a number of exemptions.

Australian legislation generally recognises the existence of both direct and indirect discrimination. The 1984 Equal Opportunity Act in South Australia is most explicit on this point, defining direct discrimination as occurring when:

> ... a person treats another unfavourably because of the other's age or if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other age group. (1984 South Australia Equal Opportunity Act, section 85A)

Table 2.1: Legislation to ban age discrimination

South Australia	1991
Queensland	1992
Western Australia	1993
New South Wales	1994
Northern Territory	1994
Australian Capital Territory	1996
Victoria	1996
Tasmania	1999
Commonwealth	partially covered by 1996 Workplace Relations Act

Table 2.2: Legislation to ban compulsory retirement

New South Wales	1990
Queensland	1994
South Australia	1994
Northern Territory	1994
Western Australia	1995
Australian Capital Territory	1996
Victoria	1996
Tasmania	1999
Commonwealth	1999

Note: The above dates refer to the year in which the relevant Acts were proclaimed. In some cases, there was a significant delay between parliamentary passage and the date of proclamation. Dates of proclamation have been used to provide a standard chronology.

It also defines indirect discrimination as occurring when there is a particular requirement, the nature of which:

> ... is such that a substantially higher proportion of persons of a different age group complies, or is able to comply, with the requirements than those of the other's age or age group; and the requirement is not reasonable in the circumstances of the case. (1984 South Australia Equal Opportunity Act, section 85A)

The NSW Act also recognises the role of indirect discrimination, for example, in section 49ZU(3), which prohibits an employer from using age as a pretext for inducing an employee to retire. The 1980 report of the NSW ADB (1980), also recognises the role of indirect discrimination by stressing that "people should not be treated less favourably in employment, provision of goods and services or accommodation because of their chronological age". In addition, the Board's annual reports regularly note the existence of both direct and indirect forms of discrimination.

In a review of legislative moves towards the banning of age discrimination, including the abolition of compulsory retirement, Dharmananda and Williams (1991) examined the relative importance of demographic, economic and human rights considerations. The economic arguments were advanced by the South Australian Attorney-General in 1990 in his second reading speech on the Bill to amend the Equal Opportunity Act by adding age as a ground for complaint against discrimination. He claimed that the move would give employers greater access to a greater range of skills and training which might otherwise be lost through compulsory retirement at an arbitrary age. He added that the move would also "lead to a lessening of the dependence of older people on government and promote the self-esteem of older workers".

However, Dharmananda and Williams go on to agree that human rights considerations have been at least as important as demography, economics, or government budgetary concerns. As they remark:

> ... the intrinsic dignity of a person is questioned when a person's chronological age has been or is seen as an indicator of specific characteristics that he or she lacks. The use of stereotypes when dealing with the ageing and the aged denies them the opportunity to participate as they choose in society. Legislation, in making unlawful discrimination on the grounds of age, can serve also to alter or modify the perceptions of the ageing and the aged. (1991, pp 37-9)

Summary of legislative provisions

New South Wales

The Anti-Discrimination Act was passed in 1977 and amended in 1993 to include age as a ground for discrimination. The Act is administered by the ADB and the Equal Opportunity Tribunal (EOT). The EOT was established by an amendment to the Act in 1981. In 1997, the EOT was abolished and incorporated into a new body – the Administrative Decisions Tribunal – which has an Equal Opportunity Division.

Victoria

The 1995 Equal Opportunity Act prohibits age-related discrimination. It is administered by the Equal Opportunity Commission and the Equal Opportunity Tribunal.

Queensland

The 1995 Anti-Discrimination Act prohibits discrimination on the ground of age. It is administered by the Anti-Discrimination Commission.

South Australia

The 1984 Equal Opportunity Act, as amended in 1990, prohibits discrimination on the ground of age. It is administered by Equal Opportunity Commission.

Western Australia

The 1984 Equal Opportunity Act, as amended in 1992, prohibits discrimination on the ground of age. It is administered by the Equal Opportunity Commission.

Tasmania

The 1998 Anti-Discrimination Act prohibits discrimination on the ground of age. It is administered by the Anti-Discrimination Commission.

Australian Capital Territory

The 1991 Discrimination Act prohibits discrimination on the ground of age.

Northern Territory

The 1992 Anti-Discrimination Act prohibits discrimination on the ground of age.

It is noteworthy that, in New Zealand, the 1994 Human Rights Act specifically prohibits age discrimination in a number of areas, including employment. There was no earlier legislation prohibiting age discrimination in employment. However, the 2000 Employment Relations Act has a section – 105(1)(i) – that also prohibits age discrimination in employment; thus, as in Australia, a claimant has a choice of procedures. New Zealand cases are reported together with Australian proceedings by the law reporting firm, CCH Australia Ltd, and a New Zealand case is described below.

Generally speaking, the various Acts prohibit a range of discriminatory arrangements or actions in the workplace or place where a person is seeking employment.

Such actions include the following:

- advertising of vacancies;
- decisions about offers of work;
- terms and conditions of employment;
- decisions on promotion, training, transfer or other work-related benefits;
- termination of employment or other unfavourable actions;
- decisions concerning access to a guidance, apprenticeship or training programmes or other occupational training or retraining;
- variation to the terms of employment or the terms of work performance.

The various Acts also include definitions of employer and employee. Apart from the straightforward situation of a full-time paid employee, some of the prohibitions in the legislation extend to the following situations:

- independent contractors or contract workers;
- partnerships;
- agents paid by commission;
- membership of industrial organisations including trade unions and professional organisations;
- qualifying bodies with the power to confer, extend or renew qualifications or authorisations to engage in a trade or profession;
- employment agencies which provide services for finding employment, or finding prospective employees for employers (Bennington and Calvert, 1998).

Action at the Commonwealth level

In 1974, the Australian (Commonwealth) government acceded to ILO Convention 111, which outlaws discrimination in 'employment and occupation'. The text of the convention became Schedule A of the 1998 Industrial Relations Act and remains part of the 1996 Workplace Relations Act, which replaced the earlier legislation. These provisions relate to industrial situations covered by federal awards or agreements.

To fulfil Australia's obligations under Convention 111, the Commonwealth government established national and state committees on discrimination in employment and occupation. The reports of these committees indicate increasing awareness of age discrimination during the 1980s. The National Committee on Discrimination and Equal Opportunities (NCDEO) reported a 58% increase in complaints during 1981-82 – mostly relating to discriminatory job advertisements – and its 1983-84 report noted the growing difficulty faced by older workers in obtaining re-employment after losing their jobs.

These committees were abolished in 1986, but nothing took their place until 1991, when the Human Rights and Equal Opportunity Commission (HREOC) was given jurisdiction in relation to age discrimination. In 1990-91, HREOC received 75 complaints of age discrimination, and the figure has remained at a similar level since. This was the second most important ground for complaint, exceeded only by cases under the International Covenant on Civil and Political Rights.

HREOC has also investigated other complaints relating to compulsory retirement, and has reported on them to the Commonwealth Attorney-General. In a recent report, the Commission criticises the variability of legislation from state to state, noting that: "every Australian is entitled to adequate protection against discrimination regardless of where he or she lives or works" and calls for comprehensive national prohibition of discrimination on the grounds of age (HREOC, 1997, p 109).

Most recently, the Commission has conducted a comprehensive inquiry into age discrimination (HREOC, 2000), which is described in a later section of this chapter (pages 21-3).

Code of conduct

In 1998, the Commonwealth government established a new structure designed to assist unemployed people to find jobs, known as the Job Network. The Job Network operates through contracts awarded to various agencies, including those established by religious groups, commercial placement agencies, and self-help groups. Contractors are required to adhere to a code of conduct which prohibits discrimination. Complaints about breaches of the code may be referred to HREOC. The Job Network operates a national job vacancy database, and users are contractually bound to observe all Commonwealth, State and Territory legislation as well as the code of conduct.

Although there have been complaints of discriminatory practices by Job Network contractors, age does not appear to be a significant cause for complaint. However, older workers continue to find difficulty in obtaining employment, and they constitute a disproportionately large percentage of the long-term unemployed (House of Representatives, 2000).

Finally, it should be noted that, after long delays, compulsory retirement in the Australian Public Service was abolished as part of a package of amendments to the 1999 Public Service Act.

The attitudes of employers

The attitudes of employers have fluctuated over the years, particularly in response to labour market pressures. In the 1950s, the effects of the depression birth-rate caused a sharp drop in the number of school leavers entering employment. This resulted in general support for the need to retain older workers in the labour force, reflected in a number of OECD publications from the 1960s. A seminar held in Melbourne in 1958 elicited support for the employment of older workers from employers and trade unions alike (Stoller, 1960).

In 1977, in a very different labour market climate, the Employers' Federation in New South Wales lobbied successfully to have age excluded from the provisions of the Anti-Discrimination Bill when it was before the State parliament. In 1993, the same organisation lobbied again (this time unsuccessfully), when the Act was amended to include age. The executive director of the Federation described the legislation as unwarranted interference with the freedom of employers to hire and fire (Brack, 1993).

Studies in a number of countries have indicated the reluctance of employers to hire older workers, and the situation in Australia is basically similar (see for example, Ashenfelter and Rees, 1973; Kohli et al, 1991; Falconer and Rothman, 1994; Taylor and Walker, 1994; AARP, 1995; Encel and Studencki, 1995). A survey of employers in Queensland, undertaken in 1994, found that their preference was to hire workers aged 23-29 years. The survey was undertaken shortly before the introduction of legislation to ban age discrimination and abolish compulsory retirement, and it was noted that over half of the employers surveyed were unaware that the law was about to change (Steinberg et al, 1998).

The most detailed academic study undertaken regarding the impact of age discrimination legislation on employers' attitudes is reported in a recent paper by Bennington and Wein (2000). They studied a sample of employers and a corresponding sample of job applicants and their conclusion is similar to those of the other reports cited above:

> In the very important areas of recruitment and selection, the anti-discrimination legislation does not appear to be

> particularly significant or relevant for employers, but it is possible that it has greater significance for those applying for jobs within their own organisation because human resource practices within organisations are perhaps more open to scrutiny at this point and employers are somewhat more mindful of their practices ... [but] discrimination at the recruitment and selection stages is still very common and anti-discrimination legislation has only had a limited effect. Therefore, it could be argued that multiple approaches, including public awareness campaigns, greater exposure of the research findings and a more proactive approach to monitoring discrimination are necessary if discrimination in employment is to be significantly reduced. (Bennington and Wein, 2000, pp 31-2)

The Bennington and Wein study also found that, contrary to the lobbying rhetoric of the employers' associations (cited above), there was no overall negative response from the employers who participated in the study.

- Out of 180 employers, only 13% gave a negative response, compared with 23% who were positive and 61% who were neutral.
- Only 12% reported difficulty in complying, compared with 68% who had no difficulty.
- The clearest difference related to the cost of compliance, where only 9% reported a cost increase, as against 77% who had no problem.

As the authors point out, these responses are in clear contrast to the arguments of neo-classical economists who argue that anti-discrimination legislation interferes unwarrantedly with the market mechanism, increases costs and imposes inefficiencies. In particular, it contradicts the arguments of Richard Posner, who has argued that age discrimination legislation is unnecessary because employers will not act against their own interests (1995). Posner, who writes both as an economist and as a jurist, exhibits a touching faith in the wisdom of employers which is open to grave doubt. There is abundant evidence that employers and managers are influenced at least as much by popular stereotypes as by rational calculation. A variety of minority ethnic groups have suffered (and continue to suffer) from stereotypes regarding their work capacities. In particular, the issue of discrimination against women, and the stereotypes about 'women's work' attached to it, have generated a vast literature (see for example, Blaxell and Reagan, 1976; Walby, 1986, Mumford, 1989; Encel and Studencki, 1995).

Inquiries into the system

Three recent reports by official bodies have provided a detailed evaluation of the law and practice of anti-discrimination:

- NSW Law Reform Commission (1999) *Review of the Anti-Discrimination Act 1977*;
- HREOC (2000) *Age matters*;
- Age Discrimination in Employment Project (Brooke, 2001) *Age limits*.

Report by the NSW Law Reform Commission

In 1999, the NSW Law Reform Commission (LRC) published the results of a lengthy review of the 1977 Anti-Discrimination Act and its implementation. The review covers the entire field of discrimination, but this summary is restricted largely to an examination of the LRC's comments on age discrimination. However, some of its more general observations about discrimination law and practice are also relevant.

Definitions and exceptions

The report notes the difficulties associated with a general prohibition against age discrimination, particularly because of the numerous exceptions which have to be built in. These exceptions are more numerous in the case of age, than with any other form of discrimination. They include instances such as:

- laws relating to the legal capacity and welfare entitlements of children;
- programmes providing for the special needs of people of particular ages;
- regulation of fitness to control a vehicle;
- youth wages;
- genuine occupational qualifications (GOQs).

The LRC report considers that both the range of issues and the range of exemptions are too wide, and expresses a strong preference for restricting the operation of age discrimination legislation to the sphere of employment (as is highlighted

below, employment is in fact by far the largest area of complaint). The LRC's comments on this point are worth quoting at length. Noting that the US legislation (the Age Discrimination in Employment Act, last amended in 1986) applies to persons over the age of 40, the LRC report continues:

> If presented with a clean legislative slate, the Commission would recommend restricting prohibitions with respect to age discrimination to the area of employment and to the age group identified in the US legislation. Such an approach is justifiable because there is a volume of evidence to support the view that older workers are not routinely treated on their merits, but, as a class, suffer from prejudice and stereotyped assumptions. As age is an immutable human characteristic, it should not be permissible to treat people detrimentally on that ground. On the other hand, the evidence to suggest that age is inappropriately used as a basis of discrimination in other areas is limited and equivocal.... [But] the legislative slate is not clean and to restrict the ground of age discrimination to those over 40 years of age and to limit its operation to the area of employment would require a major reduction in the scope of the present Act. To remove or limit the scope of the current regime would tend to undermine the legitimate effect of the current provisions in concentrating attention on the inappropriateness of stereotyped assumptions about people on the basis of age, where individual decision making is required. This factor has satisfied the Commission that, on balance, the ground should be retained. Nevertheless, its main area of operation should be treated as that of work and it should not be permitted to override statutory requirements in specific areas. (NSW Law Reform Commission, 1999, p 271)

Genuine occupational qualifications

Section 49ZYJ of the NSW Anti-Discrimination Act provides that discrimination is not unlawful if age is a genuine occupational qualification, and continues:

> Being a person of a particular age or age group is a genuine occupational qualification for a job if either of the following requirements is satisfied:
>
> (a) in dramatic performances or other entertainment, the essential nature of the job calls for a person of that age or age group for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a person of another age or age group;
>
> (b) the holder of the job provides persons of that age or age group with services for the purpose of promoting their welfare or furthering their education and those services can most effectively be provided by a person of a particular age or age group.

Provisions relating to GOQs apply in all the other states and territories. In Victoria, the 1995 Equal Opportunity Act provides for exemption in relation to:

> ... a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

Similar specifications apply in Western Australia and the Australian Capital Territory, while Acts in other states are open-ended, with no specific circumstances prescribed.

Youth wages

The issue of youth wages has been particularly contentious, with sharp differences of opinion between employers and unions. The LRC received a number of submissions on this point, where age discrimination was treated in terms of disadvantages attached to youth rather than seniority. Some submissions argued that wage discrimination against young people was just as offensive as discrimination against women or Aboriginal people. Others maintained that the abolition of youth wages would lead to an increase in youth unemployment and reduce the opportunities for young workers to gain experience. The idea of a 'training wage' is favoured by the present Australian government.

Before the amendment of the Anti-Discrimination Act in 1993, the NSW government published a Green Paper which canvassed a number of options relating to age discrimination, including possible ways of dealing with the issue of youth wages (New South Wales, Attorney-General's Department, 1992). The majority of public submissions in response to the Green Paper favoured an option by which junior wage rates would be phased out over a period of two years, and the Act was amended accordingly by the White Paper (New South Wales, Attorney-General's Department, 1993). The phasing-out process was to give employers time to plan for the removal of this exception. The White Paper argued in favour of competency-based training wages to replace age-based wages, in order to minimise the possibility of increased youth unemployment. The LRC report notes, however, that the development of competency standards would require substantial justification if they were not to become indirectly discriminatory (NSW Law Reform Commission, 1999).

Following a change of government in NSW in 1995, the new administration set up a committee representing government departments, the ADB, employer groups, unions and other interested parties to examine the youth wage issue. In the meantime, the exception remained in force, and was still in effect when the LRC report was published. The report observes that the exception is "difficult to justify in terms of justice or equity" (p 272), and recommends that it should cease to operate by December 2000.

However, this recommendation has been overtaken by events at the national level. In 1996, the Commonwealth Parliament passed a new Workplace Relations Act, which redefined the powers of the Australian Industrial Relations Commission (AIRC) – the leading industrial tribunal in Australia. As the result of a deal between the government and the minor parties that hold the balance of power in the Australian Senate, the AIRC was required to conduct an inquiry into junior rates of pay. The AIRC concluded that none of the non-discriminatory alternatives which had been proposed were feasible (AIRC, 1999). The report also declared that "well-designed junior rate classifications framed to reduce the capacity to exploit the use of them, may justifiably be used for creating or protecting employment opportunities for young people" (1999, p xvi).

Following the report, the 1996 Workplace Relations Act was amended to exempt junior rates and certain types of trainee wages permanently from the anti-discrimination provisions of the Act. The Act further enables junior rates to be introduced, removed or varied on a case-by-case basis. The AIRC decision and subsequent legislation reinforces the situation in which youth wages are exempted in all states and the Australian Capital Territory (Northern Territory being the exception).

Implementation

The LRC report deals not only with the law, but also with implementation procedures. On the latter score, particular concerns included:

- lack of clarity in procedures for handling complaints;
- bias in favour of complainants;
- lack of support for complainants;
- persistent delays, which drive people to seek redress by other methods (such as the industrial tribunals), to accept unsatisfactory offers of settlement, or to abandon the complaint (NSW Law Reform Commission, 1999).

In its evidence to the LRC, the ADB acknowledged that there was generally a period of six to eight months between the time of a complaint being lodged and its consideration by an ADB official. The report makes several recommendations for changes in the law to reduce these delays.

Although shortage of resources is clearly an important cause of delays in dealing with complaints, it is also clear that the complaints-based system is itself a major factor. As the LRC observes, the system:

> ... requires individuals or groups to identify isolated acts of discrimination and presumes that discrimination can be corrected by providing redress to those individuals. This results in a reactive and piecemeal approach to achieving equal opportunity which neglects the need to deal with systemic discrimination. Even the indirect discrimination provisions of the ADA [Anti-Discrimination Act], which were intended to address systemic discrimination, operate within the

> individualist framework of the ADA and have, as a result, been poorly utilised. Depending on individuals who are often in positions of disadvantage to bring complaints also means that if such persons are unaware of their rights or are not willing to mobilise the process for fear of victimisation, lack of support or understanding of the process, no complaint is made. This effectively drives discrimination underground, further entrenching inequalities. (NSW Law Reform Commission, 1999, p 17)

The report also recommends that the president of the ADB should have the power to initiate inquiries and to terminate cases where one or other of the parties is uncooperative, and when the complaint appears to have been abandoned. In its submission to the LRC, the ADB argued strongly for the power to initiate complaints, giving four broad justifications:

1. it furthers the objectives of the legislation;
2. it is in the public interest;
3. it would allow discrimination to be addressed which would otherwise be ignored because of barriers to the lodging of individual complaints;
4. it overcomes some of the shortcomings of the individual complaints-based system.

The LRC report notes that provision for the initiation of proceedings exists in other jurisdictions. Thus, the Human Rights and Equal Opportunity Commission (HREOC) has a broad general power to inquire into alleged violations of human rights. Three states – Victoria, Queensland and South Australia – give the relevant bodies such a power, but the provision is hedged around with restrictions in each case, including the requirement that the action must be approved by the responsible minister. Not surprisingly, this means that they are rarely used. The ADB submission argued that ministerial approval should not be necessary, but the LRC evidently recognised that this would be politically impracticable. Thus, it attempted to steer a middle course by recommending that the minister should have the power to refer a matter for investigation to the ADB, and, correspondingly, that the president of the ADB should have the power to make recommendations to this effect.

Codes of practice

The importance of public education is stressed by all the bodies concerned with discrimination, and all have programmes for this purpose. The NSW ADB has been foremost in this regard, supported by the Act which gives the ADB extensive powers of research, investigation and dissemination of information. The ADB operates an active programme of educational forums for employers, which is financially self-supporting. It has also issued guidelines for various industries to clarify the responsibilities imposed by the legislation. Apart from a set of guidelines prepared generally for employers and managers, the following groups have been particularly addressed:

- real estate agents;
- club directors and managers;
- the media;
- advertisers;
- local authorities;
- unions.

In its submission to the LRC, the ADB recommended that it should be given power to issue 'topic-related' codes of practice, with special emphasis on employment. An employment code would deal with:

- recruitment;
- harassment in the workplace;
- terms and conditions of employment;
- termination of employment.

The ADB argued that codes of practice should be legally binding, but the LRC did not accept this position. It did, however, recommend that the ADB should have the power to formulate non-binding codes of practice, to be developed in conjunction with relevant industries and interested parties.

It may be noted, in passing, that a code of professional conduct has been adopted by the Recruitment and Consulting Services Association (RCSA), which covers one quarter of the industry in Australia and New Zealand. It includes the requirement that members must comply with "all legal, statutory and government requirements", which presumably includes anti-discrimination laws. (The report of the Age Discrimination in Employment Project [Brooke, 2001], discussed below [pages 23-4], highlights a number of complaints about age discrimination by recruitment agencies.)

Concluding note

The LRC report includes a draft Bill to implement the recommendations of the Commission, which is currently under consideration by the NSW government. Most of the recommendations are concerned with streamlining and expediting the work of the ADB, strengthening its educational functions, and giving the president of the ADB a more proactive role in dealing with complaints. There are few recommendations dealing with age discrimination in particular, although the LRC criticised the excessive number of exemptions from the Act. Clause 65 of the draft Bill provides for a simplified form of exemption in relation to age.

The Human Rights and Equal Opportunity Commission report

In 1999, the HREOC published a discussion paper entitled *Age matters?* and invited responses, with special reference to:

- suggestions for countering negative stereotypes about both young and older people;
- whether age discrimination in employment could ever be justified;
- whether age-based distinctions could ever be justified in insurance, workers' compensation or superannuation;
- whether the Commonwealth Parliament should enact an Age Discrimination Act.

Following the receipt of a large number of responses to the discussion paper (57 in all) and a series of workshops, the Commission issued its report, *Age matters*, in May 2000 (HREOC, 2000). The following paragraphs comment on the most relevant sections of the report.

