



**International Symposium on Age Discrimination
held on 5 September 2005, London**

**Preparatory event for 2006 Global Conference on Ageing
International Federation on Ageing (IFA)
30 May – 2 June 2006, Copenhagen, Denmark**



International Federation on Ageing

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Background and context

The 8th Global Conference on ageing is scheduled to be held by the International Federation on Ageing (IFA) in Copenhagen between 30 May and 2 June 2006, hosted by DaneAge.

Age Concern England (ACE) was invited by DaneAge and the IFA to lead a strand of activity running throughout the Copenhagen Conference on age discrimination. As a lead up to the conference, ACE hosted an international symposium on 5 September 2005 on the subject, taking advantage of the occasion of the Meeting of the Executive Committee of the IFA in London.

The symposium aimed to be a freestanding event providing an opportunity for international level discussion between senior IFA representatives and other key expert stakeholders on issues relating to age discrimination. It was also a forum to consider the key issues for global debate at the Copenhagen Conference around the age discrimination theme.

The symposium focused on 6 key themes as follows:

- *The personal experience of age discrimination*
- *Defining age discrimination*
- *The balancing of individual rights and social solidarity*
- *Age, equality and citizenship*
- *Beyond legislation – achieving cultural and attitudinal change*
- *Evaluating the outcome of action on age discrimination*

Each theme was initially explored through a paper produced and presented by an expert reporter. Each paper was then subject to analysis by an expert discussant, whose role was to highlight and consider key issues emerging from the paper prior to a broader discussion by all participants.

The outcome of this event was twofold.

Firstly, this report summarises the presentations and discussions of the 6 key themes. The full papers presented at the symposium are available on www.ageconcern.org.uk/xxxxxxxxxxxxxx

Secondly, the discussions provided an opportunity to identify the key themes for discussion at Copenhagen in the age discrimination strand. These are encapsulated in the Copenhagen programme in three sessions under the title

Ageism – Towards a Global View.

The three sessions in Copenhagen will focus on the following themes:

- **Age Discrimination in Five Continents: Real Issues, Real Concerns.**
- **Age equality in a diversifying population**
- **Practical actions to address age discrimination**

The report of these three sessions, and the papers which were presented in Copenhagen will also be available in due course on the above web address.

On behalf of Age Concern England, the IFA and DaneAge, I would like to thank all of the participants in the International Symposium for taking part in the event and for providing such an excellent platform for the sessions in Copenhagen and for adding to our knowledge and understanding of this important subject.

I would also like to thank my colleagues in Age Concern England for their work to ensure that the symposium was such a success.

Richard Baker
Age Concern England
Symposium Chair
May 2006

Session 1 - Age Discrimination: experiences and definitions

Paper 1 The personal experiences of age discrimination by older people in the European Union

**Presenter Geert Decock , Secretary, Anti-Discrimination Expert Group,
AGE, the European Older People's Platform, Belgium**

Geert Decock began by pointing out that whilst legislation combating racial discrimination covers employment and the area of goods, facilities and services, legislation combating age discrimination has been limited to employment. He argued that this separation does not make sense in the real world of older workers and older people.

Age discrimination in employment

Recruitment

Employers frequently use three different types of age limits: straightforward chronological age, age banding (not older or younger than a given age) or age grouping (young and dynamic, junior etc). This has been successfully challenged in Lithuania and in Ireland.

Indirect age discrimination occurs if an employer requires applicants to meet certain conditions unrelated to the demands of the job but which were disadvantageous to an older person, such as being required to take a health or physical endurance test.

Access to vocational training

Many companies limit training for employees over a certain age on the basis that 'return on investment' in the years before retirement goes down and that productivity of workers goes into decline as they age. In fact employers frequently cause this decline in productivity of older workers by deciding it is not worth training, promoting or motivating older workers because of the nearness of retirement.

Human resources policies

Age discrimination legislation is in place in most EU countries though in European legislation 'age' is not defined and thus differential treatment on the grounds of age can give a better deal to older people and be discriminatory towards younger people and vice versa. For example in the Netherlands, a company whose policy granted special benefits to people on the basis of their age and length of service was found to be discriminatory.

Employment and working conditions

Many people are forced out of work due to their age. Practices such as the FIFO system (First In First Out) or LIFO system, (Last In First Out) and mandatory retirement ages, whether state or employer imposed, all discriminate on the grounds of age.