General

The HREOC report notes that there are many inconsistencies between the anti-discrimination laws of the various states, and also that employees of the Commonwealth government are not protected against age discrimination. It also comments on the fact that the 1986 Act which established the HREOC does not make discrimination unlawful, and that determinations of the HREOC are not legally enforceable. In practice, the HREOC can only record complaints and draw attention to discriminatory practices. As noted above, the HREOC does in fact receive a steady stream of complaints. The report classifies them under five headings:

1. age stipulations in job vacancies listed by Job Network agencies;
2. vacancies and promotional opportunities in the defence forces;
3. cases where workers over 65 were refused employment on the grounds of age limits established under legislation;
4. age discrimination by trades unions in refusing membership;
5. discrimination in the offer of redundancy packages and the monetary value of the packages.

The report recommends three alternative courses of action:

1. comprehensive national anti-discrimination legislation (including the ground of age);
2. an Age Discrimination Act;
3. provision of enforceable remedies for age discrimination in employment.

Other specific sections of the HREOC report are examined below.

Redundancy

In its 1997 annual report (HREOC, 1997), the Commission examined complaints against two state governments. The complainants, who were aged over 50, submitted that the voluntary departure packages that they received were substantially less than the value of packages offered to younger employees.

The Human Rights Commissioner found that these actions constituted discrimination and recommended that such practices should be abolished. It should be noted, however, that a discriminatory practice exists in NSW, which works *in favour* of older workers. Some industrial awards in that state provide that workers over the age of 45 are entitled to a loading of 25% if they are made compulsorily redundant. These awards were granted exemption from the Anti-Discrimination Act in 1994 (CCH, 1998). The 1996 Workplace Relations Act also provides for a similar form of 'affirmative discrimination' for employees aged over 45 who are made redundant.

Superannuation

The report notes the difficulties involved in amending the law on superannuation. Superannuation payments have always been linked to pension age and retirement age, and are in a sense discriminatory. Pension age – set at 65 for men and 60 for women in the early years of the 20th century – effectively became retirement age. In the 1990s, compulsory retirement was abolished as part of the process of prohibiting age discrimination (Encel, 1996). This has created anomalous relationships between superannuation eligibility and work in later life.

Until 1993, superannuation was available only to government employees and employees of large private companies with their own superannuation schemes. In that year, the Commonwealth government introduced a national occupational superannuation scheme, which requires all employees and employers to contribute to their ultimate retirement income. This forms part of a so-called 'three pillar' system that embraces the national scheme, private superannuation and old-age pensions (which in Australia are non-contributory and paid out of taxation revenue).

The HREOC report deals at some length with the complex web of legislation, regulation and restrictions in this area, and stresses the need for a much more comprehensive approach to the issue. Its recommendations are based, in part, on a discussion paper published by the Institute of Actuaries (1999).

The HREOC report makes the following recommendations in relation to superannuation:

- At present, the 1993 Superannuation Industry (Supervision) Act specifies that funds cannot accept contributions from fund members over 70, and they are obliged to pay out members' benefits at that point unless the member is still in paid work. The HREOC report recommends the removal of these restrictions.
- Under the 1992 Superannuation Guarantee (Administration) Act, employers are under no legal obligation to make superannuation contributions for employees 70 years and over, *or* for those under 18 years who are working part time. The HREOC report recommends that these distinctions should be removed.
- All age distinctions in superannuation and related legislation should be evaluated for their necessity in achieving the objective of superannuation. The report observes that widespread consultation with state and territory anti-discrimination bodies and superannuation funds will be necessary to ensure that national consistency is achieved.

The HREOC report makes this general comment:

> The main cause of concern for older workers is that superannuation restrictions create barriers to continuing employment and hence restrict retirement income security ... [There is] ... frustration experienced by workers not yet retired and over 65 who are unable to continue to contribute to their superannuation funds. Workers with broken patterns of employment, for example older women or self-employed people, feel that they have not had time to accumulate superannuation sufficient for retirement needs and would like to continue working and contributing to superannuation as long as possible. (HREOC, 2000, pp 43-4)

Other issues

One chapter of the HREOC report outlines a wide range of areas where discrimination occurs. They include the following:

- income support for young people;
- work for the dole;
- income support for older people;
- immigration;
- healthcare;
- accommodation;
- insurance;
- financial services;
- concessions;
- inconsistent definitions of 'independence' for young people.

Conclusion

In recommending that the Commonwealth Parliament should legislate, the HREOC report expresses sharp criticism of the failure of successive national governments to deal with the issue of age discrimination. Federal law, the report observes, is weak and inadequate compared with legislation at state and territory level. It contrasts the treatment of age discrimination with complaints based on race,

gender and disability. Under the Act which established the HREOC, complaints under those three headings can be taken to the Federal Court, but this is not the case with age discrimination in employment. Although the 1996 Workplace Relations Act makes it unlawful to terminate employment on the ground of age, and requires the AIRC to ensure that industrial awards do not have age discriminatory provisions, it does not cover a range of other areas of employment. The prohibition of termination on grounds of age applies only to employees covered by industrial awards made by the AIRC, and does not apply to employees earning more than a specified amount (currently about Aus$70,000 per annum). It also does not protect a range of casual, fixed-term or probationary employees. In addition, age discrimination is not unlawful in contracts and consultancies for government-funded programs, or in the provision of services to government.

The age discrimination Act recommended by the Commission would deal with the following issues:

- all aspects of employment;
- all employment-related entitlements;
- all actions of employment and recruitment agencies;
- education and vocational training;
- provision of goods and services, accommodation and healthcare;
- sale of land and housing;
- local government decisions;
- membership of unions;
- membership of clubs;
- offers of partnerships.

These recommendations reflect the wide range of areas in which complaints have been recorded. In terms of political reality, it is improbable that such comprehensive national legislation will be enforced; it is likelier that action will take place at the state level in response to reviews such as the one carried out by the NSW Law Reform Commission.

Report of the Age Discrimination in Employment Project, 2001

In 1998, three of the state Equal Opportunity Commissions – Victoria, South Australia and Western Australia – joined forces to investigate systemic disadvantages faced by older people in employment. The objectives of the study were as follows:

- to identify perceptions underlying age discrimination in the workplace;
- to identify forms of age discrimination;
- to examine the utilisation of age discrimination legislation in Australia and overseas, and barriers leading to its under-utilisation;
- to make recommendations for the increased use of age discrimination legislation to protect the rights of older workers.

The study was based at the Lincoln Gerontology Centre of La Trobe University, in Melbourne, and directed by Dr Libby Brooke. Dr Brooke kindly made available the final draft of the report, which was published in March entitled *Age limits* (Brooke, 2001).

The research entailed consultation with key stakeholders in legal, trades union, employer and other relevant organisations in the three states (the author was one of those interviewed). Focus groups of older workers and employers were also held, including specific groups of older women and people from non-English-speaking backgrounds.

This summary covers the relevant references to the operations of legislation banning age discrimination. Although the report largely repeats the findings of earlier research, it represents the largest and most systematic study of its kind and its findings are therefore of interest.

The following general conclusions appear in the report:

- Older people and employers are unclear about their rights and responsibilities in recruitment.
- Older people were often unsure about procedures such as disclosure of their age in job applications and how to write a CV that presented their experience in a positive manner. Employers were often unsure about the implementation of procedures which comply with age discrimination legislation.
- Older workers commonly reported that recruitment agents screened applicants according to age criteria at the stage of application.
- Age discrimination was commonly covert and evasive. Discrimination was perceived to be easy to mask using code words, such as ‘too qualified’. Asking ‘How old are your children?’ was another indirect form of discrimination.

- There is a lag between the legislative abolition of mandatory retirement and community attitudes. Covert and overt pressures exist towards induced early retirement, commonly justified by ageist stereotypes.

The report recommends the development of a range of instruments that would target employers at all stages of the employment process, that is, recruitment, training and exit. These instruments would address the following issues:

- responsibilities involved in complying with the legislation;
- awareness raising to dispel ageist stereotypes;
- concerted education campaigns, for example, to promote understanding of age discrimination and how it can be combated.

A particular area of complaint relates to the practices of recruitment agencies. (As noted above, only one quarter of the industry is covered by the Recruitment and Consulting Services Association and bound by its code of practice.) A recruitment consultant interviewed by the researchers commented that older applicants were often advised to remove their age from applications and truncate their work history in order to disguise their age. An unemployed former customs officer claimed that negative judgements were made by recruitment agencies at an early stage, and observed that, "recruitment agents are going through the motions of recruitment according to an 'Identikit picture' of what employers want" (Brooke, 2001, p 13).

Lawyers interviewed by the researchers drew attention to the problem of onus of proof, which makes the complainant's task very difficult. Several employers recognised the high level of ignorance about age discrimination legislation, but added that knowledge of the law could be exploited to evade compliance. A human resources manager commented that:

> "The legislation tells employers what they can't say and provides the reason for evasion. The policies and structures can be in place, but what in reality we are doing is different." (Brooke, 2001, p 15)

The issue of access to training was raised by a number of the participants. The report notes that:

- training has a low profile as an age discrimination issue compared with recruitment and exit policies;
- lack of performance measurement of training opportunities hides lack of compliance with training as an age discrimination issue;
- there are particular difficulties for persons from non-English-speaking backgrounds, many of whom are not even aware of the training opportunities which do exist.

Although compulsory retirement has been abolished in all states and territories, and also in the Australian public service, employers expect workers to retire no later than age 65 and preferably earlier. Many of the participants reported pressure from employers, which can be covert and cumulative and whittle away the confidence of the older person that he/she has the right to remain employed.

Cases

In order to give greater depth to this account of anti-discrimination law and practice in Australia, a number of case examples have been selected. Some are drawn from reported legal cases in Australia and New Zealand; others are derived from the files of the NSW ADB, which gave the author permission to examine the records of completed cases dealt with by conciliation (Encel and Studencki, 1998). The cases are grouped according to their central issue.

Recruitment

Recruitment appears as the greatest single cause for complaint in relation to employment.

The defence forces, which have strict age requirements relating to rank, posting and specialist services, have attracted a number of complaints, as noted by HREOC. The best-known case, which went to the Federal Court, concerned Robert Bradley, a helicopter pilot aged 37, who applied for entry to the Specialist Service Officer scheme (which provides an advanced pilot training course). He was denied entry on the grounds that the upper age limit was 28. The Human Rights Commission found that there was insufficient evidence to establish a direct connection between Bradley's age and his ability to meet entry criteria. Bradley took the case to the Federal Court, where a judge ruled in his favour. The Commonwealth appealed to the Full Bench, and lost the appeal (*Commonwealth of Australia v HREOC and Bradley*, 1998; Full Federal Court, 1999).

Ms A, aged 47, was employed as a receptionist, but was dismissed after three weeks because her employers wanted someone younger. After a conciliation conference, the company apologised and paid Aus$2,500 by way of compensation.

Mr I, aged 55, answered a job advertisement by telephone and, after he had given his age, was told that the position was already taken. Suspecting age discrimination, he called again and gave his age as 26. He was then invited to an interview. However, he did not proceed with the complaint.

In a New Zealand case, an employer attempted to cut the salary of a new female employee when he discovered that she was younger than he had been told by the recruitment agency that had hired her. There was a dispute and she was dismissed. The case went to the EOT. The sacked employee won the case and was awarded lost wages and compensation for "humiliation, loss of dignity and injury to feelings" (CCH 92-740, 1995).

A recruitment agency in Victoria sought exemption from the Equal Opportunity Act to enable it to specify levels of experience required for professional jobs. The possibility of indirect discrimination was raised during the hearing before the Anti-Discrimination Tribunal, but the Tribunal did not consider this as a serious issue and granted the exemption (CCH 92-906, 1997).

A Queensland case involved a salesman who was seeking a job with a particular company, and claimed that he had been refused because of his age. The case went through a series of appeals, the last of which was before a full bench of the Queensland Supreme Court. The court found in favour of the company, on the grounds that no offer of work had actually been made. As it was only a hypothetical situation, the making of a hurtful or unfortunate statement did not create an entitlement to compensation (*McIntyre and Another v Tully*, 2000).

Harassment

Harassment with respect to age is probably under-reported, particularly in comparison with sexual and racial harassment. However, a few cases have made it as far as the tribunals.

Mr M was a senior bank official, aged 58. He claimed that he had been subjected to "three years of concerted and sustained acts of discrimination and harassment", with the object of forcing him to retire or leave. After a conciliation conference, the parties decided to enter into direct negotiation. As a result, Mr M left the bank with a financial payout (amount undisclosed) and withdrew his complaint.

A butcher in the city of Newcastle, aged 64, was transferred by his employer – a meat processing company – from the butcher's shop to a sausage-making factory. He claimed that this had been done deliberately to induce him to retire. The employer claimed that he was too slow at his job. The EOT found in the employee's favour, and awarded him Aus$15,000 in damages (*Gilshenan v P.D. Mulligan P/L*, 1995).

Annette Goodworth, a secretary in the employ of a motor car dealer in the small town of Moruya on the south coast of NSW, was summarily dismissed at the age of 53 in 1994. The employer endeavoured to replace her with a much younger woman, and told her that she should consider early retirement (he denied this before the tribunal). It was also alleged that the employer's son had offered the job to the younger woman, saying that Mrs Goodworth's health was not good (this was also denied).

The tribunal rejected the employer's argument that Mrs Goodworth had been dismissed because of inefficiency and awarded damages of Aus$12,500, covering loss of salary, long-service leave, superannuation, distress and the peremptory manner of her dismissal (*Goodworth v Marsden Motors Pty Ltd*, 1994).

Inherent requirements of the job

The most significant cases dealing with 'inherent requirements' have involved airline pilots, both domestic and international. These cases are described below in a separate section. However, details are available concerning other interesting examples.

Mr J, aged 59, applied for an inspector's position with a municipal council. Without the benefit of an interview or a medical examination, he was simply told that the council wanted someone more agile. After a conciliation conference, the council's representative offered him Aus$10,000 in compensation, but the full council then refused to endorse the offer. The matter was then referred to the EOT, which ruled in favour of the complainant.

Grant McDonald, aged 49, applied for a position with the Home Care Service of NSW. He alleged that an official of the service had told him that a younger person would be fitter in the job (the official in question admitted making these remarks). The position was re-advertised and McDonald's subsequent application was unsuccessful. The tribunal rejected McDonald's complaint and found that there was no evidence of discrimination, remarking that the Home Care Service had dealt with the matter 'meticulously' (*McDonald v Home Care Service of NSW*, 1996).

Advertising

Generally speaking, advertisements for jobs have ceased to contain 'ageist' statements; however, discrimination in advertising and recruitment has become more subtle. The Commissioner for Equal Opportunity in Western Australia observed in an interview with the author that service industry employers now tend to ask for photographs of the applicants. However, lapses do occur, as indicated by the two following examples.

Ms H noticed an advertisement in a NSW country town newspaper, which read, 'Potential retirees need not apply'. She reported this to the ADB, which contacted the newspaper and advised them that such advertisements breached the law.

A claimant, who did not state his age, lodged a complaint against the government jobs agency – the Commonwealth Employment Service (CES) – on account of job advertisements that specified age limits. The offending advertisements were removed and the CES agreed to train their staff to avoid discriminatory actions.

Miscellaneous

Dr Ivory, a senior lecturer at Griffith University in Queensland, turned 65 in 1996. His contract provided for mandatory retirement at that age. The university agreed to waive this requirement, but then performed an about-face and insisted that he retire. Dr Ivory complained to the Anti-Discrimination Tribunal and won his case. The Tribunal awarded Aus$5,000 compensation for pain and suffering; and criticised the university for ignorance of the law (*Ivory v Griffith University*, 1997).

Mrs Patricia Alcock worked for 12 years as part-time receptionist in a hotel at Port Macquarie – a popular seaside resort on the North Coast of NSW. In 1993, after returning from a holiday, she was told by the manager that her employment was being terminated, as she was now 60 and should retire.

Attempts to conciliate the case were unsuccessful, and Mrs Alcock took her complaint to the tribunal, rejecting legal advice that she should settle for less than the amount claimed. The tribunal found in her favour and awarded the full amount of her claim (*Alcock v Sheppeard and Others*, 1995).

Finally, one case involving promotion has reached a judicial settlement. Ghockson, a Detective Superintendent in the police force of Western Australia, applied for promotion to Assistant Commissioner. He was 56 at the time. The application was denied on the grounds that he was "resistant to change" and had an unsatisfactory management style. He took the case to the EOT and lost. In its decision, the EOT declared that "it is necessary to establish a causal connection between the act complained of and the less favourable treatment ... it is not necessary to establish an intention to harm or to discriminate" (*Ghockson v Commissioner of Police*, 1996).

The airline pilots' cases

Allegations of discrimination by airline pilots who had been compulsorily retired have led to a particularly interesting series of court decisions.

In the Allman case (*Allman v Australian Airlines (Qantas Airways)*, 1995), the complainant successfully sued Qantas Airways. In the Industrial Relations Court of Australia, the Chief Justice ruled that there was no 'inherent requirement' that a pilot should be under 60, and his judgment was upheld on appeal.

In another case involving a domestic pilot, Qantas argued that age was used as a criterion because of the concern that its investment in training pilots should be recouped by appointing pilots who would spend enough time in the system. An economist called by Qantas as an expert witness argued that "a preference for younger trainees is properly and reasonably explained as a rational economic reason for preferring to hire applicants who have a longer expected tenure or working life". The EOT rejected this argument, observing rather sharply that:

> The Tribunal is not directly concerned with the principles of economic rationalism, but with the principles of equal opportunity. The principles of economic rationalism are not enshrined in legislation; the principles of equal opportunity are, and it is the legislation that the Tribunal is called upon to apply.

The EOT concluded that the complainant had been discriminated against on the ground of age, and further that Qantas was practising 'systemic discrimination' against all applicants. In its judgment, the EOT ordered that Qantas should arrange for the complainant to complete the selection process as soon as practicable, and that the company should cease to take age into account in the selection of pilots placed on its 'hold-list' of available pilots. Costs were also awarded against Qantas (Encel and Studencki, 1998).

The leading case in this area is that of John Christie, who flew with Qantas on international routes. He lost his job at the age of 60 because of international aviation rules which prevent a pilot over 60 being in command of an aircraft. Christie took the matter to the Industrial Relations Court of Australia. The case ended with an appeal to the High Court of Australia, where the majority accepted the argument that the age limit was an 'inherent requirement'. The dissenting judge argued that the criterion of inherent requirements should not be unduly expanded (*Qantas Airways v Christie*, 1998).

In the US and Canada, there have been similar cases turning on the principle of 'genuine occupational qualification' (GOQ) or 'bona fide occupational qualification' (BFOQ). In the US, the principle of GOQ was written into the 1964 Civil Rights Act, while in Canada the term BFOQ has been incorporated into both national and provincial legislation.

Assessment and evaluation

Human rights and the meaning of discrimination

The development of anti-discrimination law represents one stage in a process that began with the English philosophers of the 17th century, such as John Locke, who saw government as the guarantor of individual rights. Locke's ideas were central to the American Declaration of Independence, which was also based on the concept of 'inalienable' rights, picked up a few years later in the French Declaration of the Rights of Man and the Citizen. A century and a half later, similar principles were incorporated, in much greater detail, in the Universal Declaration of Human Rights. The terminology of 'human rights' and 'human rights abuses' has since become part of the common stock of public discourse.

There is no constitutional guarantee of human rights in the Australian Federal Constitution or in any of the state constitutions. This reflects the continuing influence of British jurisprudence (although the British situation has changed with the UK's membership of the European Union). In the absence of a Bill of Rights, partial guarantees have developed, of which anti-discrimination law is a prominent example.

Anti-discrimination law operates through the settlement of individual complaints, mostly by conciliation but occasionally through a judicial determination. The process is not an easy one for the complainant. As indicated by the tables on pages 29-30, the proportion of complaints which are actually settled does not rise above 10%. The three official reports discussed above all raise concerns about this situation and academic commentators have made similar criticisms.

The most stringent critique of anti-discrimination law comes from a legal academic, Margaret Thornton. Thornton's writings (1982, 1990) are concerned mainly with gender discrimination, but many of her remarks apply to discrimination on other grounds, including age. She maintains that the procedures embedded in the law depend on the assumption that social change can be brought about by changing the 'hearts and minds' of individuals. In an early analysis of equal opportunity legislation, she dismissed it as no more than a 'pinprick' (Thornton, 1982). In a subsequent book (1990), she derides "the elusive marsh-mallow substance" of individualist liberalism that lies at the core of anti-discrimination legislation. She is concerned about the asymmetry between employer and employee, and criticises the tribunals for their "deference to managerial prerogative". Since employment is a contractual relationship, power resides in the employer who determines the substance of the contract, giving it a privileged status which is,

> ... resilient to challenge through anti-discrimination legislation ... the ultimate power of the employer to hire and fire militates against an employee's ability to resort to formal legal remedies. (1990, pp 114-15)

Thornton does, however, concede that the anti-discrimination process is a step forward:

> Anti-discrimination legislation is an important symbol of our society's attempt to cross the individualism/collectivism divide and to recognise group difference. Innovative procedures such as the focus on conciliation as the primary mode of dispute resolution ... serve to underscore the attempts to include collective values within legal practice ... anti-discrimination legislation does serve an important symbolic and educative function ... the public interest dimension, embodied in the legislative texts, confirms the fact that equal treatment is a matter of societal concern; it is not just the private concern of those who are deleteriously affected. (Thornton, 1990, pp 259-61)

A similarly qualified view is expressed in a study by Louise Thornthwaite (1993), using data from NSW. Although her research pre-dates the introduction of age as a ground for complaint, her findings are generally applicable. She notes that the ADB and the EOT (now the Equal Opportunity division of the Administrative Decisions Tribunal) can remedy past actions, but their power to impose binding changes on employer policies and practices is severely limited. Tribunal hearings are costly, stressful and time-consuming, and employers are at an advantage because of greater resources both before the tribunal and also in the case of subsequent appeals. The result of unequal power means that resulting settlements commonly represent a compromise. It is apparent, she concludes, that "while anti-discrimination legislation does give individual workers the power to challenge management actions, it does so to only a limited extent" (Thornthwaite, 1993, p 48).

Nevertheless, Thornthwaite gives the system a good report, apart from its limitations. She sums up as follows:

> The ADB's conciliation process enables employees to discuss their grievances, first with counsellors who have considerable expertise in handling such disputes and, second, with employers in a relatively confidential, informal and non-adversarial manner.... For those complaints referred to the EOT, the opportunity for a hearing may give some relief to the complainants and many may also obtain private settlements prior to the inquiry commencing, when the threat of tribunal proceedings induces some respondents constructively to negotiate.... The anti-discrimination machinery may also perform a substantial educational function through its involvements in dispute settling. (Thornthwaite, 1993, p 46)

Bennington, who approaches the topic from the viewpoint of human resources management, examines the difficulties and uncertainties which surround the operation of anti-discrimination law,

and examines the varying interpretations resulting from different tribunals and courts (Bennington and Calvert, 1998). She notes the problems that are likely to arise for both employers and workers. Changes will be necessary in the workplace if workers are to be free of discrimination. Workers, she concludes:

> ... are likely to have to face ongoing assessment and pressure to produce if they wish to remain in employment at any age, and probably more particularly at older ages when they can expect to be under the microscope more than in the past. (Bennington and Tharenou, 1997, pp 423-5)

Bennington adds that employers will also be under greater scrutiny, and will have to take great care that no other variable is used as a proxy variable for age.

Conclusions

The evidence indicates that anti-discrimination legislation clearly has a place in dealing with the pervasive phenomenon of age discrimination. However, the legalistic framework of the system means that only a small proportion of complaints about discrimination actually succeed. The effectiveness of the system could be improved by giving tribunals the power to initiate inquiries, as stressed by the NSW Law Reform Commission (1999) and the HREOC (2000).

A further improvement in the operation of the various boards and commissions concerned with discrimination would be to strengthen their educational functions. As the Age Discrimination in Employment Project points out (Brooke, 2001), it is important to dispel the ageist stereotypes of older workers and to raise public awareness of the short-sightedness of age discrimination.

In the Australian context, the effectiveness of legislation would also be improved with the passage of a national anti-discrimination Act, similar to the US 1967 Age Discrimination in Employment Act, as advocated in the HREOC report (2000).

Finally, the implications of an ageing workforce require much more attention at government level. In the 1960s, when the depression birth-rate and the Second World War resulted in a sharp drop in the number of school leavers entering the workforce, it became fashionable to emphasise the virtues of older workers. This concern dropped away with the advent of the baby boomers moving into work. The current ageing of the population is unlikely to be counterbalanced in this way. Effective policies against age discrimination should be seen as part of a wider strategy designed to maximise the contribution of older people to the economy and to society in general.

Analysis of Complaints to the NSW Anti-Discrimination Board (1994–2000)

Notes: Table 2.4 is based on research in the Board's files. The other tables are derived from annual reports of the Board. Not all years have been shown and those selected were chosen to indicate significant fluctuations.

Table 2.3: Inquiries and complaints (1994–2000)

	Inquiries	Complaints
1994-95	16,000	1,508
1995-96	21,000	1,939
1997-98	18,923	1,312
1999-2000	16,655	1,381

Table 2.4: Analysis of all grounds for complaint (1996–2000)

	1996–97		1999–2000	
	Number	%	Number	%
Gender	412	25.0	288	20.0
Race	371	22.0	259	19.0
Disability	293	17.0	288	20.0
Victimisation	120	7.0	91	6.6
Age	79	5.0	112	8.0
Homosexuality	68	4.0	56	4.0
Racial vilification	62	4.0	28	2.0
Marital status	34	2.0	20	1.4
Homosexual vilification	22	1.4	20	1.4
Other grounds	181	12.6	219	17.6
Total	**1,542**	**100.0**	**1,381**	**100.0**

Table 2.5: Complaints of age discrimination (1994–2000)

	1994–95	1996–97	1997–98	1999–2000
Employment	85	47	56	72
Goods and services	79	21	30	27
Accommodation	17	8	10	10
Clubs	8	1	2	1
Others	8	2	4	2
Total	**197**	**79**	**102**	**112**

Table 2.6: Analysis of cases of age discrimination in the files of the ADB (1994–97)

Gender of complainants	Male	Female	Not known	Total
Employment	133 (70.7%)	55 (29.3%)		188
Goods and services	42 (55.3%)	26 (34.2%)	8 (10.5%)	76

Nature of complaints	Recruitment	Dismissal/ Retrenchment	Other	Total
Employment	74 (39.4%)	52 (27.6%)	62 (33.0%)	188

3

Age discrimination legislation in Canada

Morley Gunderson

Introduction

As is the case in a number of developed countries, issues of age discrimination are of increasing policy interest in Canada for a variety of reasons. The reasons pertain to demographics and the ageing population, pension viability, impending labour shortages, restructuring in the information economy, phased retirement, human rights, unjust dismissal, mandatory retirement and the accumulation of seniority-based wage increases and service credits for pensions.

The workforce is ageing, with the baby-boom population (born shortly after the Second World War) now aged in its mid-50s – at the age of early retirement and approaching the age of normal retirement of around 65. Increasing life expectancy also means that issues of age discrimination will be prevailing for older workers for a longer period of time.

Given this ageing population, and the fact that a smaller portion of the population is of working age, concern exists over the viability of pay-as-you-go schemes such as public pensions (for example, the Canada/Quebec Pension Plan). In such schemes, payroll taxes from the current generation of employees pay for the benefits received by retired employees with the expectation that when the current generation retires, the new workforce pays for their retirement benefits. Such schemes work when there is stable population and productivity growth. However, if the retirement age population is growing faster than the working age population (as is the case currently), and productivity growth is stagnant, the viability of this 'social contract' becomes severely strained, as large intergenerational transfers can be involved. This is compounded by the extensive medical expenses associated with an older population. In such circumstances, negative impressions of older people as a 'drain on the system' may foster discrimination against individual older people. Also, there may be pressure to facilitate the continued employment of older workers so that they can contribute to the system and draw less from it. Protection against age discrimination can facilitate that continued employment.

Possible impending labour shortages, including those resulting from the smaller number of younger workers in the labour force, is drawing attention to older workers as a potential source of labour supply. This is augmented by the realisation that much of the recent downsizing led to a loss of older workers who had an important role in mentoring, providing institutional knowledge and in networking with other organisations.

The information economy and knowledge work is having diverse impacts on older workers. On the one hand, they can facilitate continued employment since it is less physically arduous; on the other hand, it gives rise to skill obsolescence and the need to learn new technologies, especially those associated with IT. To the extent that older workers find it more difficult to adapt to such technological change, they may have a shorter expected working life over which to amortise the cost of relearning.

There is pressure from employers more generally for a flexible and adaptable workforce. Some of this may be well suited for older workers. This is the case, for example, with respect to part-time work or self-employment to facilitate phased retirement, as well as with respect to broader-based job classifications that involve a wide range of tasks that may suit older workers given their

range of experience. Other requirements for flexibility may be more difficult for older workers.

There is general agreement in policy circles that it is desirable to facilitate the phased transitions into retirement for older persons, rather than to have abrupt shifts from work to full retirement (Gunderson, 1998). This is especially the case when employees may have an incentive to work full time and even long hours prior to retirement to build up pension benefit accruals that are related to the person's final year earnings. Such incentives can inhibit phased retirement, leading to abrupt changes that are not likely to be healthy for employees, and can lead to loss of valuable talent and mentoring for employers. In such circumstances, age discrimination legislation can provide protection to facilitate transitions into retirement.

There is also increased emphasis on anti-discrimination and issues of human rights in general, especially given the growing diversity of the workforce with respect to such factors as gender and ethnicity. In such an environment, the human rights of older workers becomes an area of obvious consideration[1]. This is further fostered by the fact that the United Nations declared 1999 as the Year of Older Persons. Accommodating disabled workers at the workplace, especially to facilitate their return to work after an accident, is taking on increased importance. In such an environment, accommodating older workers becomes an obvious consideration (Gunderson, 1992).

Issues of unjust dismissal have also taken on increased importance to protect workers who are dismissed 'without cause'. Such protection is provided through the grievance procedure and arbitral jurisprudence for unionised employees, and through common law and the courts for non-unionised employees (usually higher-level personnel). In three Canadian jurisdictions (Nova Scotia, the federal jurisdiction and Quebec) it is also available through the statutory protection of general employment standards legislation (designed mainly to assist lower-level employees who would not typically go through the courts and who may not be covered by a collective agreement). Such dismissal without just cause often happens to older employees and, hence, is often interpreted as age discrimination.

In Canada, the issue of age discrimination is intricately tied to the issue of mandatory retirement. Unlike in the US, mandatory retirement is not generally banned (discussed further on pages 35-8). To accommodate mandatory retirement, many jurisdictions in Canada have an age limit on the employment section of their human rights code. This effectively indicates that the human rights code (which prohibits discrimination on the basis of age) does not apply to persons aged 65 and over, and thus that those 65 and over are not protected by the human rights code. In effect, the codes appear to say to employers, "you cannot discriminate on the basis of age ... unless the person is 65 or older"!

This issue is compounded by the fact that mandatory retirement may inhibit some groups – notably women – from accumulating the seniority-based service credits and wage increases that can augment their pension benefits. Also, their lack of service credits may make them ineligible for generous early retirement provisions of occupational pension plans (Pesando et al, 1991).

Clearly, there is a wide range of important policy issues associated with age discrimination in employment. The purpose of this chapter is to analyse age discrimination in Canada. The subject matter is not only important in its own right, but also because of the way it may shed light on

[1] It is the case, however, that age discrimination tends not to attract the same moral outrage as many other forms of discrimination. This may reflect, in part, the fact that we all can expect to be older, while we will not all be members of other groups against which discrimination is prohibited. Furthermore, age discrimination is often justified in the minds of some as it can involve more opportunities for others, such as jobs and promotion opportunities if, for example, mandatory retirement prevails. As indicated by the Ontario Human Rights Commission (OHRC): "Partly because of the recognized social utility of retirement policies and partly because of the differing attitudes to age discrimination, the legal and normative approach to age discrimination appears to be less critical and rather accepting of the practice" (2000a, p 7). The OHRC further states: "Age cases tend to be treated differently than other discrimination cases, particularly when the case involves retirement issues. The most noticeable difference from a human rights perspective is the lack of moral opprobrium linked to age discrimination which, in comparable circumstances would generate outrage if the ground of discrimination were, say, race, sex or disability" (p 39).

related policy issues. This chapter outlines age discrimination legislation in Canada, relating it to the various facets of the employment relationship, and especially mandatory retirement. It also relates age discrimination to other aspects of labour market legislation, such as employment standards, and discusses aspects of enforcement and evidence on the effectiveness of age discrimination legislation. The chapter concludes with some observations about the principal issues that have arisen in Canada with regards to age discrimination. The focus here is on age discrimination against older people in employment. Legal issues pertaining to age discrimination against younger people, and those outside of the employment relationship (for example, in housing and the provision of goods and services) are analysed in more detail in other sources (for example, Zinn and Brethour, 1999; CHRC, 2000; OHRC, 2000a).

Age discrimination legislation in Canada

Analysing age discrimination in Canada is complicated by the fact that Canada is a federation with power distributed between the central (federal) government and 10 provincial governments. Three territorial governments are also governed by the federal government, but have been delegated specific powers. The federal–provincial division of power differs depending on the issue. For example, immigration and unemployment insurance are under federal jurisdiction. Labour and human rights matters are largely under the jurisdiction of each province, although the federal government has jurisdiction over about 10% of the workforce, in areas of national interest such as banks, transportation, telecommunications and broadcasting. Also, as discussed subsequently (page 34), there is an overriding federal Charter of Rights and Freedoms (hereafter referred to as the Charter), as well as related laws that govern specific areas such as collective bargaining, labour standards, workers' compensation, health and safety, and unemployment insurance.

Human rights codes[2]

Protection against age discrimination in employment is provided in the human rights code of each province and of the federal jurisdictions. These codes also prohibit discrimination in other areas such as accommodation, facilities and services to the public. Such codes were generally established in the early 1980s, with the prohibited grounds for discrimination including race, gender, ethnic origin, colour, religion, marital status, disability, sexual orientation and age (in Canada's largest province – Ontario – age was cited as grounds for discrimination in around 7% of cases in 1999-2000; two thirds of these were regarding employment; OHRC, 2000b). Some jurisdictions also include grounds such as alcohol/drug dependence, nationality/citizenship, pregnancy/ childbirth, criminal conviction, political beliefs and language. Even if a prohibited ground is not explicitly stated within a code, some court interpretations have effectively 'read in' the prohibition as following from the general guarantee of equal treatment under the law based on the Charter. This is the case, for example, for sexual orientation under the federal and Alberta legislation.

Actions can be discriminatory as long as they are deemed to have an *adverse impact* even if discrimination is not the *intent* – that is, it is the results and not the motive that matters. In part, this is designed to get at *systemic* discrimination, which is often the unintended by-product of other employment practices that have a disparate impact on particular groups. Alternative phrases used to describe this type of discrimination include indirect, constructive, unintentional and adverse impact. For an age-related job requirement or qualification to be considered *not* discriminatory it must be a reasonable and bona fide occupational qualification (BFOQ), and it should be proved that the person cannot be accommodated without undue hardship to the organisation. Court decisions in this area have also treated adverse impact and wilful intent discrimination similarly when making awards and penalties.

[2] Information describing the law and jurisprudence in this and the following sections draws extensively from Zinn and Brethour, 1999; OHRC, 2000a; Jackson, 2001; McPhillips, 2001. McPhillips (2001, p 223) lists the websites of the different human rights commissions in Canada.

As indicated previously, all jurisdictions prohibit discrimination on the basis of age in their human rights codes, although some have a maximum age of 65, beyond which the code does not apply with respect to employment. Such maximum ages for age protection exist in four of the 10 provinces – Ontario, British Columbia, Saskatchewan and Newfoundland. People beyond the age of 65 are able to make a complaint on some other enumerated ground with regards to employment (as well as for accommodation, facilities and services to the public), but not on the basis of age (the exception is Saskatchewan, where the age limit applies to all aspects of the human rights code).

The enforcement of the human rights codes is made via a complaint to a human rights commission; however, many are abandoned or withdrawn early, and many are dismissed by the commission. Of those that continue, most are settled informally with the assistance of the commission. For example, in Ontario in 1997/98, almost half of the employment cases were withdrawn or abandoned, and slightly more than one quarter were dismissed. Of the remaining quarter, most were settled informally, with only a few going to a formal board of inquiry. Board decisions can be appealed through judicial review to the courts, but, in general, the courts in Canada are loath to interfere with decisions of administrative boards unless they make egregious procedural errors.

The penalties involved are usually not severe, typically requiring restitution for the loss the aggrieved individual experienced as a result of the discrimination (including possible back-pay), and possibly requiring the losing party to pay costs. Punitive damages are usually low, largely because such procedures are not intended to be punitive. Rather, they are intended to be educational – to ensure that the parties see their mistake and rectify it for current and future situations. Public opinion and adverse publicity are likely to be main deterrents for discrimination cases, although they may not be deterrents to the most egregious employers.

Federal Charter of Rights and Freedoms

The Charter of Rights and Freedoms was adopted in 1982 as part of the Canadian constitution. As part of a constitution, it sets limits to the power of governments by taking precedence over all other federal and provincial laws, enabling them to be challenged as violating the Charter, with the Supreme Court being the ultimate arbiter. Thus, the Charter has become an important element in labour regulation, including for issues pertaining to age discrimination. This has occurred largely through the equality provision:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (Section 15(1); a subsequent subsection allows laws and policies that are designed to ameliorate the conditions of the disadvantaged individuals, including the enumerated groups)

Importantly, these equality rights are subject to the 'reasonable limits' or Section 1 defence of the Charter, where Section 1 guarantees those equality rights,

> ... subject only to such reasonable limits prescribed by law as can be demonstrated in a free and democratic society.

In essence, an individual or group that feels they are not adequately protected against age discrimination (or any other form of discrimination) by their existing laws, can bring a 'Charter challenge' under the equality provision of Section 15(1). But, this is subject to a possible Section 1 defence if the practice is deemed to be reasonable in a free and democratic society. In essence, social trade-offs are allowed so that discrimination is permissible if it serves other important social objectives (just as special programmes that favour disadvantaged groups are allowed because of their broader social objectives). This has become a crucial issue in the mandatory retirement debate, as outlined below.

Mandatory retirement

Where it exists, mandatory retirement is part of a company personnel policy or collective agreement that requires the employee to retire from the company at a particular age, usually 65, when private and public pensions become available. In some circumstances (sometimes termed automatic retirement) the organisation is not allowed to re-hire the individual under any contractual arrangement. In other circumstances (sometimes termed compulsory retirement) the organisation can re-hire the person on a new contractual arrangement.

Approximately half of the Canadian workforce is covered by some form of mandatory retirement policy – similar to the situation that prevailed in the US prior to their legislative ban on mandatory retirement (Gunderson and Pesando, 1988, p 33). There is considerable variation in the extent to which mandatory retirement is automatic or compulsory, in the actual age of mandatory retirement (60-70), and the extent to which it is accompanied by subsidised early retirement options (for example, at age 55, 60 or 62). Mandatory retirement tends to be associated with workers who are relatively advantaged working in the primary labour market, often covered by a collective agreement, and almost invariably covered by a pension plan. There is little systematic evidence about the extent to which those who are subject to mandatory retirement are involuntarily constrained by it, in the sense that they would like to continue working at the same organisation. The limited evidence available suggests that the numbers are small and growing smaller over time as the trend towards early retirement continues. (Of course, those subject to mandatory retirement always have the option of seeking continued employment elsewhere – mandatory retirement refers to retirement from a particular organisation, not from the whole labour force.)

At first glance (and for many people, at all subsequent glances) mandatory retirement appears to constitute age discrimination. It is a blunt rule that requires people to retire at a specified age – it is not tied to any qualification or occupational requirement. The appearance of discrimination is further enhanced by the fact that the human rights codes of a number of jurisdictions have a maximum age for protection, as discussed above. The fact that these people tend to be advantaged, covered by a pension plan and possibly by a collective agreement, does not negate the possibility of discrimination.

Yet, in a now famous case – *McKinney v University of Guelph* (1990) – the Supreme Court upheld allowing mandatory retirement, that is, it did not ban mandatory retirement as a contractual arrangement. It determined that mandatory retirement *was* discriminatory under the equality provision of Section 15(1) of the Charter, but that such discrimination was "demonstrably justified in a free and democratic society" under Section 1. In essence, it determined that the potential social benefits of allowing mandatory retirement outweighed the social costs, including the possible violation of the equality rights of older workers. As stated by Zinn and Brethour:

> In concluding that the age limits as set out were reasonable limits under s 1 of the Charter, the Supreme Court of Canada indicated that the objectives of government in passing this section [the age limits beyond which the human rights code did not apply] were pressing and substantial. The objectives (the preservation of integrity of pension plans and to foster the prospects of younger workers by establishing an age maximum) were held to be rationally connected to the restriction and minimally impaired the equality rights of older workers. (1999, p 33)

This principle has been upheld in a number of other related decisions of the Supreme Court:

> Although the cases differ in some respects (for example, some involve Charter challenges to legislation while others involve the application of mandatory retirement defenses in human rights codes), mandatory retirement at age 65 has always been found justifiable by the Supreme Court. (OHRC, 2000a, p 24)

So, what are some of the social purposes that could be served by allowing mandatory retirement?

Mandatory retirement can *facilitate worksharing* by opening up job and promotion opportunities to younger workers. Older people who are now retiring may have had their job and promotion prospects enhanced by the retirement of others

before them; it is now their turn. There is a risk, however, that this could be subject to the 'lump of labour fallacy', which assumes that every job occupied by an older person precludes a job available for a younger person. The number of jobs in the economy is not fixed, although in specific organisations (such as universities) new jobs are often determined by retirements. Even if the job occupied by an older person precludes the hiring or promotion of a younger person, this does not appear to justify such a blunt instrument as requiring all older people to retire from an organisation.

By providing a fixed retirement date, mandatory retirement can *facilitate planning* on the part of both the employer and the employee. Employers are better able to forecast their retirements for purposes of succession planing and to determine disability, medical and pension costs. Employees are better able to engage in their own retirement planning, including saving. However, it still appears excessive to force people to retire simply to facilitate such planning.

Mandatory retirement may also *facilitate retiring with dignity and reduce the need for constant monitoring and evaluation* since it happens to all people at the pre-specified age. In the absence of mandatory retirement, older workers may be at more risk of being dismissed 'for cause' because employers do not know how long the employee will otherwise remain with them. In such circumstances, there would also be more monitoring and evaluation of performance to back up any need for dismissal with cause. If performance falls off, work teams may also be less likely to 'carry' an individual if they also do not know how much longer that person will remain with the company.

A less obvious role of mandatory retirement is that it may facilitate deferred or back-loaded compensation systems (Lazear, 1979). Under such systems workers are 'underpaid' relative to their productivity when they are younger and initially working with the organisation, in return for the expectation of being 'overpaid' relative to their productivity later in their career. Such 'wage tilt' may serve a wide range of other functions. It may ensure honesty and work effort from the employee, to be sure of remaining with the organisation to get their deferred compensation. (The deferred compensation can be thought of as analogous to the employee posting a performance bond with the organisation, with repayment conditional on good performance.) Deferred compensation may reduce the need for constant monitoring and evaluation, since the monitoring can be periodic and retrospective based on past performance with the compensation increase being conditional on acceptable performance. Deferred compensation may also discourage unwanted turnover and encourage loyalty, commitment and bonding with the organisation. It may ensure that employees have an interest in the financial solvency of the firm. It may also minimise adverse selection, since employees will not chose to work in an organisation in which any under-performance will be revealed over time.

Obviously, employees may have some concern that employers will behave opportunistically, and dismiss workers when their wage starts to exceed their productivity. But, such risks are minimised by the firm's concern with its reputation in such implicit contract arrangements, and by the fact that other protection may exist in such forms as the collective agreement, pension guarantees, severance pay, protection against unjust dismissal and protection against age discrimination in general. Furthermore, if deferred wages give rise to these positive incentive effects, the worker's expected lifetime productivity profile (and hence lifetime compensation) should also be higher. In such circumstances, mandatory retirement may be necessary to provide a termination date to this particular contractual arrangement, because otherwise wages would exceed productivity for an indefinite period while deferred wages were being paid. Neumark and Stock (1999) provide evidence from the US which indicates that age discrimination laws actually facilitated deferred wage profiles even though they also banned mandatory retirement. This occurred because they provided a greater degree of certainty that firms would pay the deferred wage to older workers, and this offset the tendency for mandatory retirement to facilitate the deferred wage by providing a termination date to the contractual arrangement. This was further facilitated by the fact that firms could use subsidy and penalty features of their pension plan to substitute for mandatory retirement. Whether this would be true in Canada may be a more open question, since provinces that have banned mandatory retirement have also banned features of occupational pension plans that could otherwise penalise people for continuing in employment beyond their normal mandatory retirement age (Pesando and Gunderson, 1988). Also, it is possible to provide legislative protection against age discrimination but to exempt mandatory retirement, particularly

if it is part of a pension plan and/or collective agreement.

Clearly, mandatory retirement may serve a variety of purposes. The possibility that it serves some important workplace function is enhanced by the fact that it tends to occur where the parties have mutually agreed to such an arrangement, as part of a well-defined collective agreement and/or pension plan. Employees that enter such arrangements are generally advantaged employees; it is not a last-minute practice sprung on an unsuspecting disadvantaged employee. Older workers may well have benefited by the earlier worksharing, reduced monitoring, enhanced planning and deferred compensation. Of course, they still may prefer not to retire when the binding constraint of mandatory retirement now applies to them, especially if they are receiving deferred compensation. But that is not the relevant consideration as it is part of a long-term mutually-agreed contractual arrangement.

In this perspective, mandatory retirement is part of a mutually-agreed personnel policy that presumably confers benefits on both employers and employees. The question then becomes: when should the state ban such arrangements? There are times when the state does ban such mutually-agreed arrangements: indentured service when emigrants had their passage paid for in return for agreeing to work for the payee for a fixed period of time; consensual prostitution; and opting out of employment standards if someone agrees to work for below the minimum wage. There are other times when the state sanctions arrangements that inhibit our freedoms at some time (for example, marriage contracts, loan contracts) presumably because of other benefits. Where mandatory retirement fits in this spectrum should be a matter of legitimate debate. In Canada, the debate appeared to go in favour of allowing mandatory retirement; in the US it went in the direction of banning it.