Whilst most people are against raising the state pensionable age, many older workers feel that fixed retirement ages should be a thing of the past, and they should be able to decide for themselves when and how they retire.

Seniority-based pay scales are explicitly mentioned in EU legislation and could be considered age discriminatory as they are biased in favour of workers with a longer length of service. The Dutch Equal Treatment Commission found that a company which rewarded seniority in its company pension scheme could find other less discriminatory ways of rewarding long standing employees.

Geert Decock suggested however that it was reasonable for discrimination in favour of older workers to take place where employees, having done strenuous work over a long period of time, were allowed to reduce their working hours or move into another less strenuous position. Not allowing for that possibility would amount to a form of indirect age discrimination. Further consideration also needs to be given to what extent age-related reduced capacity can be regarded as disability.

Harassment and discrimination by association

EU legislation defines harassment as conduct which takes place with the purpose of violating the dignity of a person and of creating a hostile work environment. This might occur if there is pressure on an older employee to retire to make way for a younger one.

Discrimination by association (not covered by the current EU legislation) is discrimination that is experienced by a person, because of the characteristics of another person with whom the employer closely associates him or her. For example an employer might refuse to hire an older person if he or she is caring for an elderly parent.

Age discrimination in employment in Australia and the United States

Age discrimination is not unique to the EU. For example, Australia's Human Rights and Equal Opportunity Commission's report *Age Matters: a report on age discrimination (2000)* devotes nearly 50 pages of the 120-page to age discrimination in employment.

In the United States, the Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age.

Age discrimination in access to goods, facilities and services

Geert Decock then moved on to his second major area and drew attention to an AGE report (2004) *Age Barriers: Older people's experience of discrimination in access to goods, facilities and services*. This identified a wide range of areas of reported discrimination and inconsistencies in practice between EU Member States.

He identified the following areas:

Education

In many countries there is an age limit for the receipt of student loans as well as in access and cost of education at other points. The Dutch Equal Treatment Commission ruled that a higher fee for university students above the age of 30 is in breach of the law on Equal Treatment on the grounds of age in employment.

Health care

Free breast screening in many EU countries is targeted at specific groups of women at a higher risk by making use of chronological age or age banding though evidence from Denmark shows more incidents per screening are found amongst older women than younger women.

In Belgium, older people have their orthopaedic shoes replaced more often than younger people. In France, Slovenia and Belgium older people, sometimes as young as 50, wishing to access dental and physiotherapy services are often refused private insurance or expected to pay significantly higher premiums.

Finally across Europe there is a significant lack of gerontological expertise especially in many of the new member states such as Lithuania, the Czech Republic, Latvia and Slovakia.

Biomedicine and clinical trials

AGE members from the UK looked at 20 out of 194 clinical trials testing treatments on the Cancer Relief UK website and found that only six did not have some form of age exclusion.

Insurance

In the UK, unlike other EU countries, insurance when booking train tickets is only available for people under 75. In Belgium insurance companies cancel the policies of older drivers involved in an accident even if they were not responsible for the accident. In Germany, two insurance companies refuse to sell motor insurance to people aged 60 and over and others limit it to people under the age of 80.

Financial services

Credit is generally not available for people aged 65 and over in Lithuania and the Czech Republic or 70 and over in Germany whilst in the Netherlands some companies refuse new credit cards to people aged 70 and over. The Lithuanian Equality Body has found in favour of a 65-year-old pensioner who was denied access to consumer credit on the basis of his age.

Volunteering

In Germany, there are age limits of 60 for some leisure activities like participation in choirs. The Lutheran church does not welcome volunteers aged 62 and over.

Access to public spaces, transport and modern technologies

The needs of older people are rarely considered in the design of public spaces, means of transport or mobile phones or computer software. Some of the new automated telephone systems are difficult to use but banks in Sweden now charge 5 Euro for access to a personal operator.

Political involvement and civic participation

In Belgium, Slovakia and Germany, political parties have attempted to remove older politicians aged over 50 in favour of young and dynamic new faces.

Multiple discrimination

Geert Decock pointed out that older people all have multi-faceted identities, being black or white, gay or heterosexual, male or female or disabled and thus may be the target of multiple discrimination. Thus any measure aimed at tackling age discrimination must integrate the other dimensions too.

Conclusion

In his concluding remarks, Geert Decock expressed the view that age discrimination is widespread because age is difficult to conceal, easy to check and age limits are simple to administer. Age limits exist in every field of society and there are also unwritten prejudices about age, which affect the way people are treated.

Reasons for the imposition of age limits are varied. They may be used to protect a particular age group, for reasons of cost-effectiveness or to limit risks. Such limits fail to take into account differences between older people and their life expectancy.

Many age limits are based on the assumptions that there is a standard course of life but the fact is that ageing is a very individual process. People over 50 make up a large, growing and diverse section of the EU's population. Age limits will continue to be used, but AGE - the European Older People's Platform - wants to question the discriminatory nature of some of the age limits in order to guarantee the right of older people to equal treatment, regardless of their age.

Discussant *Mark Gorman, HelpAge International*

Mark Gorman responded from a developing world perspective but pointed out that there were great differences between individual developing countries. However, he was particularly interested in the idea of all citizens bearing rights as this was quite a new concept in developing countries.

In poorer countries, age discrimination is not identified and in general, there is no legal framework. Employment law is relatively underdeveloped but where regulation does exist, it is often discriminatory, for example mandatory retirement ages.

Discrimination is also widespread in access to goods and services; an example was given from Bangladesh where credit loans are informally restricted by age.

Ageism and stereotyping influence attitudes which affect the way decisions are taken and resources allocated. The two main concerns of older people in developing countries are health care and material security.

Health is often not free at the point of delivery, and even if there are exemptions from charges, many people are unaware of their entitlement or cannot claim them.

Discrimination occurs as hard-pressed officials manage demand with scarce resources.

Older people are marginalised and often seen as a waste of resources especially in health and medicine. For instance, UNAIDS does not collect data on infections of people over 49 years.

Material and physical security is a major concern. Harassment of older people in the workplace is less of an issue than in the community. Older people, particularly older women, experience abuse from their families, public officials and their communities. This ranges from denial of their inheritance rights, which can lead to abandonment of the elderly relative, to charges of witchcraft.

Even where protective laws exist, older people are often unaware of their rights, but more likely they are reluctant to bring cases for fear of reprisals and lack of resources. Even if the case is won, harassment does continue, as was shown by an example from Swaziland. Public attitudes must be changed by involving older people in decision making and dispute resolution.

A framework for rights and citizenship is already part of the development debate and age could be brought into it, though the obstacles are numerous. Even the concept of citizenship is problematic with some groups, such as migrant workers.

Access to information will continue to be a key factor in development issues. Developing countries are leaping forward in communications, especially with mobile phones and radios, though access to technology is another barrier for older people, but it will provide another opportunity to engage them with the debate.

Paper 2 Defining Age Discrimination

Presenter *Colm O'Cinneide, Faculty of Laws, University College London, a member of The European Network of Legal Experts*

Introduction

Colm O'Cinneide introduced the topic by noting that age discrimination law represented a natural extension of earlier anti-discrimination legislation relating to sex and race. There had been relatively little public debate except where it linked to mandatory retirement or raising the retirement age. Age discrimination cases are likely to form a significant percentage of all discrimination cases brought before the courts in future. Banning unjustified age discrimination is more complex than banning discrimination on grounds of race or sex because of the number of exemptions that might be argued to be justifiable.

Why ban age discrimination?

There are two particular arguments for banning age discrimination which should be distinguished as they can lead to significantly different approaches to the framing and application of legislation. The first is essentially a human rights approach which sees irrational prejudice and stereotyping on grounds of age as a fundamental infringement of human rights and dignity. The second is a socially utilitarian goal of removing obstacles to greater participation in the labour market which, if achieved, would lead to many socially desirable consequences. Both are valid arguments but *what* is defined as age discrimination and *how* it is defined may depend upon which argument is given the greater emphasis.

Age discrimination as a violation of rights

The first justification focuses upon the unfair use of age as an arbitrary and stereotyping tool for making distinctions in employment. Age is used as a 'proxy' for other characteristics so that younger people may be assumed to lack maturity and judgement whereas older people are assumed to lack flexibility, motivation, reliable health and ability to absorb new ideas. However, the available evidence suggests that up to the age of 70 at least there is no deterioration of performance with age except in a very limited range of jobs. Broad assumptions made across a particular age group do not take account of individual differences. When individuals are subject to discrimination as a result of age-based stereotypes, then it can be argued that

their rights to equality and dignity are violated and their individual qualities are subsumed within the (often demeaning) stereotype. This view defines age discrimination as involving a denial of basic human rights.