The operative words here are allowing and banning. Allowing mandatory retirement, for example, does not mean favouring or regarding it as a good policy in all circumstances. It simply means allowing it to exist for persons who presumably agree to it, usually as part of a collective agreement and/or pension plan. It is therefore also perfectly consistent for an individual to be in favour of eliminating mandatory retirement in their particular institution but to be in favour of *allowing* if it is mutually agreed. This is analogous to being personally opposed to abortion, but pro choice.

This also reminds us that if mandatory retirement serves a number of the functions previously outlined, and if it is banned, this could have implications for a wide range of personnel and human resource management functions. Deferred wage profiles would be less prominent[3], thus, younger workers would experience an increase in their wage (since they would no longer be 'underpaid' when young), and older workers would experience a reduction in their wage (since they would no longer be 'overpaid' when older in return for being underpaid when younger). Until wages decline for older workers (this process may be very slow since it may otherwise appear to be age discrimination), older workers who continue in employment will experience windfall gains as their wages in excess of their productivity continue. (This is one reason why older people may oppose mandatory retirement *ex post* even though they agreed to it *ex ante*. As the expression goes: 'it is amazing how substantial sums of money can clarify one's thinking!'.) Pressure may also exist for the wages of older workers to decline to compensate for any age-related pension, medical and disability costs associated with older workers. This will be compounded *if* there are also age-related productivity declines or even greater variance in productivity among older workers, and such variance is costly for employers to manage.

This possibility of a decline in wages for older workers will also mean that employers will have to guard against charges of age discrimination. This is likely to result in more monitoring and evaluation – a process that will be enhanced by the need to have documentation to defend against possible unjust dismissal charges, since dismissals of older workers are also likely to increase given that there is no longer finality to their contractual arrangement.

[3] This assumes that only the mandatory retirement aspect is changed and that protection against general age discrimination (that is, whatever effect it had on facilitating deferred compensation [as outlined in Neumark and Stock, 1999]) remains unchanged.

To the extent that the deferred wage compensation structure served to enhance efficiency, then any change should result in a decline in expected lifetime productivity and overall wages. Pensions may decline in importance to the extent that pension benefit accruals in the later years of an employee's working life were an important mechanism for the payment of deferred compensation, and to the extent that there is less pressure to provide retirement income security if an older person can continue working. Working in the other direction, employers may try to use the early and postponed retirement features of pensions as a way to induce voluntary retirement if mandatory retirement is banned.

These are meant to be merely illustrative of the types of adjustments that may occur if mandatory retirement were to be banned. Banning one aspect of the intricate set of personnel and human resource policies can effect various other aspects of the system, if that policy serves an important function and there are not readily available substitutes.

However, one of the concerns is that the current practice in many jurisdictions of having a maximum age of 65 beyond which human rights code protections do not apply (so as to accommodate mandatory retirement) is tantamount to 'throwing the baby out with the bath water'. It effectively denies protection to those who may need it most – people beyond the age of 65. A possible solution is to remove the age limit in order to provide such protection, but to exempt mandatory retirement provisions, and perhaps, further, only if they are accompanied by a bona fide collective agreement and/or pension plan (Gunderson, 1998). That way, people are allowed to enter into such contractual arrangements but only if they have the protection of a collective agreement and/or pension plan. In effect, this is the situation in jurisdictions that do not have an age cap in their human rights code, but that regard mandatory retirement as a bona fide occupational requirement (such jurisdictions do not explicitly tie the allowing of mandatory retirement to the co-existence of a collective agreement and/or pension plan).

Bona fide occupational qualification

Age discrimination legislation allows discrimination on the basis of age when age can be shown to be a bona fide occupational qualification (BFOQ). This means that mandatory retirement would have to be proven to be a BFOQ in jurisdictions without an age limit in their human rights code. In jurisdictions with an age limit, mandatory retirement would have to be considered a BFOQ if it occurred earlier than the age limit. Also, the BFOQ defence would be necessary to avoid age discrimination charges for other age-related rules in addition to mandatory retirement. The defence is a difficult one since it comes up against the adverse impact principle discussed earlier, whereby a practice could be considered as discriminatory if it were the unintended by-product of some other workplace practices that had a disparate impact on older workers, and this could not be reasonably accommodated on the part of the employer.

For age to be a BFOQ (in other words, for mandatory retirement to be allowed) the employer must establish the following conditions:

1. The rule must be made in good faith and intended to ensure adequate performance or safety (and not for some ulterior reason such as to facilitate downsizing).
2. It must be objectively related to performance in that workers who continue working beyond that age are likely to perform more poorly, and this could jeopardise organisational performance especially in ways that could endanger themselves, their co-workers or public safety.
3. It is not feasible to accommodate such persons without undue hardship, for example, through individual testing.

It is for these reasons that cases have tended to be in occupations where safety is involved, such as airline pilots, police, fire fighters and bus drivers. The determination of a BFOQ is done on a case-by-case basis, which gives rise to some discretion.

Other labour market legislation

While mandatory retirement receives the most attention, age discrimination legislation relates to all facets of employment including recruitment and selection, training, promotion, transfers, compensation, and termination or dismissal, as well as employee benefits. For example, employers are not allowed to use age in recruitment postings, nor can they require it in the

application procedure or interview. They can require it if the employee is hired and it is necessary for other purposes such as to administer pension or benefit plans. While important, and the same general principles of age discrimination apply, these issues have not attracted the same attention as mandatory retirement.

Issues of age discrimination can occur in other areas, such as insurance policies. Human rights codes generally allow distinctions based on age (as well as gender, marital status and disability) but only if they are reasonable and based on bona fide grounds (OHRC, 2000a, p 31). Age discrimination can also be an issue in areas such as housing and the provision of public services.

While the human rights codes of the different jurisdictions and the federal Charter are the main mechanisms through which age discrimination issues have arisen, there are also other aspects of labour market legislation in which age discrimination issues can arise.

Each jurisdiction has *collective bargaining legislation* that governs the establishment and conduct of collective bargaining. Once collective bargaining is established, the grievance procedure and the associated grievance arbitration process can be used to deal with disputes over the interpretation of the collective agreement. Issues of age discrimination would seldom occur directly, but they can occur indirectly. For example, unjust dismissal claims are often brought by older workers who argue that their employment was terminated without cause, with age often being the factor that is implied by 'without cause'.

Labour standards legislation also exists in all jurisdictions, regulating factors such as hours of work and overtime, vacations, holidays and leave, minimum wages, and advance notice in the case of terminations. These regulations are not directed any differently for older workers. Although they may be affected in an indirect fashion, for example, if the older person has more seniority and hence is entitled to longer vacations or a longer period of notice in the event of a layoff.

Workers' compensation legislation also exists in all jurisdictions, providing income replacement in the event of a work-related injury. The income replacement is often based on replacing most of lost wages that otherwise occur as a result of the injury. Vocational rehabilitation is also often provided (indeed required) to facilitate the return to work. Employers are also required to reasonably accommodate the return to work of injured workers.

There is the potential for age discrimination issues to arise in a variety of these areas. Typically income replacement benefits are paid out until the injured worker reaches age 65, the age of 'normal' retirement. Then a pension benefit is paid out by the worker's compensation board, paid for through a payroll tax levied on employers. Presumably, a worker could argue that they should continue to be paid on the basis of their wage loss rather than a pension, if they would not have retired at that time. Also, boards may be reluctant to invest in the vocational rehabilitation of an older injured worker, given the shorter duration of their time in the labour force. Also, employers may be reluctant to invest in costly accommodation requirements to facilitate the return to work of injured workers who are older and who may soon retire. Even though such actions may be rational investment decisions, in that the expected benefit period for amortising the cost is smaller for older workers, they could also be interpreted as discriminatory. While this is a possibility (and there is not systematic research evidence on this point), it does not appear that age discrimination issues are major aspects of workers' compensation legislation and its appeals process.

Legislation exists in each jurisdiction in Canada dictating how *apprenticeship systems* are to be regulated. Aspects of the regulation include the length of the apprenticeship system, the ratio of apprentices to craftpersons, the certification procedures and the wages during the apprenticeship period.

The main basis for age discrimination in this area is if people are denied entry into an apprenticeship programme on grounds of their age. This happened in a case in Ontario (*O'Brien v Ontario Hydro*) in which the employer refused to allow a 40-year-old man to enter an apprenticeship programme. The firm did hire older workers in other positions, but did not want to place the plaintiff into an apprenticeship because they did not think he would adapt to the negative aspects of the training, including menial tasks, minimal responsibility, low pay and shift work. The Human Rights Board deemed this to be age stereotyping and hence discriminatory (OHRC, 2000a, p 29).

Evidence on the effectiveness of age discrimination legislation

Unlike other areas such as gender discrimination (see Gunderson, 1989, 1994), there is an absence of comprehensive studies analysing the effectiveness of age discrimination legislation in Canada. This is likely to be the case for a variety of reasons. As indicated previously, issues of age discrimination do not seem to attract the same amount of public attention (and hence the attention of policy makers) as other forms of discrimination. Furthermore, age discrimination legislation in Canada is fairly 'weak' in that it often does not apply to people beyond the age of 65 and, when it does, it is often 'protected' by the Charter or by BFOQs. Also, as outlined below, age discrimination legislation generally involves a few isolated complaints rather than a proactive initiative, as is the case with pay equity and employment equity.

It is also, of course, extremely difficult to prove discrimination on the basis of age unless it is tied to a concrete policy such as mandatory retirement. There are so many other factors related to age that make it easy for employers to give a credible defence. For example, if a company bypasses an older employee in recruitment or for a promotion, it can feasibly be argued that the person did not have the latest in education or technical training. Also, anti-discrimination initiatives such as pay equity or employment equity – which are the main initiatives used in Canada for other target groups – would not be appropriate for identifying discrimination against older workers.

For example, pay equity – or equal pay for work of equal value – exists in most Canadian jurisdictions. Four steps are involved. First, male-dominated and female-dominated jobs are identified, for example, on the basis of employing 70% or more of the particular gender. Second, gender-neutral job evaluation procedures are used to evaluate the 'worth' of the job in terms of components such as skill, effort, responsibility and working conditions. Third, a procedure for relating pay to job evaluation worth is established, for example, by estimating separate pay lines for male-dominated and female-dominated jobs. Fourth, the pay in undervalued female-dominated jobs is adjusted upwards to be level with the pay of male-dominated jobs of similar value. These procedures have led to substantial pay equity awards in the situations where they have been applied.

In theory, the same procedure could be applied to jobs dominated by older workers compared to younger workers. But in practice, the procedure would probably be unworkable. Older workers tend not to be segregated into particular job ghettos in the same way as women. Deferred compensation practices (as discussed previously) and seniority-based pay increases alter the relationship between pay and productivity related measures used in the job evaluation components such as skill, effort and responsibility.

Similarly, employment equity or affirmative action initiatives exist in the federal jurisdiction and for federal contractors. They apply to four target groups: women, visible minority groups, disabled people and Aboriginal people. Three generic steps are involved. First, an internal audit is made within the organisation to determine the representation of the target groups within the organisation. Second, this internal representation is then compared to their external availability in the relevant labour market from which the firm can reasonably be expected to recruit. Third, targets are established with a plan and timetable to increase the internal representation to similar proportions to those that exist in the relevant external labour market.

Again, in theory, older workers could be considered a target group and the same procedures followed. But there is not a normal expectation that every firm would have an age structure that is similar to the structure which exists in other firms or in the external labour market, nor that it would be discriminatory if this did not occur. Different firms are likely to have different age structures for many reasons other than discrimination.

Similar issues apply if, for example, estimates of wage discrimination are obtained from regression equations estimated on data sets with individuals as the unit of observation. The conventional procedure involves estimating separate wage equations, say, for men and women. The overall average male–female wage differential is then decomposed into two component parts. One is attributable to differences between men and women in their endowments of productivity-related characteristics, such as education or experience (that is, to differences in the mean values of their explanatory variables). The other

component is attributable to differences in the way that men and women are paid for the same wage-determining characteristics (that is, to differences in the parameter estimates or regression coefficients). The latter component is taken to reflect discrimination because it reflects differences in the pay that men and women receive for the same wage-determining characteristics.

Again, in theory, the same procedure could be applied to older workers versus younger workers. But again, since age is related to so many other characteristics such as seniority and experience, as well as to the nature of education and training, it would be difficult to reach a general agreement that any wage gap could not be accounted for by differences in wage-determining characteristics. Furthermore, deferred compensation profiles and age-related benefits would complicate the analysis.

Only indirect evidence exists on the effect of age discrimination legislation. Based on a number of background studies, the Ontario Task Force on Mandatory Retirement (Ianni, 1987) concluded that few people would be likely to continue in employment if mandatory retirement were banned, given the trend towards earlier retirement (see Agarwal, 2000, for similar, more recent evidence). Furthermore, banning mandatory retirement would not lead to large increases in factors such as unjust dismissal claims or increases in health and other expenditures. As the Ianni study acknowledged, however, these conclusions were based on observations about what has happened in some of the Canadian jurisdictions where mandatory retirement could be contested as constituting age discrimination, or where it was voluntarily abandoned. As indicated, mandatory retirement can still survive in jurisdictions that have effectively banned it. Furthermore, it may be voluntarily abandoned in situations where it is least likely to have an impact.

It is also the case, that the long-term impact may be quite different from the short-term impact. It may simply take time to adjust deferred compensation, pension plans or procedures of progressive discipline to protect against unjust dismissal claims. Employees may also need time to adjust their retirement plans if they are already geared to mandatory retirement provisions. Time may also ease the adjustment process, as employers and employees learn to adapt to the new circumstances.

Conclusions

In spite of the fact that age discrimination tends to be treated differently to other forms of discrimination, issues pertaining to age discrimination will be likely to take on more importance in Canada in the near future because of various demographic and other pressures. Canada may be a particularly important 'laboratory' in this respect, because there is considerable variation across different jurisdictions in some aspects of age discrimination legislation, and Canada has not effectively banned mandatory retirement, as has the US.

The main lessons from Canada for age discrimination are likely to arise from the issue of whether mandatory retirement constitutes age discrimination. The answer from Canada so far is twofold: (1) yes, mandatory retirement is discriminatory, but (2) it is justified (and therefore upheld by the courts) when it is associated with other positive aspects of the employment relationship when those positive aspects are clearly demonstrated (for example, it sustains pension plans or is a BFOQ). The other message that comes from Canada is that the relevant policy question to ask is not: Are you for or against mandatory retirement? Rather, it is: Are you for or against the state *allowing* mutual agreements such as mandatory retirement? And, if so, are there other conditions (such as, the existence of a bona fide pension plan and/or collective agreement) that would have to accompany such a policy if it were allowed? This is an area of legitimate policy debate, and one that would be better informed by additional information surrounding the conditions under which mandatory retirement prevails.

As indicated earlier, in human rights tribunals most age discrimination complaints are abandoned, withdrawn or dismissed. Potential reasons for this were discussed, including the lack of moral outrage from society over this issue, the fact that it has social utility in other areas, and the difficulties of using conventional procedures that are used in other areas of discrimination to detect discrimination with respect to age. Whether these reasons account for what appears to be a lack of strength of age discrimination legislation remains an open and interesting question.

They do suggest, however, ways in which age discrimination legislation may be strengthened. Publicity and education about the seriousness and

potential debilitating effect of age discrimination may help put it more on an equal footing with other forms of discrimination in the public eye. It may also be helpful to provide information on how the various aspects of the human resource function that are facilitated by mandatory retirement (such as pension planning and so on) can be sustained without mandatory retirement. If the probability of detecting age discrimination is lower than that of detecting other forms of discrimination (for example, because of an inability to estimate pay lines) then human rights tribunals may want to consider higher penalties for the fewer cases that are detected so as to provide a similar *expected penalty* (probability of detection multiplied by the expected penalty if detected) to deter such discrimination. Removing any age cap on age discrimination legislation, but allowing mandatory retirement when there are bona fide pension plans and/or collective agreements, will ensure that older workers are covered by the legislation but that mandatory retirement can be negotiated when there is the protection of a pension and/or collective agreement.

Increasing pressure will be placed on the legislative and other initiatives given the ageing workforce and other pressures discussed in the introduction. Anticipating that pressure, and proactively responding in advance, will facilitate a more reasoned and informed response.

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4

Age discrimination legislation in the US: assessment of the evidence

David Neumark

Introduction

Legislation prohibiting age discrimination in the US dates back to the 1960s, when, along with the 1964 Equal Pay Act and the 1963 Civil Rights Act barring discrimination against women and minority ethnic groups, the US Congress passed the 1967 Age Discrimination in Employment Act. Gender and race discrimination per se, along with the impact of the Equal Pay Act and the Civil Rights Act, have been the primary focus of researchers studying discrimination and, coupled with affirmative action, by far the more vociferously debated. But this does not imply that issues regarding the rationale for, or effectiveness of, age discrimination legislation are settled. Indeed, some critical issues have been addressed, and continue to be studied, by researchers in both economics and law, although many questions remain. The debate may have been far more muted than that over gender and race discrimination, not so much because there is a consensus, but rather because all individuals can expect to be older some day, so that issues of fairness are perhaps less prominent. Nonetheless, the issue is fundamental, especially as rapidly ageing workforces in the US and other industrialised countries threaten to increase vastly the social costs of any barriers to the employment of older workers.

The aim of this chapter is to provide a summary, critical review and synthesis of what we know about age discrimination legislation in the US. In so doing, the chapter first traces the legislative history and evolving case law, and discusses implementation of the law. It then reviews the existing research on age discrimination legislation – research that addresses the rationale for the legislation, evidence on its effectiveness, and criticisms of age discrimination legislation.

The evolution of age discrimination legislation

Most discussions of age discrimination legislation in the US refer to the 1967 Age Discrimination in Employment Act (ADEA) and subsequent amendments. However, age discrimination legislation in the US has a longer history. At the federal level, the US Civil Service Commission abolished maximum ages of entry into employment in 1956, eliminating age discrimination in hiring in federal employment (Miller, 1966). Paralleling the executive orders that established affirmative action, Executive Order 11141, issued in 1964, established a policy against age discrimination among federal contractors, although administrative procedures for handling complaints were apparently not established (Miller, 1966). Finally, the 1965 Older Americans Act was designed to encourage research and programmes to aid older people, but also stated among its general objectives "the opportunity for employment with no discriminatory personnel practices because of age". Again, though, no administrative procedures were established.

While the federal actions prior to the ADEA were therefore perhaps best characterised as ineffectual, state statutes paralleling the later federal legislation were passed from the 1930s. As of 1960 eight states had age discrimination statutes on the books, with enforcement mechanisms (see Neumark and Stock, 1999, for a compendium of state age discrimination laws). These state statutes were part of states' Fair Employment Practices Acts, which established state-level commissions to counter discrimination. These commissions operated by initially seeking conciliation in response to claims of age

discrimination. But in the absence of a satisfactory outcome they had the power to hold hearings, issue findings of probable cause, and seek court-enforced orders for employers to cease and desist from discriminatory practices (Miller, 1966; Lockard, 1968; for more discussion of state anti-discrimination statutes in the context of race discrimination, see Neumark and Stock, 2000). Evidence on the effects of the state statutes is discussed below, but it is noteworthy that, when federal legislation was later established, the role of anti-discrimination commissions in states with their own age discrimination statutes was explicitly recognised, with enforcement generally first deferred to the state agency responsible for enforcing the anti-discrimination statute (US Code, Section 633). This also pertained to many states that enacted age discrimination legislation in the 1960s (for a discussion on the effectiveness of state laws see US Department of Labour, 1965; Friedman, 1984).

Federal legislation, which is summarised in Table 4.1, began in earnest with the 1967 ADEA. The original ADEA prohibited discrimination based on age, covering those aged 40-65, and including discrimination based on age within this protected age range (Piette, 1995). (The ADEA originally applied to federal and state employees; however, in a recent case [*Kimel v Florida Board of Regents*, 2000] the courts ruled that state employees were not authorised to sue states under the ADEA, based on the argument that the US Constitution does not give the US Congress the power to subject states to suits at the hands of private individuals.) As originally stated, the purpose of the Act was to:

> ... promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. (US Code, Section 621)

Crawshaw-Lewis (1996) argues that the "arbitrary age discrimination" that the original legislation was intended to eliminate was discrimination against older individuals based largely on negative stereotypes. She cites the record of the debate from the Congressional Record:

> The bill recognizes two distinct types of unfair discrimination based on age: first, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is a result of a

Table 4.1: Key federal age discrimination legislation

Year	Legislation	Provisions
1967	Age Discrimination in Employment Act (ADEA)	Prohibited discrimination based on age, covering those aged 40-65, including discrimination based on age within this protected age range.
1975	Age Discrimination Act	Prohibited age discrimination in all programmes or activities receiving federal assistance, including state or local government units that receive federal funds.
1978	ADEA amendments	Extended the age range for the protected group to 40-70, raising the mandatory retirement age to 70 in the process. Eliminated mandatory retirement for most federal employees. Granted some exemptions or delays for raising mandatory retirement age.
1986	ADEA amendments	Eliminated the upper age limit, thus banning mandatory retirement, with very limited exemptions.
1990	Older Workers Benefits Protection Act	Regulated financial inducements to retire.

> deliberate disregard of a worker's value solely because of age. (1996, p 770)

As further elaboration, Crawshaw-Lewis cites the ruling from *Hazen Paper Co v Biggins* (1993), indicating that Congress passed the ADEA out of concern that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes".

The ADEA was followed by the 1975 Age Discrimination Act, which prohibited age discrimination in all programmes or activities receiving federal assistance, including state or local government units that receive federal funds. Important amendments or changes to the ADEA occurred in 1978, 1979 and 1986. The 1978 amendments extended the age range for the protected group to 40-70, hence raising the mandatory retirement age to 70 in the process. They also eliminated mandatory retirement for most federal employees (Stone, 1980). But the 1978 amendments also granted some exemptions: delaying the imposition of the higher mandatory retirement age until 1982 for tenured employees of educational institutions, and continuing to allow mandatory retirement at ages 65-69 for individuals in "bona fide executive or high policy-making" positions with access to a sufficiently high pension benefit (Stone, 1980) and for employers with fewer than 20 employees. (These amendments also established the right to a jury trial when there were factual issues regarding monetary liabilities.) The ADEA currently covers all private employers with 20 or more employees, state and local governments (including school districts), the federal government, employment agencies and labour organisations.

An important change occurred in 1979, when the US Equal Employment Opportunity Commission (EEOC) took over administrative responsibility for the ADEA from the Department of Labor and, regarding federal employment, from the US Civil Service Commission (Stone, 1980). This change was viewed as increasing the power of the ADEA, as it was accompanied by increased resources and a greater prevalence of 'pattern and practice' lawsuits (by the EEOC).

The last direct amendments to the ADEA were in 1986, eliminating the upper age range for defining the protected class, resulting in the prohibition of mandatory retirement. As this took away the most direct lever for employers to induce workers to retire from the firm, the focus switched, to some extent, to financial inducements. These were addressed in the 1990 Older Workers Benefits Protection Act (OWBPA), which provided some restrictions on financial inducements to retire. One of the important restrictions was the requirement that retirement incentive schemes be offered to anyone over a minimum age, rather than to workers in a specific age range. The second was that offsets of pensions benefits against severance payments were limited. These are viewed as having restricted the ability of employers to induce retirement through financial incentives (Issacharoff and Worth Harris, 1997). On the other hand, the OWBPA is viewed as having codified the types of retirement incentives that can be used (Albert and Schelberg, 1989). Another important piece of legislation regulating pension (and other) benefits, and potentially impacting opportunistic behavior of employers toward older workers, was the 1975 Employees Retirement Income Security Act (ERISA) (see Posner, 1995, Chapter 12 for an excellent overview of pension regulations).

Prohibited and allowed practices under the Age Discrimination in Employment Act

The current ADEA has many parallels to Title VII of the Civil Rights Act prohibiting gender and race discrimination and defines as illegal many of the same activities prohibited under Title VII. Indeed, the ADEA had its origins in Title VII when members of the House and Senate initially attempted to introduce a prohibition of age discrimination into Title VII (Crawshaw-Lewis, 1996). They eventually settled on instructing the Secretary of Labor to study age discrimination in employment with the goal of recommending legislation "to prevent arbitrary discrimination in employment because of age", which led to the enactment of the ADEA three years later (Stone, 1980). In addition, reflecting their similarities, the legal interpretations of the ADEA and Title VII are to some extent intertwined, as discussed below. Prohibited actions include using an individual's age as a basis for refusal to hire an applicant, discharge of an employee, or the setting of other conditions of employment (compensation, or terms, conditions or privileges of employment). The Act also regulates the behaviour of employment agencies and labour unions. Among

other things, these two types of agents, as well as employers, are prohibited from using any advertisement relating to employment indicating preferences, limitations, and so on, based on age (US Code, Section 623).

At the same time, the ADEA recognises that there are some differences regarding the treatment of age in the labour market. In this sense, it differs from Title VII, which, while granting some very limited exceptions in which gender or race can play a role in the labour market (for example, in occupations such as locker room attendants and actors), largely treats gender and race as factors to be ignored. For example, the ADEA recognises the role of seniority systems and as such protects the use of a bona fide seniority system, as long as it is not used to evade the purposes of the Act. It also recognises that some work limitations may arise with age (although there is conflicting evidence on this point in the industrial gerontology literature; see the studies cited in Miller, 1966, pp 395-9; Hellerstein and Neumark, 1995, footnote 2; Posner, 1995, Chapters 4 and 7; and the discussion below), and hence permits the use of age as a bona fide occupational qualification (BFOQ) that is "reasonably necessary to the normal operation of a business". Finally, it recognises that costs related to benefits may be higher for older workers, and makes some allowances for this. In particular, an employer can offer younger and older workers benefits that cost the same, even if the actual benefit to older workers is less. At the same time, there was a clear sense that employers sometimes relied on incorrect stereotypes regarding age. The Department of Labor report on age discrimination argued that age discrimination was fundamentally different from gender and race discrimination because it was based not on animus or antagonism toward older persons, but rather on assumptions "about the effect of age on their ability to do a job when there is in fact no basis for those assumptions" (US Department of Labor, 1965, p 20). The notion was not that the assumptions were never correct. As Miller (1966) puts it:

> [T]he BFOQ issue in age cases and in cases involving other forms of discrimination is that the age statutes contemplate the establishment of valid generalizations about the effect of age upon the physical ability to perform a particular kind of job; such a generalization, if based upon race or religion, would never be validated. (p 393)

However, the Department of Labor report argues that the use of incorrect assumptions (or stereotypes) constitutes the "arbitrary discrimination" that Congress expressed interest in prohibiting when it instructed the Secretary of Labor to study age discrimination. Finally, the ADEA recognised that employee pension plans (and potentially other benefits) are inextricably bound up with both age and seniority, and established careful guidelines to clarify what was and was not permitted.

Implementation of age discrimination legislation

Enforcement

Enforcement of the ADEA currently resides with the EEOC. Claims of age discrimination may emanate from individuals or from the EEOC. An individual wishing to pursue civil action on an age discrimination claim must first file a charge with the EEOC or, in states with parallel age discrimination statutes, first file a charge at the state level (for details on time limits and additional discussion see www.eeoc.gov). The EEOC's (or state agency's) role on receiving a charge is to "eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion" (US Code, Section 626).

After filing a charge, there are a number of possible outcomes, and depending on the facts, the EEOC can investigate with different levels of priority. The charge may be dismissed if the EEOC does not think there was a violation of law. If a charge is dismissed, the complainant may still pursue a civil action in court (under the ADEA, a plaintiff has a right to a jury trial and liquidated damages – damages required to compensate for a loss, rather than punitive damages which are intended to punish the offender). If the charge is not dismissed, the EEOC can seek a settlement with the agreement of both sides, or the charge may be mediated if both sides are interested. If conciliation or mediation is unsuccessful, the EEOC can decide to file suit. Or, if it nonetheless chooses not to file suit, the complainant may still due so.

According to the EEOC, possible remedies include: back pay (in which a victim is reinstated and awarded pay that would have been received

if it were not for the prior discrimination); hiring, promotion or reinstatement; front pay (which compensates a victim in situations where in principle reinstatement or nondiscriminatory placement would be an available remedy, but either is not ordered or cannot be accomplished for reasons peculiar to the individual claim); or other actions that will "make the individual whole". It is possible that payment of attorneys' fees, expert witness fees and court costs may be sought. Finally, compensatory or punitive damages may be sought where a finding supports a charge of intentional discrimination, or if the employer acted with "malice or reckless indifference", although punitive damages cannot be sought from state and local governments.

EEOC activity

Recent figures describing EEOC activities are presented in Tables 4.2 and 4.3. As explained above, EEOC activity is usually initiated by a complaint brought by an individual, although the EEOC can also bring lawsuits of its own accord. The figures in Table 4.2 provide some information on selected types of issues reflected in complaints filed with the EEOC, for the fiscal year 2000. Figures are reported for the ADEA, Title VII and all statutes, to provide some indication of the types of issues that are more or less likely to arise in charges filed under the ADEA. Because a single discrimination charge may cover multiple issues (and indeed multiple statutes), a breakdown by selected issues is reported, as well as the total number of charges.

Table 4.2 reveals, first, that ADEA and Title VII charges account for a preponderance of those received at the EEOC (94.7% in 2000). Those types of issues that we might expect to figure more prominently in ADEA cases – such as benefits relating to pensions and retirement, layoffs and discharges – do so, although by only a small factor in the case of discharges. On the other hand, not surprisingly, issues more directly related to race or gender (such as sexual harassment) are rarely alleged in ADEA cases, and wage issues are somewhat less prevalent than in Title VII cases.

Table 4.2: Receipt of discrimination charges by EEOC, by issue (2000 fiscal year, preliminary)

Statute	ADEA		Title VII		All statutes	
Total	**Column**	**%**	**Column**	**%**	**Column**	**%**
Selected issues						
Benefits	468	1.9	1,033	1.0	1,986	0.9
Benefits, retirement/pension	1,620	6.6	283	0.3	2,042	0.9
Discharge	6,763	27.5	26,346	24.9	41,902	19.3
Hiring	1,973	8.0	3,320	3.1	6,548	3.1
Layoff	1,137	4.6	1,793	1.7	3,465	1.6
Promotion	1,645	6.7	7,415	7.0	10,047	4.6
Retired, involuntary	217	0.9	83	0.1	372	0.2
Sexual harassment	266	1.0	9,328	8.8	10,064	4.6
Terms of employment	2,578	10.5	13,806	13.0	19,178	8.8
Wages	1,099	4.5	6,188	5.8	9,013	4.2
Total issues	**24,586**		**105,854**		**216,839**	
Total charges	**15,926**		**59,215**		**79,325**	

Note: The number of issues exceeds the number of charges because individuals may file charges claiming multiple types of discrimination.
Source: figures from EEOC's website – www.eeoc.gov – and directly from the EEOC

Table 4.3: EEOC administrative and legal activity (1999 fiscal year)

Statute	ADEA		Title VII		All statutes	
Total	**Column**	**%**	**Column**	**%**	**Column**	**%**
Resolutions by type						
Settlements	816	5.3	3,748	6.3	6,094	6.2
Withdrawals with benefits	578	3.7	2,084	3.5	3,593	3.7
Administrative closures	3,601	23.3	14,265	24.1	23,570	24.1
No reasonable cause	9,172	59.4	35,614	60.3	58,174	59.5
Reasonable cause	1,281	8.3	3,374	5.7	6,415	6.6
Total resolutions	**15,448**		**59,085**		**97,846**	
Breakdown of reasonable cause determinations						
Successful conciliations	184	14.4	859	25.5	1,578	24.6
Unsuccessful conciliations	1,097	85.6	2,515	74.5	4,837	75.4
Litigation and monetary benefits						
Lawsuits filed by EEOC or joined by EEOC	40		324		439	
Monetary benefits from litigation (millions)	$43.3		$46.9		$96.9	
Monetary benefits excluding litigation (millions)	$38.6		$119.1		$210.5	

Notes: At the time of writing preliminary 2000 figures were not yet available, but the numbers generally change very little from year to year; in the litigation figures, the total column includes cases filed under more than one statute, sometimes including the ADEA or Title VII; the charges included in these figures include those filed with the EEOC as well as those transferred to the EEOC from state Fair Employment Practice Agencies.
Source: figures from EEOC's website – www.eeoc.gov – and directly from the EEOC

Table 4.3 reports on EEOC activity. The first section covers the resolution of charges filed with the EEOC (this refers to resolutions occurring in the year, not necessarily resolution of charges filed in that year). Again, these are broken down by ADEA resolutions, Title VII resolutions and the totals, although the distributions differ relatively little. Of the ADEA charges resolved in 1999, 5.3% were settled, which means that the charge was disposed of with benefits to the party that brought the charge, with the settlement recorded. In contrast, 3.7% were classified as withdrawals with benefits, meaning that the charge was withdrawn after the charging party received benefits. Nearly a quarter of cases (23.3%) were closed administratively, which includes reasons such as failure to communicate on the part of a charging party, closure of related litigation that makes the charge futile, a determination of no jurisdiction, and so on. Of the remaining charges, the vast majority are found to be without reasonable cause, implying that the EEOC found no reasonable cause "to believe that discrimination occurred based upon evidence obtained in investigation".

The second section of the table breaks down those charges in which there was a determination of reasonable cause, showing that in only about 14% of ADEA cases is there successful conciliation (compared with 25.5% for Title VII cases). The third section of the table reports on EEOC litigation and monetary benefits, covering suits filed by the EEOC, or plaintiffs' suits joined by the EEOC. Clearly, only a small fraction of unsuccessful conciliations result in litigation by the EEOC, although the monetary benefits collected are quite high per lawsuit. The final row instead reports benefits excluding litigation. As the figures show, these can be as high or higher in total, but cover a far higher number of charges.

Case law

Aside from the regulations issued by the EEOC, the effects of age discrimination legislation in practice are strongly influenced by the evolving case law. Over time, this helps to establish, among other things, the types of charges that will be found in violation of the ADEA, the types of cases (that is, the nature of the evidence) that may be brought and the burden of proof. It is worth pointing out that some of the critical case law arose in race discrimination cases brought under Title VII of the Civil Rights Act, rather than the ADEA (see Issacharoff and Worth Harris, 1997, for a critique on the application of the race and gender discrimination 'model' to age discrimination cases). The most important case law is summarised in Table 4.4.

In ADEA cases, the plaintiff's ultimate burden is to prove that the action of the employer (typically) was taken on the basis of age, which does not require that age was the sole factor, but was the determining factor. As in other areas of discrimination, this can be proven in one of two ways. The first is to prove 'disparate treatment' – established in *International Board of Teamsters v United States* (1977) and other cases – which requires proof that an employer intentionally treated someone less favourably because of their age (Starkman, 1992). Such cases are distinguished by requiring proof of discriminatory intent. As an example, several cases in the 1970s alleging failure to hire based on age focused on help-wanted advertising that stated or implied that older applicants would be treated less favourably (Piette, 1995). Other examples of proof of discriminatory intent may involve evidence that defendants referred to a worker or applicant as "too old", or made other disparaging comments about age. In these cases, plaintiffs first try to establish direct evidence of intent to discriminate, such as discriminatory statements. In the absence of such evidence, the precedents established in *McDonnell Douglas v Green* (1973) and *Texas Department of Community Affairs v Burdine*

Table 4.4: Key court decisions regarding age discrimination

Year	Decision	Content
1971	*Griggs v Duke Power Co*	Established disparate impact cases.
1973	*McDonnell Douglas v Green*	Established evidence and burden of proof for intentional discrimination.
1976	*Mastie v Great Lakes Steel Corp*	Allowed employer to look at salary and fringe benefit costs in reduction-in-workforce cases, as long as decision is based on individual assessment.
1977	*International Board of Teamsters v United States*	Established disparate treatment cases.
1981	*Texas Department of Community Affairs v Burdine*	Established evidence and burden of proof for intentional discrimination.
1987	*Metz v Transit Mix, Inc*	Ruled that allowing a company to replace an employee based on the higher cost of employing him could violate the intent of the ADEA.
1993	*Hazen Paper Co v Biggins*	Noted that the ADEA was concerned with employment decisions based on age stereotyping, but allowed decisions to be based on factors like seniority that may be strongly correlated with (but analytically distinct from) age. Instructed lower courts to look for evidence of whether age actually motivated the decision.

(1981) are used to determine whether intentional discrimination has occurred. First, the plaintiff tries to establish a prima facie case for discriminatory intent (which may rely in part on statistical evidence; Piette, 1995), ruling out the most likely non-discriminatory explanations of the action. The burden of proof then shifts to the employer to offer a legitimate non-discriminatory explanation. Finally, the plaintiff can then rebut the employer's explanation, most commonly by trying to prove that the non-discriminatory explanation is false (see Crawshaw-Lewis, 1996, who criticizes the use of the *McDonnell Douglas/ Burdine* test to determine whether age discrimination occurred, arguing that it pays insufficient attention to animus and stereotyping based on age, and has difficulty in determining whether age actually motivated a decision [p 771]).

The second route is to prove 'disparate impact', established in *Griggs v Duke Power Co* (1971). Disparate impact cases do not rest on proving discriminatory intent, but require two things: first, that an employer's policy that may appear neutral in fact impacts older individuals more adversely; and, second, that the practice cannot be justified by "business necessity" (Starkman, 1992). An instructive example is fitness requirements for a job. These may appear neutral (because they are based on something other than age), but in many cases are apt to disproportionately disadvantage older workers or job applicants. Courts have generally found them allowable, only if they can be demonstrated to be absolutely necessary for the specific tasks to be performed (Piette, 1995). Disparate impact cases are more likely to rely solely on statistical evidence (Piette, 1995), in part because such cases must establish the differences in how the practices in question impacted different groups, and in part because it is not necessary to prove discriminatory intent. Relative to race and gender discrimination cases, disparate impact claims are less common under the ADEA (Lindemann Schlei and Grossman, 1983). This is because establishing 'legal significance' is difficult when the standard is a comparison to what would occur as part of the normal progression of older workers out of the labour force and their replacement with younger workers (*Kephart v Institute of Gas Technology*, 1981). According to Crawshaw-Lewis (1996), recent court rulings have undermined the use of disparate impact cases under the ADEA.

To this point, the discussion of case law applies equally well to the ADEA and Title VII of the Civil Rights Act. But case law surrounding the ADEA has had to wrestle with the unique problem of allowing employers to pay *some* attention to age; as noted above, the ADEA only prohibits "arbitrary age discrimination". Specifically, the ADEA allows employers to take actions "where the differentiation is based on reasonable factors other than age ..." (US Code, Section 623); this phrase introduced the 'reasonable factors other than age' defence. As examples of this, in *Mastie v Great Lakes Steel Corp* (1976) the court ruled that an employer could look at salary and fringe benefit costs in determining which workers to dismiss in a "reduction in force", as long as the decision is "predicated upon an individual as opposed to a general assessment". Regarding salaries, in *Metz v Transit Mix, Inc* (1987) the court ruled explicitly on the question of the "excessive salary" of an older worker, deciding that allowing the company to replace the employee based on the higher cost of employing him would violate the intent of the ADEA. The court raised two issues. First, the plaintiff's salary was based directly on years of service (although not age per se) and, second, the defendant did not offer to reduce the salary paid to the plaintiff. *Metz* opened the courts to consideration of age discrimination claims in dismissal cases based on high salaries, requiring plaintiffs to show that age and salary were strongly linked, and that salary motivated the decision (Crawshaw-Lewis, 1996). However, in other cases (such as *Holt v Gamewell*, 1986), the courts disallowed age discrimination claims based on salary considerations. Thus, through the *Metz* decision, Crawshaw-Lewis concludes that "plaintiffs charging age discrimination based on salary have encountered a decidedly mixed reception" (1996, p 779).

A second fundamental issue in ADEA cases is pension status. In *Hazen Paper Co v Biggins*, the US Supreme Court, on the one hand, noted that the ADEA was concerned with employment decisions based on age stereotyping, but, on the other hand, allowed decisions to be based on factors such as seniority that may be strongly correlated with (but analytically distinct from) age, thus, instructing lower courts to look for evidence of whether age actually motivated the decision (Crawshaw-Lewis, 1996). Although this decision concerned a pension-status case, its reasoning has been applied to other age discrimination cases. It has, in some ways, made plaintiff's cases more difficult by noting that decisions based on factors

correlated with age were not necessarily sufficient to establish age discrimination. In particular, since *Hazen* the courts have been much less favourable to age discrimination disparate impact claims based on the argument that an employer's decision was motivated by the higher salary of an older worker, with some courts ruling that firing employees based on high compensation stemming from seniority does not violate the ADEA (Crawshaw-Lewis, 1996, p 781).

Rationale for age discrimination legislation

Discrimination, differential treatment and worker choice

This section discusses the rationale for age discrimination legislation, examining both evidence of age discrimination and incentives for employers to discriminate based on age. These topics cannot be discussed, however, without confronting the issue of what is meant by 'age discrimination'. In the sense of the Becker model of discrimination (Becker, 1971) and much of the empirical work on race and gender discrimination (see, for example, Altonji and Blank, 1999), the operational definition is something akin to treating groups of workers (such as older people) differently – in a way that cannot be explained by differences in productivity or characteristics related to productivity or costs. Such treatment is probably most easily interpreted as based on animus, although it could also be based on incorrect stereotypes, which, as noted earlier, is probably what was originally meant by the 'arbitrary' age discrimination explicitly prohibited by the ADEA. However, employers may also engage in "differential treatment" based on age for reasons unrelated to animus or incorrect stereotypes, and interpreting whether such treatment is discriminatory is difficult. Indeed, the case law recognises the inevitable tension in trying to distinguish between differential treatment based solely on age and behaviour based on factors that happen to be related to age, but are not necessarily driven by age-related considerations per se. It also notes the problems of additionally barring some types of behaviour that might be justified on productivity or cost grounds, while allowing others. These distinctions set the stage for an expanded view of age discrimination beyond simple arbitrary discrimination – perhaps most commonly when an employer has an economic incentive to treat workers differentially because of age, yet cannot mount an adequate defence based on 'reasonable factors other than age'.

Empirically, of course, it is extremely difficult to distinguish between these different types of behaviour. The ensuing discussion, therefore, often refers to 'differential treatment based on age', which may sometimes, but not always, reflect discrimination of the type outlawed by the ADEA. Alternatively, especially when discussing evidence from empirical tests, it sometimes refers to behaviour or results 'consistent with age discrimination', again to emphasise that it may or may not reflect actual discrimination based on either economic models or legal distinctions. Finally, another possibility that must sometimes be considered is whether a pattern of behaviour consistent with differential treatment by employers instead reflects differences in workers' choices, which may of course vary with age.

Evidence of differential treatment of older workers prior to the ADEA

It is probably fair to say that there was a good deal of evidence consistent with age discrimination from the period prior to the ADEA. Two sets of facts were documented in the pre-ADEA period to make the case that older workers suffered from discrimination. The first concerned unemployment. Miller (1966) noted that while, in general, unemployment rates were highest for the youngest part of the population, there were also some indications that older workers who lost their jobs experienced more difficulty finding new jobs than 'prime-age' workers. In particular, in 1963, the unemployment rate for men over the age of 55 was a full percentage point higher (4.5%) than for men aged 35-54 (3.5%). Perhaps more tellingly, durations of unemployment were longer for older men, with average durations of 21 weeks for men over the age of 45, compared with 14 weeks for men 45 and under (Boglietti, 1974, reports similar evidence for Canada and Western European countries in the 1960s and early 1970s). Furthermore, Miller (1966) suggests that unemployment comparisons may understate the problem, as older individuals who cannot find work are more likely to leave the labour force completely and hence not appear as unemployed (in the US unemployed workers are classified as those individuals who do not have a job but are looking for work). Finally, and related to this,

Miller cites survey evidence of hiring practices in various cities carried out just prior to the ADEA. The study (by the US Department of Labor, 1965) found that, while workers over the age of 45 constituted 25% of the unemployed, they constituted only 8.6% of new hires (the survey covered cities in states lacking anti-age discrimination statutes).

While such evidence is consistent with discrimination, it need not *reflect* discrimination. For example, in models of long-term incentive contracts (Lazear, 1979; and see below), older workers are paid more than their marginal product on their 'career' job, while workers at new jobs are paid considerably less than their marginal product. Thus, new employers would not pay older workers a wage as high as that earned on their previous job, which could result in older workers finding some wage offers unacceptable and, hence, searching longer for appropriate employment. Similarly, in a model with specific human capital investment, older workers with high tenure will tend to be paid more than their best wage at an alternative employer. If reservation wages are formed partly on the basis of pre-displacement wages, the same result occurs (Valletta, 1991). Note, however, that both of these models predict that it is tenure, rather than age per se, that might increase the length of spells of joblessness. Although age and tenure are obviously related, their separate effects can be estimated. Valletta specifies a model for length of jobless spells of permanently displaced workers, allowing for non-linear effects of age and tenure. While he finds that, among men, the highest-tenure workers have longer spells of joblessness, consistent with the above models, he also finds that lengths of jobless spells rise sharply for workers in their 50s and early 60s for all men and white-collar women. The strong age effects independent of tenure suggest that Lazear-type contracts or specific human capital models do not fully explain the longer unemployment durations of older workers.