Age discrimination defined as a social problem

This justification employs more utilitarian arguments. When people are denied access to work on age grounds they suffer social exclusion and high levels of poverty which in turn impose substantial economic and social welfare costs upon society at large. Wider social and economic factors such as the decline of traditional industries and the obsolescence of certain types of skills meant that by 1997 three out of five people in the active 55–60 age group across the EU had left the labour market. The UK Employers' Forum on Age has argued that ageism in employment costs the UK £31 billion every year in lost production, and that 'improving labour market participation rates, particularly among the over-50s, is key to maintaining the UK's productivity, wealth and standard of living.'

Taken together, this 'social exclusion' rationale and the principled 'equality' rationale provide powerful justification for age discrimination legislation.

Why age discrimination is different

Age discrimination legislation differs from sex or race discrimination legislation where very few exceptions are allowed and those only in clearly defined circumstances. The question of what should count as a justifiable exemption is indeed one of the most difficult areas of age discrimination law.

Positive action

Age may have to be used as a proxy to identify appropriate recipients of particular forms of social security. The UK government has introduced vocational training and employment schemes for long-term unemployed people aged under 26 and over 50, groups which are particularly disadvantaged in the labour market.

Mandatory retirement

Mandatory retirement is illegal in the United States, Australia, New Zealand and in certain Canadian provinces. Elsewhere, the use of mandatory retirement is justified on three grounds: the phasing out of high-paid older workers, organisational planning

and the importance of opportunities for young people. Nevertheless compulsory retirement ages constitute straightforward discrimination on the grounds of age.

Age-linked characteristics

Characteristics such as 'seniority', 'maturity' and 'experience' are used as differentiating factors but may be indirectly discriminatory. These are not linked directly to a person's age but an older person is more likely to have acquired them than a younger person. It took nearly forty years of litigation in the US to establish that the Age Discrimination in Employment Act covered indirect discrimination.

'Open' and 'closed' approaches

An 'open' approach would enact legislation which allows for exceptions which are 'necessary' or 'justified' but leave the courts to define in individual cases what constitutes a 'necessary' or 'justified' exemption and thus, build up case law.

A 'closed' approach would define a range of circumstances in which the use of age-based criteria was automatically deemed to be justified, offering much greater certainty to employers and reducing the scope for court cases.

'Half open' approaches seek to have the best of both worlds. Some exceptions are written into the legislation, providing a measure of clarity in some areas but leaving room for argument in others.

'Rational' versus 'necessary' standards

Whichever approach is adopted, the question remains as to the standard of justification required. Does the justification have to be that the distinction is *necessary*, or is it sufficient to argue that the distinction can be justified as *rational*?

Scope

Finally there is a crucial question about the scope of age discrimination legislation. Should it only apply to employment or should it cover access to services such as health care, housing, transport and essential goods? A rights-based approach would certainly suggest the extension of legislation into these areas as they affect the dignity of the person. The experience of Commonwealth countries and Ireland in extending legislation into these areas shows that it can be effective in combating in-built age prejudice.

The provisions and scope of the EU Equality Directive

The Directive establishes a general framework for prohibiting discrimination in employment on the grounds of age, disability, religion or sexual orientation and its general provisions apply across those four grounds of discrimination though there are some special provisions relating to age. The Directive therefore adopts a rights-centred approach to age equality issues just as it does to other equality issues. Member states are obliged to implement the Directive in their own legal systems.

The Directive does not define 'age' so, both younger and older workers have rights to age equality. However, it does contain some limitations as to its scope. It does not apply to state social security and social protection schemes nor retirement ages.

This exemption does not apply to benefits, including occupational pensions, provided by employers, even if they are public bodies, and does not give employers the right to impose mandatory retirement ages without proving justification. However, member states can introduce special exemptions to allow occupational security schemes to define ages when employees are entitled to retirement or invalidity benefits. The Directive does not apply to the provision of goods and services.

The definition of direct discrimination

This is defined as occurring where someone treats one person less favourably on the grounds of his or her age than he or she would treat other persons in a comparable situation, and there is no objective justification for doing so. Difficulties are likely to arise in finding suitable 'comparators' and in establishing age as the material fact, separated out from characteristics such as maturity, seniority and experience.