Shapiro and Sandell (1985) provide additional evidence of re-employment difficulties for displaced older workers. They use the National Longitudinal Survey of Older Men (NLSOM), covering the period 1966-78, which predates the transfer of enforcement authority for the ADEA to the EEOC. They first choose a sample of involuntary job losers, and estimate a wage equation for the pre-displacement job accounting for both age and tenure. They then use this estimated regression to predict wages on the post-displacement job, in the most relevant case accounting for the loss of tenure resulting from the job loss, and adjusting for age. Finally, they ask whether the gap between the predicted and actual wage on the subsequent job varies with age. The adjustments for age and tenure are important to control for other sources of larger wage losses among older men. Without the adjustment for tenure, the wage loss could be attributable to loss of specific human capital, which might be highest for the oldest workers. But, with the adjustment for tenure, loss of specific human capital should not play a role. Similarly, adjusting for age should allow for depreciation of general human capital at older ages. The findings indicate that only men aged 65 and older appear to suffer disproportionate wage losses on displacement. However, Shapiro and Sandell suggest that this is, at best, weak evidence of age discrimination because the sample from which they estimate the wage structure using pre-displacement wages only includes workers up to the age of 63. They are therefore unable to control for the possibility of much sharper depreciation of human capital at ages 65 and beyond (one possibility they do not explore is that the social security earnings test leads workers aged 65 and over to choose lower wage jobs, presumably entailing less effort or hours; Johnson and Neumark, 1996, present evidence consistent with this effect for older men). They also note that pre-displacement wages may reflect the effects of discrimination, so that their evidence does not provide a general test for age discrimination, but rather for discrimination affecting displaced workers.

The second set of facts regarding age discrimination prior to the ADEA concerns age restrictions in hiring. Miller (1966) cites surveys conducted in New York in 1957 and 1958 in which 42% of firms had maximum age restrictions of 50 for new hires. A study by the US Department of Labor (1965) found that, in a survey conducted in five cities in states without anti-age discrimination statutes, nearly 60% of employers imposed upper age limitations (usually between age 45 and 55) on new hires (study cited in Hutchens, 1988). Clearly this evidence mitigates against the notion that higher rates and longer periods of unemployment for older workers solely reflected worker choice.

Aside from this rather direct evidence of discriminatory practices, there is additional evidence of a quite different nature using data from the period following the passage of the original ADEA, but prior to more vigorous enforcement of the ADEA beginning in 1979 (and hence, to some extent, informative about age discrimination prior to the ADEA as we now know it). Johnson and Neumark (1997) study data from the NLSOM for the period 1966-80, focused on self-reported age discrimination as captured in the question: 'During the past five years, do you feel that, so far as work is concerned, you were discriminated against because of your age?'. Longitudinal information on responses to this question, and on subsequent labour market behaviour, is used to study the impact of age discrimination (Johnson and Newmark focus on those individuals who switch from reporting no age discrimination to reporting age discrimination, to attempt to net out the effects of unobserved individual differences in the propensity to report discrimination that might be correlated with labour market behavior; they also control for general job satisfaction to account for other negative job characteristics that might cause a worker to report age discrimination). First, they find that only a relatively small percentage of older men reported age discrimination (7% of the sample). However, this refers only to men with jobs and might not cover the type of discrimination posed by age restrictions on new hires (although it could do so partially if those men had searched for other jobs). Second, they find that those workers who report discrimination are more likely to separate from their current employer, and less likely to be employed subsequently. In addition, those who report discrimination and separate from their employer suffer a wage loss in the order of 10%. Thus, this evidence points to other adverse consequences of differential treatment by age (as perceived by workers) in the period prior to EEOC enforcement of the ADEA.

In a different vein, Rosen and Jerdee (1977) conducted a study of employer behaviour based on reactions to hypothetical scenarios regarding how managers would respond to various situations involving workers (see also Rosen and Jerdee, 1976). Specifically, managers were given hypothetical scenarios regarding personnel decisions (covering, as examples, unsatisfactory performance, investment in training and promotion) and asked how they would respond. However, for some survey respondents the worker involved was described as young (aged 32), and for others the worker involved was described as older (aged 61). The responses led the researchers to reach three main conclusions. First, managers perceive older workers as less flexible and more resistant to change. Second, managers are less inclined to provide support for career development and training of older workers. And third, promotion opportunities for older workers are more likely to be restricted in jobs requiring flexibility, creativity and high motivation. Rosen and Jerdee (1977) suggest that these attitudes are likely to have real impacts in denying older workers opportunity, although their evidence does not speak to this directly.

Employer incentives for differential treatment based on age

The preceding evidence is certainly consistent with discrimination against older workers based on age. However, it does not tell us much about the source of the discriminatory behaviour, which is of interest both from the perspective of the economist trying to understand behaviour in the labour market and to analyse the need for legislation prohibiting age discrimination, and, as amply illustrated above, from a legal perspective of trying to establish which types of behaviour are prohibited by the ADEA.

Animus

Perhaps the simplest hypothesis is that age discrimination is based on animus toward older workers. As explained by the Becker model of discrimination, in the case of animus toward a particular group on the part of an employer, that employer essentially has an economic incentive (defined by profits and tastes for employment of various types of workers) to discriminate against that group. Animus-based discrimination may generate inefficiencies at the economy-wide level, as human resources are not put to their most effective use (as long as we do not take account of discriminating employers' pernicious tastes in evaluating social welfare) (Holzer and Neumark, 2000, discuss the conditions under which this type of discrimination generates inefficiencies in the context of race and gender discrimination). As noted above, however, animus toward older workers was not the view of the original Department of Labor report (US Department of

Labor, 1965) which argued for the ADEA. It also appears problematic to view age discrimination in the same light as race discrimination, for which there is a well-documented history of animus. Posner further points out that, "the kind of 'we–they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a role in the treatment of the elderly worker" (1995, p 320), because those who make the firing and hiring decisions are often themselves older individuals. In addition, Issacharoff and Worth Harris (1997) argue that the legislative history of the ADEA indicates that age discrimination was perceived to be quite different from and more complex than blind or arbitrary prejudice based on race, national origin, and so on.

Stereotypes

An alternative view that runs through the Department of Labor report is that employers hold negative stereotypes about older workers. Some of these were discussed above in the context of Rosen and Jerdee's (1977) work. Other research has documented stereotypes that discount the productivity and competence of older workers (such as Kite and Johnson, 1988). Employers holding negative stereotypes about older workers may perceive it to be in their interest to treat them differentially based solely on their age.

The use of stereotypes per se is well understood in economic models. In particular, when employers have imperfect information about the productivity- or cost-related characteristics of workers, but know something about the *average* relationship between these characteristics and the groups to which workers belong (such as age, race or gender), it is rational to use information on these group averages, which can be interpreted as stereotyping. This is referred to as statistical discrimination (Phelps, 1972). As Posner (1995, Chapter 13) argues, statistical discrimination may be an efficient way of processing information about workers or applicants, relative to other screening mechanisms.

However, while reliance on stereotypes that are 'on average' correct can be efficient, incorrect stereotypes are more problematic. To the extent that these stereotypes can be wrong, there is a potential rationale for prohibitions of differential treatment of older individuals based on them. Indeed there are economic models in which government action to prohibit discrimination based on incorrect negative stereotypes can 'correct' the false stereotypes, although the reverse can also occur (Coate and Loury, 1993).

While employers may hold negative stereotypes regarding older workers, some of which may be incorrect, all 'generalisations' held about the consequences of ageing are not necessarily false. So, what does the evidence say about negative stereotypes regarding older workers? Some earlier studies in the field of industrial gerontology explored the effects of ageing on productivity or supervisor appraisals (which could reflect stereotypes), and found evidence of productivity either holding steady or declining slightly (see Meier and Kerr, 1976; Fleischer and Kaplan, 1980). Other evidence points to declines in acuteness of vision or hearing, ease of memorisation, computational speed, and so on (see the evidence reviewed in Posner, 1995, Chapter 4). However, older workers may offset these declines with greater effort, and some faculties may increase with age as others decrease. As an example, Posner (1995, Chapter 7) argues that ageing is associated with declines in creativity but increases in leadership ability. Finally, some more recent evidence, from production function estimates for the manufacturing sector, fails to find evidence of lower productivity of workers aged 55 and older, who appear as productive as those aged 35-54, and more productive than those under age 35 (Hellerstein et al, 1999). However, as Posner (1995) points out, all such evidence is potentially prone to upward selection bias in estimates of the productivity of older workers, if the most productive workers tend to remain on the job. Thus, the evidence is probably best characterised as mixed and presumably there is tremendous variation within age groups. With the evidence suggesting that many differences between older and younger workers are largely non-existent or small, negative stereotypes about older workers and classifications based on them appear likely to act – at least sometimes – in an arbitrary fashion, harming many productive older workers.

Direct economic incentives

Finally, there are plausible direct economic incentives for employers to treat workers differentially based on age. The simplest of these may be incentives based on relatively accurate stereotypes or generalisations. For example, as noted by Miller (1966), because of the higher

likelihood of illness and death among older workers, the costs of health insurance and life insurance are likely to be higher for older workers. Similarly, there may be less time over which to recoup an investment in training when hiring an older worker (although younger workers may be more likely to leave the firm for another job). In principle, the employer may be able to adjust the wage or compensation package to compensate for the differential costs. However, there may be barriers to doing this, which stem from the law or other issues of workforce management (precluding, for example, paying an older worker a lower wage than a younger worker, to compensate for higher health insurance premiums). It is not clear why the law should prohibit differential treatment based on these considerations and in some cases it does not (see, for example, the discussion of benefits on page 46).

A more complicated set of economic incentives and consequent issues for government policy comes from consideration of models of the long-term attachment of workers to employers in the context of providing incentives to workers to exert effort (and not to shirk). As developed by Lazear (1979), the basic model that captures these ideas has employers paying workers less than their marginal product when young, and more than their marginal product when old. The underpayment in the younger years, and the fact that the worker is never fully paid for his 'lifetime' productivity until his retirement, provides an incentive for the worker to work hard and avoid losing their job.

The Lazear model creates three types of incentives pertinent to differential treatment of workers based on age. First, the model explains the existence of mandatory retirement (as discussed in Chapter 3, pp 35-8). As Lazear shows, the overpayment of older workers entails older workers being paid more than the marginal value of their leisure, so that they will not choose to retire at the date at which, over their lifetime, the stream of wage payments adds up to their stream of marginal productivity. This, Lazear argues, necessitates mandatory retirement (as noted above, this was ultimately prohibited by the ADEA, but Lazear later showed that pension incentives could play a similar role; Lazear, 1995, Chapter 4). While workers are content with such long-term incentive contracts ex ante, ex post they would not voluntarily leave the firm, so that, from the point of view of the older worker, the imposition of a mandatory retirement age may appear discriminatory.

Second, as demonstrated theoretically by Hutchens (1988), Lazear-type contracts are likely to impose barriers to hiring older workers, because these contracts are likely to impose some component of fixed costs that can only be amortised over a shorter period for older workers. Hutchens (1996) also presents evidence consistent with this conjecture. Barriers to paying new older workers much lower wages than current older workers can lead to the same result, as they make it impossible to bring in new older workers at wages initially below their marginal products. As Issacharoff and Worth Harris state:

> ... because a reduction in pay to a level approximating productivity would appear to be a dignitary affront to the employee and would be potentially disruptive within the firm, the life-cycle wage pattern has the predictable effect of freezing unemployed older workers out of the job market altogether. (1997, p 780)

Third, Lazear-type contracts provide an incentive for the employer to behave 'opportunistically', discharging workers unfairly (that is, not for 'shirking' as understood in the original implicit contract) before their retirement date, so as to pocket some of the difference between a worker's productivity and wages to date. In such a case, there are two potential arguments for legislation prohibiting age discrimination. First, as Neumark and Stock (1999) argue, such legislation may represent a 'pre-commitment device' (Schelling, 1983), offering workers protection against opportunistic behaviour by employers. At the same time it may commit all employers to adhere to Lazear-type contracts, when it might be irrational and unconvincing for employers to make such commitments on their own (Jolls, 1996, makes a similar argument). Second, there may be negative social externalities from employers reneging, as workers at other firms raise their subjective probabilities of their own employer reneging when they see other employers doing so. This may lead to higher required compensation and less back loading of pay under Lazear-type contracts (Lazear and Moore, 1984).

Empirical evidence on the effects of age discrimination legislation

The effectiveness of age discrimination legislation in the US and elsewhere has not been widely researched. Nonetheless, there is a small base of research on which to draw in order to try and reach some provisional conclusions. The evidence is of three types. First, there is some direct evidence on the effects of age discrimination legislation on labour market outcomes, which can tell us whether the legislation is having at least some of its intended effects. Second, there is empirical research on the existence of evidence consistent with age discrimination in the post-ADEA regime. Finally, there is evidence bearing on some central critiques of the ADEA. This evidence is described below, and summarised in Table 4.5.

Table 4.5: Evidence on the effectiveness of age discrimination legislation

Study	Period covered	Findings
Direct evidence		
Neumark and Stock (1999)	1940-80	State and federal anti-age discrimination statutes boost employment of workers aged 60 and over by about six percentage points. No discernible effect of elimination of mandatory retirement, but test is weak.
Adams (2000)	1964-67	State anti-discrimination statutes boost employment of workers aged 60 and over by about 5.5 percentage points. State anti-discrimination statutes have little effect on the relative probability that an older worker is a new hire, although there is some evidence of negative effects for workers aged 65-70. State anti-discrimination statutes also reduce retention of older workers, but retirements fall substantially, overwhelming these effects and leading to the increase in employment.
Ashenfelter and Card (2000)	1986-96	Elimination of mandatory retirement for professors resulted in large reductions in retirements at or just beyond the previous retirement age.
Continuing evidence of age discrimination		
Hutchens (1988)	1983	Older new hires are clustered in a narrower set of industries and occupations than younger new hires or all older workers.
Hirsch et al (2000)	1983-98	Occupations that are less open to older new hires have steeper experience profiles and higher prevalence of pensions. Exclusion of older new hires has fallen only slightly if at all.
Adams (2000)	1992-94	Self-reported age discrimination with respect to promotions is associated with lower subsequent wage growth and higher self-assessed probability of retirement at age 62 or 65.
Critiques of the ADEA		
Neumark and Stock (1999)	1940-80	Age discrimination legislation resulted in a steepening of age-earnings profiles for new labour market entrants.

Direct evidence

The direct evidence on age discrimination legislation tries to ascertain the direction and magnitudes of the effects of the legislation on labour market outcomes that ought to be affected. This can be viewed as asking whether the legislation has some of its intended effects, without speaking to the much more difficult question of the welfare implications or the 'optimal' level or type of anti-discrimination effort.

Neumark and Stock (1999) studied the effects of age discrimination by exploiting the existence of anti-discrimination statutes in some states prior to the ADEA. Specifically, they look at changes in employment rates of older workers (in the protected age group) relative to younger workers. The state statutes are helpful because it is otherwise impossible to disentangle the effects of federal legislation from other time-series changes. If the only policy variation is the advent of federal legislation, then a change in relative employment of older workers when the ADEA passes, or when its enforcement was assigned to the EEOC, could be attributable to other changes over time which influence the relative employment of older workers. This is a legitimate concern as the 1970s and first half of the 1980s witnessed sharp changes (declines, in fact) in relative employment and labour force participation rates of older people, with factors such as social insurance programmes, pension plan offerings and health receiving considerable attention as possible explanations (see for example, Lumsdaine and Mitchell, 1999). However, with the state statutes, the advent of federal legislation can be separately identified by using those states that already had an anti-age discrimination statute to control for other aggregate changes in relative employment of older people. The relative difference between these states and the other ('treatment') states can be used to identify the effect of the policy change. In addition, of course, because the state statutes are implemented at different times, their direct effects can be estimated to draw stronger inferences regarding the effects of age discrimination legislation.

Using Census data from 1940, 1950, 1960, 1970 and 1980, and treating the federal law as binding or enforced only after the 1979 amendments, Neumark and Stock find that age discrimination laws boost employment rates of protected workers under the age of 60 by a small amount (.008, or eight-tenths of a percentage point), but boost employment rates of protected workers aged 60 and over by a substantially higher .06, or six percentage points. The estimates of the effects of the state-level age discrimination statutes in isolation are of a similar or slightly larger magnitude.

An additional important component of the ADEA is its prohibition of mandatory retirement. Neumark and Stock attempt to apply the same strategy to estimating the effects of the prohibition of mandatory retirement. However, because they do not focus on the very oldest workers, and because few states banned mandatory retirement prior to the federal legislation, they have very limited information with which to estimate the effects of banning mandatory retirement. They do not find statistically significant evidence that banning mandatory retirement boosted employment of older workers. This may be because the data are uninformative, or it may arise because employers are able to induce retirement at given ages even without mandatory retirement (Lazear, 1995).

In recent work, Adams (2000, Chapter 3) repeats this type of analysis using variation in state anti-discrimination laws from 1964 to 1967, when a number of states enacted anti-discrimination laws. Using essentially the same empirical strategy and data from the Current Population Survey, Adams finds that age discrimination laws boosted employment of protected workers aged 60 and over by about .056 (or 5.6 percentage points) – very close to the Neumark and Stock estimates.

Adams also takes the analysis further, estimating the effects of age discrimination laws on new hires. He first argues that the direction of effects of anti-age discrimination statutes is a priori ambiguous. On the one hand, these laws should reduce hiring discrimination and hence boost hiring of older workers; on the other hand, if older workers are retained longer because of age discrimination legislation, hiring of (other) older workers may fall. Similarly, anti-age discrimination legislation could strengthen long-term commitments between workers and firms, or simply increase the cost of hiring older workers, hence generating a preference for hiring younger workers and reducing hiring of older workers. Given that the Current Population Surveys used by Adams do not include tenure data, he uses two methods to classify new hires, acknowledging that neither is perfect. The first is based on workers who are employed at the time of the survey, but

report some period of non-employment during the prior year. The second requires that the person who had some non-employment also searched for work in the prior year (which is meant to remove from the group of new hires those who returned to the same job). Unfortunately, these measures fail to pick up workers who started a new job without an intervening spell of non-employment. Using the same empirical strategy as that used for the analysis of employment effects, Adams finds little evidence of effects of age discrimination laws on the relative probability that an older worker is a new hire, with the possible exception of some evidence indicating a reduced probability for 65- to 70-year-olds. Clearly, however, there is no evidence of a positive effect on hiring.

Finally, the positive employment effect, coupled with no evidence of a positive effect on hiring, suggests that age discrimination laws boost retention of older workers. Curiously, Adams finds that these laws *increase* the relative probability that older workers exit employment. How can this puzzle be resolved? In his final analysis, Adams finds that age discrimination laws are associated with substantial reductions in retirement among older workers. Thus, more of them are remaining in the labour force and, even though hiring probabilities may worsen slightly and the probability that an employed worker is retained falls, the reduction in retirement leads to a net increase in employment.

A recent study of faculty retirement by Ashenfelter and Card (2000) provides perhaps the best evidence to date on the effects of eliminating mandatory retirement, although the evidence is limited to a single, narrow occupation – university professors. The authors do a before-and-after comparison based on the elimination of mandatory retirement for professors under federal law, an earlier cross-sectional comparison of institutions (a subset of which had no mandatory retirement because of state law) and a pooled analysis allowing for a richer comparison. The findings are quite striking. Both the state and federal 'uncapping' of mandatory retirement appear to lead to large drops in retirement at ages 70 and 71, and concomitant large increases in the proportion of 70-year-old professors that are teaching two years later. This evidence may differ from that reported above (in Neumark and Stock, 1999), simply because it is based on more informative data. However, in addition, professors are typically on defined contribution pension plans, which sharply limit the ability of the employer to create financial inducements to retire at a particular age. In contrast, Lazear (1995) showed that employers could restructure defined benefit plans to induce retirement at desired ages (defined benefit pension plans specify pension payments based on a formula involving salary near the end of the career and years of service; defined contribution plans are based on payments by employers into investment funds, which form the basis of the pension). Thus, with defined benefit plans, mandatory retirement may have much weaker effects on labour force participation and the employment of older workers. Moreover, the academic profession may be quite unique, in part because the job is not physically demanding. Indeed, earlier research considering more general samples (Burkhauser and Quinn, 1983; Fields and Mitchell, 1984), presented evidence suggesting weak impacts of mandatory retirement.

Continuing evidence of differential treatment based on age

Another avenue of research that can be viewed as assessing the effectiveness of the ADEA consists of attempts to test for evidence consistent with age discrimination in the period following the ADEA. The continued existence of such evidence following the ADEA does not necessarily imply failure of the law. Anti-discrimination legislation presumably never aims to eliminate *all* discrimination, but rather to root out and deter much of it – particularly the most egregious and costly cases. As an example of this, anti-discrimination laws have typically not applied to the smallest employers. In addition, as described above, age discrimination law has undergone many changes strengthening its provisions, so evidence consistent with discrimination in the period following its initial implementation but preceding its current form would not necessarily reflect the effectiveness of current law. However, there is a fairly large hole in our knowledge regarding the effectiveness of age discrimination legislation. In particular, there is no systematic attempt using comparable data over time to conduct and compare tests or measurements of the evidence relating to age discrimination before and after the ADEA. This contrasts quite sharply with the literature on race and gender discrimination (see, for example, Smith and Welch, 1977; Eberts and Stone, 1985; Blau, 1998).

Building on his earlier work, Hutchens (1988) develops 'segregation curves' used for contrasting distributions of workers across industries and occupations. His analysis of 1983 Current Population Survey data shows that newly hired older workers are clustered in a smaller set of industries and occupations than are newly hired younger workers or all older workers. The potential reasons for this include all of the possible reasons for differential treatment based on age that were discussed above. In addition, the evidence Hutchens presents – as he acknowledges – cannot rule out the possibility that older workers prefer a narrower set of jobs. However, Hutchens argues that, coupled with other evidence – including larger wage losses of displaced older workers, longer spells of unemployment and the existence of upper age limits prior to the enactment of laws barring age discrimination – this clustering probably reflects discrimination. On the other hand, Garen et al (1996) present a model in which tax rules requiring equal fringe benefits, coupled with age discrimination laws barring lower wage payments to older workers, deter hiring older workers when defined benefit pension plans are used. This occurs because firms want to structure pensions to reduce turnover (presumably because of training), but, because reducing turnover is not an issue for older hires, pension costs are effectively higher for them. At the same time, age discrimination laws preclude employers from paying lower wages to older workers to compensate for the higher benefit costs. They also find some evidence consistent with this conjecture, as more generous defined benefit plans are associated with reduced employment prospects for older workers. This then offers an alternative explanation for Hutchens' evidence, and may point to some negative effects of age discrimination laws, although any source of wage constraints – not just the age discrimination laws – could generate Garen et al's findings.

In contrast, Hirsch et al (2000) present some evidence that those occupations that appear more closed to older new hires have steeper experience profiles and higher prevalence of pensions. This evidence suggests that the exclusion of new older workers may be based more on considerations arising from Lazear-type contracts. They also report only slight improvements over time in the occupational segregation facing new hires among older workers, and hence are reluctant to conclude that the problem is declining in importance.

While the research described above focuses on hiring, attention in the late 1980s and the 1990s in the US focused on involuntary job terminations, as corporations restructured and implemented layoffs (see, for example, Cappelli, 2000). Although much of this research was contentious (see Neumark, 2000, for a thorough review), one piece of fairly unambiguous evidence was the increased involuntary terminations of more tenured workers (Polsky, 1999). Although this evidence has not been viewed through the prism of age discrimination, it is potentially consistent with an increased tendency to treat workers differentially based on age.

Finally, Adams (2000, Chapter 2) revisits the approach of using self-reported measures of age discrimination. He uses data from the 1992 and 1994 waves of the Health and Retirement Study, which includes a question about whether workers believe that their employer gives preference to younger workers in promotion. Although repeated observations on this question are not available, Adams is able to include information on the perceived work environment and pay fairness in an attempt to control for other negative aspects of the workplace that might not be related to age discrimination, but which workers might otherwise 'blame' on discrimination when asked. He finds no wage differential associated with reported age discrimination. However, he does find evidence that reported age discrimination is associated with lower wage growth across the two waves, and with a reduced expectation of working at age 62 or 65, consistent with deleterious effects of age discrimination (with only the two waves of the Health and Retirement Survey, Adams' ability to track actual retirement is limited). Similarly, Herz and Rones (1989) report the results of a Gallup survey conducted in 1985, in which 6% of workers aged 40 and over reported that they had experienced age discrimination, mostly in the form of being denied a promotion or chance for advancement based on age. Although not directly comparable, this 6% figure is close to the 7% figure reported in Johnson and Neumark, 1997, for an earlier period. However, because these figures are based on those in work, they are not very useful in trying to gauge the overall extent of age discrimination.

Critiques of the ADEA

The evidence regarding direct effects of the ADEA points to some positive impacts on older

individuals and workers. This evidence bears on one of the simpler but potentially important critiques of the ADEA. In particular, Posner (1995, Chapter 13) argues that the ADEA acts to reduce hiring of older workers, for two reasons. First, according to Posner, the costs of hiring these workers are increased as a result of their new legal rights under the ADEA. Second, because damages in hiring discrimination cases are likely to be small, while injunctive relief – hiring the older worker who has filed a claim – is unlikely to be attractive to a plaintiff, legal action is not likely to be effective in increasing the hiring of older workers. The evidence on the effects of the ADEA on employment and hiring of older individuals does not point to increased hiring; if anything, it points to slightly reduced hiring, consistent with this critique. Overall, however, the evidence points to increased employment of older individuals. This suggests that, while the ADEA may have proven somewhat ineffective in addressing the behaviour that was most often cited in justifying it – namely hiring discrimination – it has nonetheless had positive impacts on older individuals.

A significantly harsher critique of the ADEA is that, rather than furthering any anti-discriminatory goals, the ADEA acts largely to provide a windfall to older workers. Such an interpretation is not directly contradicted by evidence that age discrimination legislation boosts the employment of older workers. The original argument espousing this view of the ADEA was proffered by Lazear (1979). After developing the argument that mandatory retirement was part of an efficient long-term incentive contract, and acceptable ex ante – although not ex post – to older workers, Lazear criticises the elimination of mandatory retirement. Because in his model older workers earn more than the value of their leisure at the time of retirement, it is in their interest to eliminate mandatory retirement. Yet doing so would, Lazear argued, also impair the ability of workers and firms to enter into Lazear-type contracts. Thus, he concludes, on eliminating mandatory retirement "current older workers will enjoy a small once-and-for-all gain at the expense of a much larger and continuing efficiency loss that affects all workers and firms adversely" (Lazear, 1979, pp 1283-4).

In retrospect, this perspective on the effect of eliminating mandatory retirement may have been too pessimistic. First, subsequent empirical work has concluded that firms have largely been able to offer financial incentives to induce retirement at specific ages (see for example, Burkhauser and Quinn, 1983; Fields and Mitchell, 1984). Second, Lazear's later work (1982) showed that pensions whose value varied with age could include incentives structured to induce retirement at specific ages, consistent with this evidence. However, the Ashenfelter and Card (2000) study suggests that, in at least some settings (perhaps those with defined contribution benefit plans), the elimination of mandatory retirement does lead to later retirement.

Some criticism of the ADEA has gone well beyond Lazear's specific focus on mandatory retirement, and has argued that the entire structure of anti-age discrimination legislation reflects rent-seeking behaviour on the part of older workers. This argument is put forth forcefully by Issacharoff and Worth Harris (1997). First, they argue that the original intent of Congress in passing the ADEA was to eliminate the type of discrimination that was reflected in maximum age limits for new hires (p 793). In contrast, citing evidence in Schuster and Miller (1984), they note that the typical ADEA plaintiff is seeking redress over dismissal (discharge or involuntary retirement), not discrimination in hiring (see also Table 4.3). (Schuster and Miller did not use a sample of discrimination charges, but, rather, focused only on court cases, using a LEXIS search. They then selected a small subset of cases that were decided on substantive matters; a much higher proportion were decided on procedural issues. Posner [1995, Chapter 13] presents similar evidence.) Based on this evidence, and evidence on the race of complainants, they argue that the ADEA has largely become a form of protection against wrongful discharge for older white males – a form of protection that does not generally exist in the US (p 796). (Issacharoff and Worth Harris [1997] further elaborate on the role of the American Association of Retired Persons [AARP] in lobbying for amendments to the ADEA and other legislation that benefited older workers, attempting to identify the 'agent' of the rent-seeking or capture theory of the ADEA.)

It is difficult to provide a full assessment of this critique. There appears to be little doubt that the AARP has successfully lobbied for legislation that benefits older workers, without automatically (or intentionally) advancing their overall welfare. However, it is not necessarily the case that the prevalence of discharges among ADEA claims implies that the ADEA is best characterised as rent

seeking. First, Issacharoff and Worth Harris (1997) note that refusal-to-hire cases are more difficult to prove, and, as was already noted, Posner (1995) argues that damages in hiring cases are not likely to be large. But the most egregious hiring discrimination cases may nonetheless surface. Second, and potentially more important, the prevalence of discharge cases may reflect employers opportunistically reneging on Lazear-type contracts. Issacharoff and Worth Harris are aware of the incentive for opportunism, but dismiss the ADEA as an appropriate way to combat this, arguing that:

> If the source of the risk to older workers is economics, in general, and opportunistic breaches, in particular, a real question emerges as to why this problem should be folded into the antidiscrimination rubric. (1997, p 800)

As a matter of how well this rationale coincides with the original intent of the ADEA, this may be a valid point. But it is unclear how it is relevant to policy or to the ADEA as it has evolved through case law. There is a policy argument for legislation that prevents this type of opportunistic behaviour, and the case law appears to recognise this (Issacharoff and Worth Harris, do, however, suggest some alternatives, based on either abrogating or limiting employment at will, creating compulsory arbitration in cases of termination of long-term employees, or other administrative mechanisms [pp 800-1]).

Aside from these considerations, Neumark and Stock (1999) have implemented an empirical test of the consequences of age discrimination legislation, in addition to their analysis of employment effects as described above. In particular, they argue that, if age discrimination laws acted predominantly as rent-seeking devices for older workers, their passage would reduce the use of long-term incentive (Lazear-type) contracts for new labour market entrants. However, if the predominant effect was to strengthen such contracts by reducing opportunistic behaviour on the part of employers, the use of such contracts would be reinforced. Empirically, they test these two alternative views by asking whether age discrimination laws result in flatter or steeper age-earnings profiles of new entrants, with the former corresponding to the rent-seeking hypothesis, and vice versa. The evidence points unambiguously toward the hypothesis that the predominant effect of age discrimination legislation is to strengthen long-term incentive contracts, as age-earnings profiles steepen following the passage of age discrimination laws. This does not mean that age discrimination legislation does not entail some rents appropriated by older workers, but rather that the main effect is to strengthen the ability of workers and firms to enter into long-term incentive contracts. This evidence therefore contradicts the assertion of Issacharoff and Worth Harris that "the ADEA's casual introduction of the antidiscrimination norm into the career-wage relationship has significantly damaged the life-cycle arrangement" (1997, p 823). While there may be something to the rent-seeking critique of the ADEA, rent seeking does not appear to be the best characterisation of the overall effects of the legislation.

Conclusions

The US has a history of legislation prohibiting age discrimination covering a period of more than 30 years. During that time, age discrimination legislation has become nearly an equal partner with legislation barring discrimination based on race and gender, although it has attracted less political debate. It is difficult to come up with a single overall assessment of the US experience with age discrimination legislation, but the following points emerge from the existing literature and evidence.

Prior to the enactment of the ADEA, there was ample evidence consistent with hiring discrimination against older workers. Evidence of other types of discrimination is difficult to ascertain, but some research points to suggestive evidence of discrimination in promotions, training, and so on.

Differential treatment based on age is probably not based on animus, and, as such, differs from discrimination based on race and possibly gender. Negative stereotypes of older workers may in part explain differential treatment, as may the economic motives for employers to classify and treat workers differently based on age. In all cases some rationale can be offered for government intervention to prohibit or reduce this differential treatment. However, the valid economic motives that employers may have for classifying and treating workers differently based on their age raise some concerns about possible efficiency costs of age discrimination legislation.

Age discrimination legislation at both the state and federal level boosts relative employment of older workers and reduces the retirement of older individuals.

In the post-ADEA period, there is still evidence to suggest that age discrimination impacts on the occupations into which older workers are hired, and their opportunities for wage growth.

Age discrimination legislation can be interpreted as rent-seeking behaviour by older workers, and some of the political history of the legislation is consistent with this. However, the empirical evidence suggests that the predominant effect of age discrimination legislation has been to reduce the likelihood that firms renege on long-term commitments to older, higher-paid workers, and consequently to strengthen long-term relationships between workers and firms.

Based on these conclusions, a relatively positive assessment of age discrimination legislation in the US is more warranted than a negative assessment. However, there is not a sufficiently overwhelming amount of evidence and variety of tests to conclude that the existing body of research is decisive. In many cases, there are only one or two studies that address a particular question. This sharply contrasts with the vast quantity of research on many other public policy issues in the US, and indicates that it may be unwise to draw overly strong conclusions based on our current knowledge.

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A

Appendix A: Age discrimination legislation in selected countries and the EC Directive

Australia

Legal instruments

Legislation to prohibit age discrimination was introduced in all Australian states and territories in the 1990s. In some states (such as, New South Wales, South Australia and Western Australia), age was added as a ground for complaint under existing anti-discrimination laws. In Queensland and Tasmania, age was included from the beginning in their Anti-Discrimination Acts. In Victoria a separate law (the 1995 Equal Opportunity Act) prohibits discrimination in employment on various grounds including age. There are some inconsistencies in the treatment of age discrimination in the various states, although the laws are generally similar.

At the Commonwealth level, the 1988 Industrial Relations Act incorporated International Labour Organisation (ILO) Convention 111, which outlaws discrimination, including age discrimination, in "employment and occupation". This was superseded by the 1996 Workplace Relations Act, which also includes ILO Convention 111.

Grounds included in the legislation

State anti-discrimination laws include multiple grounds for complaint. The widest coverage is provided by the New South Wales (NSW) legislation, which was the earliest, and Tasmania, which is the most recent. Apart from age, grounds include gender, racial origin, disability, marital status, religion and sexual orientation.

Groups to which the law applies

All the state Acts apply to both public and private sectors of employment. Apart from employees, they generally include independent contractors, contract workers, agents paid by commission and union members. The laws apply to employers and employment agencies.

The Federal Workplace Relations Act applies only to employees covered by industrial awards made by the Australian Industrial Relations Commission, and does not apply to a range of casual, fixed-term and probationary employees, contracts and consultancies.

Types of prohibited discrimination

- Direct discrimination
- Indirect discrimination
- Harassment

Scope of the protection against age discrimination in the labour market

- Advertising of vacancies
- Recruitment
- Pay
- Promotion
- Training
- Termination of employment
- Variation to terms of employment, such as, transfer to another position or change in work-related benefits

Age limits

No age limits. During the 1990s, mandatory retirement was abolished in all states. In NSW, South Australia and Queensland, separate enactments were made; in other states, mandatory retirement was abolished concurrently with the prohibition of age discrimination. At the Commonwealth level, mandatory retirement was abolished in the Australian Public Service as part of a package of amendments to the 1999 Public Service Act.

Exemptions and justifications

Grounds for exemption from the prohibition of discrimination vary between states. The following exemptions are particularly relevant in relation to employment:

- Junior rates of pay
- Employment in private households
- Minimum age levels set by qualifying bodies
- Terms and conditions of superannuation and retirement schemes
- Redundancy (in some states)
- Genuine occupational qualification (GOQ) or 'inherent requirements' of the job (all states).

Institutional framework

All states have established statutory boards or commissions to administer the laws. In three states (NSW, Queensland and Tasmania) the relevant body is called the Anti-Discrimination Board or Commission; in the others, there are Equal Opportunity Commissions. All these bodies have programmes of public education, and attempt to influence employers and the general public through non-binding codes of practice.

At the Commonwealth level, the Human Rights and Equal Opportunity Commission (HREOC) – established in 1986 – was given power to deal with complaints regarding age discrimination in 1991. HREOC has broad powers to investigate alleged violations of human rights. It can record complaints and recommend action, but has no legal enforcement powers.

In the case of complaints based on gender, race and disability, action can be taken in the Federal Court, but this does not apply to age discrimination in employment. The largest proportion of complaints about age discrimination recorded by HREOC, relate to recruitment.

Remedies and enforcement

Generally speaking, the various enforcement bodies operate similarly. Complaints are scrutinised by the staff of the Board or Commission to see if they fall within the powers conferred by law. At the next stage, the complaint is allocated to a conciliation officer. If it is clearly not covered by the law, the complainant receives a letter explaining the reasons and indicating other possible sources of assistance.

Conciliation officers investigate complaints by obtaining information from all the parties directly affected. If the investigation indicates that the complaint does not appear to constitute unlawful discrimination, the complainant receives a letter explaining the situation. If unlawful discrimination does appear to be involved, the conciliation officer tries to deal with the matter by negotiating an agreed settlement. This may require several conferences.

If the complaint is not settled by conciliation the matter may be referred to a judicial tribunal, where legal representation is permitted. Generally, lawyers are not admitted to conciliation conferences. In Western Australia, the policy of the Commission is to engage lawyers to assist complainants in preparing cases for the tribunal. Tribunals can award compensation, the amount of which varies from state to state (the maximum figure in both NSW and Western Australia is Aus$40,000). The decisions of tribunals are binding, but subject to appeal through the courts. Normally, only about 10% of complaints are referred to the Equal Opportunity Tribunal or similar judicial body, and about 25% are formally conciliated.

Non-labour market age discrimination

The legislation covers a wide range of areas. A typical list is to be found in the Queensland Anti-Discrimination Act which covers: education, goods and services, superannuation, insurance, disposition of land, accommodation, membership of clubs, administration of state laws and programmes, and local government administration.

Canada

Legal instruments

There is legislation prohibiting discrimination, including age discrimination, at both the federal and provincial levels. These are collectively referred to as 'human rights legislation'.

The federal government and each of 10 provinces and three territories (with the exception of Nunavut which is relying on the North West Territories' legislation until its legislation is developed) have their own human rights statutes. Age discrimination legislation was first developed in the 1960s – first in British Columbia in 1964, followed by Ontario in 1966. The first human rights code was enacted in Ontario in 1962 and the age discrimination was added in 1972. By the late 1970s human rights legislation, including enforcement mechanisms, existed in all 10 provinces.

The federal Act applies only to federally-regulated employers such as the federal government, banks, airlines and telecommunications companies. All other employers are subject to the relevant legislation of the province in which they operate. The majority of human rights claims fall under provincial jurisdiction.

The federal Charter of Rights and Freedom 1982 – part of the Constitution – states that all individuals are equal before the law and have the right to equal protection and benefit of the law without discrimination. The Charter lists a number of prohibited grounds of discrimination, including age, and also allows the addition of new 'analogous' grounds of discrimination. The Charter protects individuals against the acts of government and has precedence over other federal and provincial laws. It has been important in labour market regulation, including for issues of age discrimination.

Grounds included in the legislation

Human rights legislation includes multiple grounds. These are usually race, gender (including pregnancy, childbirth and breastfeeding), ethnic origin, place of origin, colour, religion, marital status, disability, sexual orientation and age. Some statutes also include such factors as nationality/citizenship, criminal record, political belief and language.

Groups to which the law applies in the labour market

Human rights legislation is given a liberal interpretation to apply widely within the labour market. It usually applies to all employees, those seeking employment, temporary and casual staff, volunteers and apprentices, independent contractors and subcontractors, employers, unions, vocational training providers, employment agencies and franchisors (for discriminatory treatment of franchisees). It applies to both the public and the private sector.

Types (and definitions) of discrimination

- *Direct discrimination:* Any form of differential treatment, whether intentional or not, that makes a distinction which *prima facie* discriminates
- *Indirect, adverse effect discrimination:* A rule, policy or standard that appears to be neutral and is applied equally to all employees, but which has an adverse effect on an employee or group of employees identified by a prohibited ground of discrimination.
  As a result of a recent Supreme Court decision, the distinction between direct and adverse effect discrimination has become blurred and the same legal analysis is applied in either case, except in the most obvious cases of direct discrimination
- *Discrimination because of association:* A person cannot be discriminated against because of his/her association, relationship or dealings with another person identified by a prohibited grounds of discrimination.
- *Victimisation, discrimination through reprisal:* Protecting people from reprisal for claiming or enforcing a human right or for refusing to discriminate
- *Harassment:* Harassment is a form of discrimination and is also specifically prohibited in many human rights statutes

Scope of the protection against age discrimination in the labour market

All aspects of employment are covered including applying for a job, recruitment, selection, training, transfers, promotion, terms of apprenticeship, dismissal and layoff. It also covers compensation, overtime, hours of work, holidays, benefits, shift work, performance evaluation, discipline and termination.

Age limits

For the employment aspect of the human rights legislation, many of the provinces have a lower age limit of 18 or 19 for claims of age discrimination and some provinces also have the same lower age limit for claims on other grounds.

Some provinces have an upper age limit of 65 for claims of age discrimination; others have no upper age limit. The upper age limit generally exists to accommodate mandatory retirement. The Supreme Court has found the upper limit of age to be discriminatory but justifiable given the social purposes it serves. In jurisdictions that do not have an upper age limit, the human rights legislation permits mandatory retirement if it can be justified as a bona fide occupational qualification (BFOQ, see below) and the Supreme Court has accepted such justification.

About half the working population is in jobs that are potentially subject to mandatory retirement.

Exemptions and justifications

- BFOQ as defined in human rights legislation and interpreted by the courts
- Positive discrimination including affirmative action programmes aimed at helping people who experience discrimination, economic hardship and disadvantage and preferential treatment of persons over the age of 60
- Insurance schemes and pension plans are allowed to have differential treatment on the grounds of age in some circumstances

Institutional framework

There are federal and provincial human rights commissions. These commissions interpret and apply the human rights laws of their respective jurisdiction. Human rights commissions have an important public policy and public education function. They also receive complaints or initiate complaints which can be mediated, investigated and, based on the result of investigation, either dismissed or referred to an administrative tribunal, often called a Board of Inquiry. This Board determines whether, on balance of probabilities, discrimination took place and orders appropriate remedies.

The courts generally deal with challenges under the federal Charter.

Remedies and enforcement

Penalties typically involve compensations for loss experienced as a result of the discrimination and measures to prevent future discrimination. The penalties are not meant to be punitive although in some jurisdictions general damages for mental anguish exist, but are usually subject to a low ceiling.

Non-labour market age discrimination

Human rights legislation also covers age discrimination in areas such as facilities, goods and services (such as, public transport, healthcare, education and social programmes), accommodation, clubs, teams and associations, and contracts. Human rights legislation is interpreted widely and many areas have been established as covered by this legislation.

Finland

Legal instruments

The prohibition of age discrimination appears mainly in three legal instruments:

- the new Constitution of Finland which came into force 1 March 2000 (section 6, 731/1999);
- the 1970 Contract of Employment Act as amended (a new Contract of Employment Act will come into force on 1 June 2001);
- the Penal Code – Employment Offences: the chapter on labour offences in the Penal Code includes provisions on discrimination in employment; it came into force in 1995.

Some provisions for discrimination, including age discrimination, also appear in other laws, such as the State Civil Servants' Act. Legislation will need to be amended to comply with the new EC Directive on Equal Treatment.

Grounds included in the legislation

- *Constitution:* grounds are gender, age, origin, language, religion, conviction, opinion, health, disability or other reason related to the person. This list is non-exhaustive

- *Contract of Employment Act:* grounds are origin, religion, age, political or trade union activity or any comparable circumstances
- *Penal Code:* grounds are race, national and ethnic origin, colour, gender, age, relations, sexual preferences or state of health

Groups to which the law applies

- *Constitution:* everyone
- *Contract of Employment Act:* employers and their representatives, employees and those seeking employment in the private sector
- *Penal Code:* employers and employees in both the private and public sector

Scope of protection against discrimination in the labour market

The Finnish Constitution states that everyone is equal before the law. No one will be treated differently from another person, without an acceptable reason, on the grounds detailed above. Justifications for different treatment must comply with the civil rights system. Positive discrimination is not prohibited if it is to secure factual equality.

The Contract of Employment Act obliges employers to provide pay and conditions as prescribed in the universally applicable national collective agreement for the comparable work in the industry concerned.

Employers are required to treat their workers impartially without unwarranted discrimination on the list of grounds listed above. Similar impartiality is required in recruitment.

The new Contract of Employment Act, coming into force in June 2001, contains more detailed provisions for the prohibition of discrimination. Justifications for different treatment in this Act are stated in a general way, such as, “a reasonable cause” and “an acceptable reason”.

In the Penal Code behaviour is considered discriminatory if an employer or his representative puts a job seeker or an employee in an unfavourable position, compared to another, without a weighty, acceptable reason. Usually such reason should relate to work.

Age limits

No age limits are attached to the prohibition of discrimination in the Constitution. Employment contracts in the private sector can include – explicitly or implicitly – a stipulation of termination at a specific age or when the employee fulfils requirements for pension. In the public sector some ages of retirement are enshrined in legislation. Separate pension legislation deals with equality in pension provisions.

Institutional framework and enforcement

The labour protection authorities monitor compliance with the provisions of the Contract of Employment Act concerning discrimination. At the national level, the administration of labour protection matters has been assigned to the Ministry of Social Affairs and Health in accordance with the Act on the Labour Protection Administration. At the local level, supervision of labour protection is the task of civil servants at the various labour protection offices in the country’s 11 labour protection districts.

The duty of the labour protection authorities is to give advice, instructions and statements on the application of provisions and regulations on labour protection. One of the administration’s responsibilities is to carry out inspections and surveys to ensure that the rules and regulations on labour protection are being followed. The supervisory duties of the labour protection authorities are mainly precautionary, while any consequent action rests primarily with the courts. The applicable procedures are governed by the Act on the Supervision of Occupational Safety and Health and Appeal in Occupational Safety and Health Matters.

Individual workers can file age discrimination civil cases against their employer in a lower court. General courts ultimately decide civil or criminal cases. Acts deemed as punishable according to the Penal Code are subject to public prosecution.

If there are probable reasons to suspect work discrimination in accordance with the Penal Code, the labour protection authority must notify the public prosecutor in compliance with the Act on the Supervision of Labour Protection and Appeal Procedure in Matters concerning Labour Protection. The notification does not have to be

made, if the public interest does not demand it, taking account of the significance of the offence and the labour protection situation of the workplace. Penal sentence for discrimination at work can be a fine or imprisonment for a maximum of six months.