Justification

The Directive deems age distinctions to be justified in three circumstances:

- a) when being of a particular age is a genuine and determining occupational requirement for a particular post;
- b) when a member state has provided that the use of an age distinction is objectively and reasonably justified 'within the context of national law' as a proportionate and necessary measure to attain a legitimate aim;
- c) when a person is subject to what would otherwise constitute indirect discrimination on the grounds of age, but the application of the provision, practice or criterion in question is justified as objectively necessary and proportionate.

In all three circumstances, any age distinctions will have to be shown to satisfy three requirements: that they are a) objectively necessary to b) achieve a legitimate aim, and c) that they have been applied in a proportionate manner.

The EU Directive is framed in clearer terms than many earlier examples of age discrimination legislation. Nevertheless there is still a danger that utilitarian considerations will slip into how age discrimination is defined in national jurisdictions, in spite of the rights-based approach of the Directive.

The UK Draft Regulations

The UK has largely adopted a permissive approach that makes full use of the exceptions allowed in the Directive. In so doing it has taken the 'half open' approach. Thus the UK Age Regulations will contain specific exemptions in the following areas:

- pay and other employment benefits;
- pay related to the national minimum wage;
- acts under statutory authority;
- retirement; and
- occupational pension schemes.

Conclusion

Defining what constitutes age discrimination is a complex process involving questions of scope, clarity, justification, positive action and other difficult questions. Defining how age discrimination laws should be applied is also complex. It has been argued here that a rights-based approach offers the best way forward but national approaches oscillate between this and a utilitarian focus which is generally more permissive. It is also true that a much greater emphasis has been placed on employment than other areas of activity.

Discussant: Konstantina Safilou-Rothschild, Sextant, Greece, Vice-Chair, AGE Anti-discrimination Expert Group

Konstantina Safilou-Rothschild expressed concern about the way that legal provisions enacting legislation against age discrimination were including a wide range of exemptions and allowing continuing justification of age discrimination in areas of crucial importance to individual older people, such as in the area of mandatory retirement.

She compared this situation with legislation and action against gender, race and disability discrimination and argued that it would be unacceptable to create exemptions and justifications in such critical areas for these groups within society.

She argued that a crucial difference between age discrimination on the one hand and gender and race discrimination and discrimination against the disabled on the other is the lack of a powerful and vocal movement of older people in the majority of countries of the world, who were clearly articulating their concerns and rejecting age discrimination they experienced. Age discrimination is therefore defined by governments and lawyers in relatively complex terms, and is subject to counter pressures from employers and service providers. In these other areas, the women's, anti-racist and disability movements have been able to clearly articulate the nature of gender discrimination, to place considerable pressure on governments and institutions and to lobby for the right kind of legislation.

In most European countries, people over 50 are not still effectively organized and because of this are not able to articulate their own experiences of age discrimination and to put pressure on legislators and implementers. Instead, she argued, the definition of age discrimination is left in the hands of Governments, lawyers and judges who seem to create more difficulties, uncertainties and confusion than is necessary or useful, and it remains the case, therefore, age is used as a criterion for employment decisions it is can be justified in a wide range of areas that this does not constitute age discrimination. She argued that few people would feel comfortable to make such statement or legal provisions in the area of gender since such discrimination is now considered to be practically 'immoral'.

She argued that the real motivation in Europe behind the current Directive has been largely economic – with concern about the cost of unemployment compensation and welfare for the continuously growing older age group - and the real concerns of the

European Union remains on the employment situation of younger people. This is illustrated by the fact that legislation concerning age discrimination in goods and services is not being prioritised because of fears that health care for older people is very costly and that should they receive protection from discrimination that this would overburden available facilities. Instead, it is widely documented that rationing of health care services for older people continues to take place in many European countries.

She argued that age equality cannot be realised until mandatory retirement age limits are abolished, but the European Union and many member states hesitate to make this change despite its desirability because demographics in Europe render pensions very expensive. This is even rejected in a context that experience in the US has shown that only a small percentage of people (around 15%) choose to continue working after 65 and arguments that the abolition of mandatory retirement would block the entry of younger people into the labour force cannot be sustained.