The number of legal cases concerning age discrimination in work has been very small.

Republic of Ireland

Legal instruments

The 1998 Employment Equality Act, which came into force on 18 October 1999, addresses discrimination in the labour market, including age discrimination. This Act replaces an earlier legislation (1993) that outlawed age discrimination in dismissal.

The 2000 Equal Status Act extends the cover of anti-discrimination legislation to include discrimination in the provision of goods and services.

Grounds included in the legislation

Both the 1998 and 2000 Acts include age discrimination as one of nine grounds – the others are gender, marital status, family status, sexual orientation, religious belief, disability, race and membership of the Traveller community.

Groups to which the law applies

The 1998 Act applies to:

- employees;
- employment agencies' workers and trainees;
- members of trades unions and professional associations;
- employers;
- employment agencies;
- organisations of workers or of employers;
- professional, vocational and occupational organisations;
- any person who procures or attempts to procure another person to act in a discriminatory manner.

The Act provides for a wide responsibility by employer, including vicarious liability for actions by others (such as employees), unless the employer took reasonable steps to prevent such behaviour.

Types (and definitions) of prohibited discrimination

- *Direct discrimination*
- *Indirect discrimination*
- *Harassment:* defined as any act of conduct which is unwelcome and offensive, humiliating or intimidating; vicarious liability of employer for harassment is spelt out in detail
- *Victimisation:* described as action to penalise an employee for taking action pursuant to the enforcement of the legislation

Scope of the protection against age discrimination in the labour market

Discrimination by employers, employment agencies and in collective agreements with respect to:

- access to employment including advertising;
- conditions of employment, including overtime, redundancy, dismissal;
- equal pay for like work;
- training, promotion, work experience, classification of posts;
- discrimination by trades unions, professional and trade associations as regards membership and other benefits.

Age limits

18 to 65 years and, in the case of vocational training, 15 to 65.

Exemptions and justifications

- Existing retirement age will continue to apply. It is not discriminatory for an employer to fix different retirement ages, whether voluntary or compulsory, for employees or any class of employees
- Age-related pay to be phased out over a three-year period
- Differences in pay or terms and conditions based on seniority
- Differences based on sound actuarial or other evidence that significantly increased costs would result if discrimination were not permitted

- Maximum recruitment age limits which take into account the cost and period of time involved in training for the job and the need for a reasonable period of employment in the job prior to retirement
- Justification on grounds of GOQ
- Positive action towards the integration into the labour market, certain state training and work experience schemes, of people over the age of 50
- Employment in private households
- Any age requirements in various Acts relating to air and sea navigation
- Police, defence forces and the prison service
- Certain benefits made available by an employer to family members or based on family events are excluded from the scope of the 1998 Act

Institutional framework

A new Equality Authority (EA) replaces the Employment Equality Agency. The EA has the following functions:

- It has the statutory duty to promote equality of opportunity in employment and training on the nine discriminatory grounds in the 1998 Act. This includes providing information to the public and reviewing the legislation, reporting back to ministers.
- It can develop codes of practice, which, after approval by ministers, have a legal basis.
- It can carry out research to produce new information.
- It can conduct inquiries connected with the performance of its business or at the request of the minister. The EA has investigatory powers for such inquiries and can, as a result of an inquiry, make recommendations and serve Non-Discrimination Notices when there are findings of discriminatory behaviour. There are appeal and enforcement procedures.
- It has the discretion to assist individuals to further proceedings, if the case raises important points of principle, or where it is unreasonable to expect the individual to bring the case without assistance.
- It can carry out, or invite businesses to carry out, equality reviews to audit levels of equality, and/or prepare action plans with a programme of promoting equality within any business with more than 50 employees, or groups of such businesses. A notice can be served if there is failure to implement an action plan. There are appeal and enforcement procedures.
- It can carry out equality investigations of individuals' complaints. A new statutory office of Director of Equality Investigations – part of the Department of Justice – is the main locus for redress, and the Director of this office has defined investigatory powers.

Remedies and enforcement

Details of enforcement and remedies are provided for individuals' cases only. All individual cases of age discrimination, except those involving dismissal, should be referred in the first instance to the office of the Director of Equality Investigations. The Director and his staff will investigate each case. The Director will issue a decision or, when it appears suitable and no party objects, the case will be referred to mediation.

Decisions by the Director may order:

- in equal pay cases, equal pay and arrears for a period not exceeding three years preceding the reference of the case;
- in other cases, equal treatment and compensation of up to a maximum of two years pay (or 10,000 Irish Punts if the person was not an employee).

Decisions may be appealed to the Circuit Court.

If a case sent for mediation is not resolved, the complaint may be re-lodged with the Director.

Decisions by the Director's office or through mediation, which have not been complied with, are enforced through the Circuit Court after the period for appeal has elapsed.

Cases involving dismissal may be referred in the first instance to the Labour Court. The procedure in the Labour Court is analogous to that undertaken by the director of Equality Investigations, including mediation and enforcement procedures. In addition to financial compensation the Labour Court may order re-instatement or re-engagement.

Non-labour market age discrimination

The 2000 Equal Status Act prohibits discrimination on the nine grounds listed above and includes age discrimination in buying goods, obtaining

services, obtaining accommodation and attending educational establishments. There are some significant exceptions to the Act.

New Zealand

Legal instruments

The 1993 Human Rights Act (HRA) provides protection against discrimination in:

- employment;
- the provision of goods and services;
- land, housing and accommodation;
- access to public places, facilities and vehicles;
- partnerships;
- industrial and professional associations, qualifying bodies, vocational training bodies and education.

Grounds included in the legislation

In addition to age, the grounds included in the HRA are gender, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, political opinion, employment status, family status, sexual orientation.

Groups to which the law applies

It is unlawful to discriminate against employees, voluntary workers, job applicants, people seeking work through an employment agency, contract workers and people seeking training. The law applies to discrimination by employers, employment agencies, partnerships, professional or trade associations, qualifying bodies and vocational training bodies.

A wide definition of 'employer' is used, including contractors, subcontractors and employers of unpaid workers, such as charitable organisations.

Types of prohibited discrimination

The HRA does not contain a general definition of direct discrimination but rather lists behaviours or activities, within each ground, that constitute unlawful discrimination.

- *Indirect discrimination:* described as any practice, requirement or condition that appears to be neutral but has the effect of discrimination, unless good reason is established
- *Victimisation*

(Harassment on the grounds of age is not included in the HRA.)

Scope of the protection against age discrimination in the labour market

In employment, discrimination is prohibited in recruitment, promotion or transfer, terms and conditions including pay, superannuation (with some exceptions based on actuarial or statistical data), other fringe benefits, training and dismissal. Discrimination is also prohibited in access to industrial and professional associations, qualifying bodies and vocational training bodies.

Age limits

The law applies to those 16 and over (for employment there was an upper age limit but this was removed from 1 February 1999; the upper limit was the age of national superannuation payments, which increased in stages from 60 to 65 during the 1990s).

Exemptions and justifications

- GOQ for safety or other reason and genuine justification for discrimination
- Pay for persons under 20 years of age
- Refusal of employment to persons aged under 20 in work involving national security and requiring security clearance
- Positive discrimination including the government equal opportunity programmes and measures to ensure equality
- Domestic employment in private households
- Reasonable minimum age requirements by a qualifying body for qualification or authorisation needed in a profession, trade or calling
- Mandatory retirement is allowed if a contract was in force on 1 April 1992, it specifies a retirement age and the worker agreed in writing
- Actions of the New Zealand government are partly exempt from the Act. The exemptions include allowing government to have a mandatory retirement age for its employees. Exemptions are to be removed by 31 December 2001 (it was planned to apply age

discrimination legislation to government activities from 31 December 1999 but this has been delayed by two years to 31 December 2001)
- Some Acts and regulations are exempt including Acts specifying a retirement age for police officers, some army staff, judges and a minimum age for bar staff. (The government has undertaken to ensure greater consistency by 31 December 2001.)

Institutional framework

The Human Rights Commission (HRC) is an independent statutory body established by the 1977 Human Rights Commission Act. The Commission jurisdiction was expanded by the HRA.

The Commission has the following functions and powers:

- to promote the observance of human rights, by education, by encouraging programmes and activities, the publication of guidelines and by public statements;
- to monitor the operation of the HRA, including the right to carry out inquiries in areas where there may be infringements of human rights, reporting back and providing advice to the government;
- to check the consistency of existing and proposed legislation with the HRA and report to government;
- to conciliate and/or investigate complaints of unlawful discrimination;
- to obtain declaratory judgements.

Remedies and enforcement

Complaints about a breach of the Act can be made initially to the Complaints Division (CD) of the HRC. If parties agree, the matter can go to conciliation, without an investigation. In some cases the CD may decide on compulsory conciliation. If conciliation fails or is not agreed the CD will investigate the complaint. If the complaint is found to have substance, the CD may decide to initiate proceedings before the Complaints Review Tribunal. Complainants can also take their own case to the Complaints Review Tribunal if the CD decides against a Tribunal hearing.

Where the Tribunal finds that the HRA has been breached, it has a range of remedies – from a declaration that a breach has been committed, an order restraining the employer from continuing or repeating the breach, to damages. Damages can include monetary loss, expenses and award for humiliation and injury to feelings. Maximum damages award by the Tribunal is currently NZ$200,000. Appeals against Tribunal decisions usually go to the High Court.

Spain

There is some age discrimination legislation in Spain – mostly related to employment. However, the grounds of age are not consistently included in all existing anti-discrimination laws.

Legal instruments

The Spanish Constitution (1978) has a general provision on equality. Some grounds are specifically stated, but age is not, and the list is not exhaustive:

> Spaniards are equal before the law and must not be discriminated against on the grounds of birth, race, sex, religion, opinion and any other personal or social condition or circumstance.

Article 17 of Workers' Statutes dealing with discrimination at work includes a long list of grounds for discrimination, but this list does not include age:

> The following precepts and practices will be considered null and void in Spain: regulations, collective agreement clauses, individual agreements and unilateral decisions by employers that discriminate unfavourably or adversely on employment, as well as pay, working day and other working conditions, on account of sex, origin, marital status, race, social conditions, religious or political ideas, membership or not of a union and adherence to union agreement, kinship with other employees of the company and language.

There are, however, two statutes in which age is included specifically as one of the grounds. These are: Article 96 of the Workers' Statues, dealing with work conditions of employees, and

Article 28 of the Law on Offences and Sanctions relating to Social Issues (Law of Offences), which deals exclusively with discrimination in recruitment.

Grounds included in the legislation

Both Article 96 of the Workers' Statutes and Article 28 of the Law on Offences and Sanctions include the following grounds in addition to age: gender, origin, marital status, race, social condition, religion and political ideas, membership or not of a trade union and language. Article 96, which deals with employers' treatment of employees, also includes the grounds of kinship with other employees and adherence to union agreements.

Groups to which the law applies

- *Workers' Statutes:* Article 96 applies to employers and employees
- *Law of Offences:* Article 28 applies to employers and those seeking employment

Types of discrimination

Direct and indirect discrimination.

Scope of the protection against age discrimination in the labour market

Article 96 of the Workers' Statutes prohibits unfavourable discrimination on the grounds of age in pay, working day, training, promotion and other working conditions.

Article 28 of the Law on Offences and Sanctions prohibits discrimination – favourably or adversely – in the access to employment through advertisement, the media or any other means.

Age limits

There is no age limit, but Article 96 does not specifically cover dismissal or retirement. Mandatory retirement operates.

Exemptions and justifications (limited information)

The Tenth Additional Provision of the Workers' Statute allows compulsory (early) retirement as a way of implementing employment policy. Case law (STS 25.1.1999) declares the validity of agreements of compulsory (early) retirement in redundancy proceedings. Earlier case law justifies compulsory retirement as a way of sharing out work (Constitutional Court, July 1982).

Institutional framework and enforcement

The legal framework facilitates negotiations of terms and conditions of employment by collective agreements (Articles 82.2 and 85.1 of the Workers' Statutes). These agreements can contain clauses dealing with discrimination, including age discrimination.

Cases of differences of treatment are dealt with by the courts on a case-by-case basis.

There is a Labour Inspectorate and a Social Policy Inspectorate. There are no other procedures to monitor the implementation of the legislation.

US

Legal instruments

By 1960 eight states had age discrimination statutes with enforcement commissions.

In 1967 the federal government introduced the Age Discrimination in Employment Act (ADEA). This Act was amended in 1978, raising the mandatory retirement age in 1979, and abolishing the upper age limit in 1986.

The 1990 Older Worker Benefits Protection Act introduced restrictions to the financial inducements to retire offered by employers. Any scheme with incentives to retire had to be offered to everyone over a minimum age and the offsets of pension benefits against severance payments were limited.

Grounds included in the legislation

Age only: the ADEA is similar to the gender and race discrimination legislation in Title VII of the 1964 Civil Rights Act.

Groups to which the law applies

- Private employers with 20 or more employees
- State and local government as employers, any agent of an employer

- Employment agencies and labour organisations
- Employees and job seekers

Types of prohibited discrimination

Arbitrary age discrimination and victimisation, protection from reprisal for enforcing rights under this Act, is prohibited.

The courts decide what constitutes arbitrary discrimination. Proving disparate impact, another terminology for indirect discrimination, is a method used in the courts to establish a case of age discrimination.

Scope of the protection against age discrimination in the labour market

- Advertising vacancies and training opportunities
- Hiring
- Employment terms, conditions, compensation and privileges
- Classification in employment affecting opportunities or status
- Discharge from employment

Age limits

The ADEA had an age limit of 40-65, which was amended in 1979 to 40-70, and again in 1986 when the upper age limit was abolished.

Exemptions and justifications

- BFOQ
- Fire fighters and law enforcement officers
- Seniority systems; some features of pension plans
- Benefit of equal costs even when actual benefit to older worker is less

Institutional framework

There are enforcement institutions at both state and federal level. Complaints go in the first instance to state agencies where the state has age discrimination laws.

The enforcement of the ADEA resides with the Equal Employment Opportunity Commission (EEOC), which took over responsibilities for the ADEA in 1979. The EEOC was established by Title VII of the 1964 Civil Rights Act and began operating in 1965. The EEOC is also responsible for the implementation of federal legislation prohibiting discrimination in employment on the grounds of gender, race, religion, origin, disability and the 1963 Equal Pay Act.

The objectives of the EEOC are to promote equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance.

Remedies and enforcement

The EEOC investigated charges brought by individuals. Individual commissioners may also initiate charges.

EEOC investigation can lead to a dismissal of the case. If the case is not dismissed a settlement can be reached with the agreement of both sides, or mediation can take place if both sides agree. If these processes fail, a suit can be filed with the federal court, either by the EEOC or by the individual. The ADEA states that any individual planning to bring a civil action for discrimination under the Act must inform the EEOC first and give 60 days notice of intent. The individual's action must cease if the EEOC commences an action to enforce the person's rights. A by-product of this stipulation is that the EEOC has full data of all complaints brought under the Act.

Possible remedies in cases of age discrimination are back pay, hiring, promotion and reinstatement. Award of cost is possible. Liquidating damages related to loss are allowed in cases where intent and/or malice are proved. The ADEA does not allow punitive damages.

Non-labour market age discrimination

The 1975 Age Discrimination Act prohibits age discrimination in all programmes and activities receiving federal financial assistance. This could apply, for example, in educational institutions.

Other countries with limited legislation addressing age discrimination

There are several countries that do not have comprehensive age discrimination legislation, but do have a few laws or statutory regulations relating to some discriminatory practices. There are also some countries in which the constitution includes a general prohibition of discrimination that can be applied to cases of age discrimination. Information on such countries is provided below, although it is likely to be incomplete. In some countries it was difficult to identify existing legislation and to confirm that the legislation was enforced.

In addition to some laws dealing with age discrimination many countries also have special labour market measures to help younger and older people. These measures are not included in the information collected here.

Belgium

The Constitution of Belgium contains the general principle of equality stating that "Belgians are equal before the law".

An Act introduced in 1998 prohibits the introduction of a maximum age when recruiting employees.

The Social Partners have concluded an agreement (1983 amended 1998) that employers must treat applicants in a non-discriminatory way where the grounds of discrimination include all grounds in Article 13 of the Amsterdam Treaty, which includes age. The National Labour Council has laid down rules in accordance with the agreement.

France

After a long search, two Labour Codes addressing some aspects of age discrimination were identified. One states: "It is a criminal offence to restrict an employment advertisement to any upper age limit" (Labour Code L311-4). There are exceptions to this general prohibition and enforcement appears to be lax.

Another Labour Code (L311-4) states that reaching the statutory age of retirement, thus entitling a person to a pension, is not a legal cause of dismissal. This appears to apply to only certain types of contracts (flexible contracts) and only in certain circumstances related to pension entitlements.

Greece

There is no specific legislation prohibiting age discrimination. The general equality statement in the Greek Constitution (Article 4) – "All Greeks are equal before the law" – is interpreted in the legal literature to not cover differentiation by age. (The Constitution provides mandatory retirement ages for professors, judges and notary public.)

Article 22 paragraph 1 of the Constitution has a provision of equal pay for equal work "regardless of sex or other differentiations", which provides a basis to prohibit age discrimination. Legal literature accepts that such discrimination is unlawful only if it is not objectively justified. For example, it is accepted that lower age limits in the public sector are justified by young people's lack of experience.

There have been very few legal cases involving age discrimination.

The Netherlands

The Dutch Constitution prohibits discrimination on any ground, with no specified grounds.

Some 60 cases – mostly to do with age discrimination in the labour market – have appeared before the courts under the current constitutional ban on discrimination. It is very difficult to prove age discrimination under the Constitution but some cases have been won.

A proposed Bill prohibiting age discrimination in the labour market was undergoing parliamentary debate in 2000 but its progress has been delayed by the ratification of the EC Directive in October 2000. The proposed legislation will now have to be adjusted to meet the requirements of the EC Directive. A revised proposed Bill is expected by summer 2001.

Portugal

The Portuguese Constitution includes fundamental rights of workers to job security. Dismissal on grounds contrary to the employee's fundamental rights is prohibited by law and this includes dismissal on the grounds of age.

Sweden

The Constitution includes the regulation of public employment and requires that, within the public sector, appointments should be made exclusively on objective criteria. Age is normally not considered an objective criterion.

Under the Employment Protection Act age is not normally accepted as an objective criterion for dismissal.

The general principle of 'good practice' in employment, which is upheld by the courts, requires that employers treat employees in an acceptable, ethical, way. Age discrimination is not generally accepted as consistent with 'good practice'.

EC Directive

Legal instrument

The European Union Council Directive (2000/78/EC of 27 November 2000, OJ L303 p 16-22) establishes a general framework for equal treatment in employment and occupation. The Directive was agreed by the Employment and Social Policy Council on 17 October 2000.

The Directive applies to labour market activities and vocational training, and lays down the minimum requirements of prohibiting discrimination by member states. The implementation of the Directive does not justify any regression from the current level of protection (although such changes can be made for other reasons).

Grounds included in the Directive

- Religion or belief
- Disability
- Age
- Sexual orientation

Groups to which the law applies

The Directive applies to:

- all persons in employment or seeking employment and training;
- private and public sector employers;
- providers of vocational guidance, providers of training;
- workers and employers organisations, professional organisations and public bodies.

Types (and definitions) of prohibited discrimination

- *Direct discrimination:* one person is treated less favourably than another
- *Indirect discrimination:* when an apparently neutral provision, criterion or practice would put one person at a disadvantage compared to another person. Indirect discrimination can be established by any means including statistical evidence
- *Harassment* is deemed a form of discrimination – when unwanted conduct takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The exact definition of harassment will be in accordance with national law and practice
- The effective implementation of the Directive requires protection against *victimisation, dismissal or adverse treatment* by the employer as a reaction to a complaint and/or legal proceedings to enforce the legislation
- *An instruction to discriminate* is also deemed to be discrimination

Scope of the protection against age discrimination in the labour market

- Access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion at all levels
- Access at all levels to vocational guidance, vocational training, retraining, including practical work experience
- Employment and working conditions, including dismissal and pay
- Membership of and involvement in any organisation of workers or employers or a professional organisation

Age limits and mandatory retirement

No age limits are specified. Article 6 paragraph 1 (sixth and seventh exemptions listed below) and paragraph 14 of the preamble can be interpreted as allowing mandatory retirement as an exemption.

Exemptions and justifications

(The information provided under this heading is given as direct quotations with references, since this is an area where interpretation of the Directive is difficult and can be important.)

- Indirect discrimination provision, criterion or practice can be defended if it can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2 paragraph 2(b)i)
- The Directive shall be without prejudice to measures laid down by national law necessary for public security, public order and the prevention of crime, protection of health and rights and freedoms of others (Article 2 paragraph 5)
- The Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes (Article 3 paragraph 3)
- Member states may provide that the Directive shall not apply to the armed forces (Article 3 paragraph 4)
- Differences of treatment by age will not constitute discrimination where age is a genuine and determining occupational requirement (GOQ) of the post, provided objective is legitimate and requirement is proportionate (Article 4 paragraph 1)
- Differences in treatment on grounds of age do not constitute discrimination when, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary (Article 6 paragraph 1). Examples are:
  (a) Setting special conditions of access to training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
  (b) The fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
  (c) The fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement
- Member states may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including fixing different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided it does not discriminate on the grounds of gender (Article 6, paragraph 2)
- Positive discrimination is allowed, that is, measures to help disadvantaged groups where the disadvantage is linked to age (Article 7)

In the preamble part of the Directive there are some further clarifications of exemptions and justifications. Some particularly interesting additions are:

- paragraph 14, which states that the Directive shall be without prejudice to national provisions laying down retirement age;
- paragraph 15, which specifically allows use of statistical evidence in cases of indirect discrimination;
- paragraph 18, which exempts the armed forces, police, prison and emergency services.

Remedies and enforcement

The Directive provides very general requirements for the enforcement of this Directive, to allow for national variations.

Member states must ensure that judicial and/or administrative procedures – including conciliation, where appropriate – are in place. Both individuals and organisations can file cases of breach of the equality legislation.

Burden of proof shall be on the respondent to prove that there has been no breach of the principle of equal treatment, except in criminal procedures or in an investigative process, where a competent body investigates the facts in the case.

Compliance and sanctions

Any laws, regulations and administrative provisions contrary to the principle of equal treatment should be abolished. Any provisions contrary to the principle of equal treatment included in collective agreements or in the rules of organisations are, or may be, declared null and void.

Sanctions may comprise of payment of compensation to the victim and must be effective, proportionate and dissuasive.

Implementation

Member states are expected to implement the Directive by 2 December 2003 but, if necessary, they can have (for the grounds of age and disability) an additional three years, to 2 December 2006. Any member state choosing to use this additional period must report annually to the Commission on the progress it is making towards implementation.

B

Appendix B: Workshop participants

Workshop: 'Age discrimination legislation: implications of international experience for the UK', London, 16 March 2001

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