She concluded by arguing that age is not a good proxy for the characteristics and capacity of individuals, and that the retention of the use of age in law and policy will prevent the achievement of age equality. Ultimately the principle that people cannot and must not be judged on the basis of their age, or the age cohort in which they belong, but according to their own individual characteristics, ability, performance and productivity is the only way of achieving age equality. This needs to be clearly articulated by older people and people of different ages and, as society ages and the older population becomes more powerful and diverse, the use of age to restrict opportunities will need to change.

General discussion

Points raised included:

- Trade unions had fought for lower retirement ages and better holidays. The Swedish parliament had been accused of breaking the ILO convention as it raised the retirement age to 57.
- A simple definition “the notion that people cease to be the same people, become inferior because of the number of years”
- With the absence of an older people’s movement, we would need to look to the trade unions to monitor and highlight the issue. It was important for older people’s organisations to define what they wanted from the legislation, and from positive action.

Session 2 Age discrimination and its wider context

Paper 3 Individual rights and social solidarity

Presenter *Robin Allen QC, Joint Head, Cloisters Barristers Chambers, UK*

Age profile as a factor in social solidarity

Robin Allen began by pointing out that achieving social solidarity in the age context has historically been easy. Being old, has been a qualification for special programmes of social protection such as state pension payments, winter fuel payments, and discounts on services. The rationale is that older people are disadvantaged vis-à-vis other age groups and are deserving because of their past contribution and current position.

Enhanced longevity is putting pressure on pension and health schemes. Entitlement was never questioned before but now we are beginning to compare the assistance that older persons *deserve and need* with the assistance that other age groups *deserve and need* in what is a new demographic and economic reality.

What is this new reality? Across Europe there is a rapidly changing national age profile. This is described in the European Commission's Green Paper *Confronting Demographic change: a new solidarity between generations*. In summary the paper observes that as the population falls and longevity increases, there will be ever fewer younger people, and ever more pensioners and very elderly people. This major change in the economic balance between older and younger people has the potential to cause a breach in intergenerational solidarity.

He illustrated this by looking at future funding of pensions which give rise to a number of issues of social solidarity, such as rates of tax, increasing working lives and encouraging change without social upheaval.

A further factor to be considered is the increasing divergence of circumstances within age cohorts with varying levels of income and wealth, health status, skills and opportunities.

The economic burden on younger persons

The EC Green Paper discusses the need to increase economic productivity so that the imbalance in age cohorts does not place too high a burden on younger people in terms of supporting older generations. In summary it concludes that there are an increasing number of people living longer who will have increasing needs associated with their longevity. They will be dependent on fewer young people for the funding (and obviously also for the physical provision) of those benefits whilst young people will find it hard to shoulder this burden.

Rebalancing?

He suggested that in Europe we can continue to increase the range and depth of social protection rights based on age but we cannot ignore the fact that it all depends on younger people taking up the burden of that provision.

Improved systems of legal protection for all ages would be not only an issue of economic good sense but also of fairness. We must neither ask younger people to shoulder burdens without thinking through the balance of rights nor must we remove necessary social support from older people without recognising the effect on the lives of key segments of that section of the population.

Robin Allen therefore moved on to consider current anti-discrimination laws and how they need to be developed in order to contribute to the increasing change in the relationship between and within generations.

The equal treatment principle

European anti-discrimination law in the field of social policy is largely based on the principle of equal treatment. The basic underlying concept of discrimination is that persons in the same situation, should not be treated differently, and those in different situations, should not be treated alike, without some objective justification. There is direct discrimination when a person is treated less favourably on a protected ground, or indirect discrimination where persons in a particular category are disadvantaged by a provision criterion or practice proportionately more than those not in that category. All this depends however on a concept of 'the same situation'.

A new comparison, a deeper view of equality

Until very recently, apart from issues in relation to retirement ages of men and

women, the equal treatment principle had little to do with a comparison of the position of older and younger people since the situations of old and young were seen immediately as different and so not comparable.

Yet Robin Allen considers that policy makers in making the various different kinds of special protection were thinking about the problems of older persons from an equality perspective, if not one of equal treatment. They were trying to address what were seen to be deeper issues of 'substantive' equality.

The new framework employment directive

Legislation in relation to age equality in employment and occupation in all member states must be in place no later than 2 December 2006. Direct and indirect discrimination and harassment in relation to employment and occupation are made unlawful. .

Full equality in practice

Within the Directive, there is one provision which goes beyond equal treatment. This is the concept of 'full equality in practice' in Article 7. By this Article Member States are *only* permitted and *not required* to adopt specific measures for full equality in practice. Where they do they must prevent or compensate for disadvantages linked *inter alia* to age, provided that the rationale for such 'positive action' is that it is with a view to ensuring 'full equality in practice'.

Behind this concept lies a simple but subtle three part point of the profoundest importance for addressing fairness, equality and non-discrimination rights. In essence the European Council has recognised that (a) Member States will want to and should seek to ensure full equality in practice, (b) the equal treatment principle by itself will not or may not secure full equality in practice, and (c) this is likely to require specific compensatory or preventative measures. Sadly the European Council failed to make this analysis mandatory, and to work out how it inter-relates with the principle of equal treatment and as yet there is little jurisprudence of the Court of Justice as to what 'full equality in practice' means and entails.

Last summer the European Court of Justice held that the aim of a similarly worded provision in what is now Article 141 EC (ex – Article 119), concerned with gender pay equality, was true *equal opportunity*. It was there to achieve *substantive*, rather than formal, equality. This was to be achieved by reducing those *de facto* inequalities

which arise in society and, thus, to prevent or compensate for *disadvantages* in the professional career of the persons concerned.

In fact in relation to discrimination on those grounds which have had protection for the longest – sex and race – comparatively little has been done to secure substantive rather than formal equality by reducing those inequalities which arise in society. An analysis based on what was necessary for full equality in practice would lead to a more thoughtful consideration on intergenerational differences and also on differences within cohorts.

Challenges to substantive equality for older persons

He illustrated this with reference to the litigation concerning *Eastleigh Borough Council* which granted special benefits for access to its swimming pool on the basis of pensionable age in the UK – which was of course different for men and women. *Eastleigh* thought that pensionable age was a good indicator of the change in the economic status of users and therefore justified the cheap rates.

After protracted litigation, the House of Lords (the supreme court in the United Kingdom) held that this was direct sex discrimination since men and women had different pensionable ages. Yet *Eastleigh*'s goal – substantive equality – was plainly laudable for Eastleigh recognised that men and women are not similarly situated economically and therefore required different treatment in order to achieve equality in a deeper sense.

Furthermore, *Eastleigh* recognised – at least implicitly – that age and gender issues are very closely associated. What it lacked was the legal framework, to deal with the overlap between gender and age when addressing issues of substantive equality. Whilst there has been some consideration of this issue elsewhere the European Union, it has not yet addressed it in any legislation.

Reconciling the pursuit of full equality in practice between different age groups with the equal treatment principle

The *Eastleigh* case may be taken as a paradigm of a wider issue. Will the pursuit of substantive equality – full equality in practice – for different age groups founder on claims of discrimination on other grounds? In *Eastleigh* the problem was resolved on

the equal treatment principle by stating that either women must get the benefit later or men earlier.

However this is not just an issue of a conflict of gender rights and age rights. Conflicts between different equality rights might arise. For instance the health care needs of different ethnic groups may differ very markedly – in the United Kingdom this is particularly so in relation to those of Pakistani and Bangladeshi ethnic origin. It is also generally accepted that health care needs rise with age. If it were decided that it was appropriate in a particular specialty to increase the provision of a particular form of health care according to an age rule it might be argued that this benefited non-Bangladeshis and Pakistanis most, since the needs of Bangladeshis and Pakistanis tend to arise at an earlier stage. This would be potentially indirect discrimination but potentially justifiable.

If however, the policy was to provide a health screen specifically for Pakistanis and Bangladeshis of a particular age – a policy which would be aimed specifically at their substantive needs – it would be unlawful direct race discrimination under domestic law and unjustifiable. If we had a law against age discrimination in the provision of goods and services this policy would also be unjustifiable direct age discrimination.

Thus the problem lies in the fact that no justification is possible on substantive equality grounds if the correct analysis is that an age-based rule is a breach of the formal equality at the heart of the equal treatment rule because it is direct discrimination.

What is needed?

The major challenge is to consider two key legal/policy questions: should the overlaps between different groups who are protected from discrimination be addressed in the future, and how should the goal of substantive equality - full equality in practice be achieved?

The new settlement between older and younger people depends in part on this taking place. Key questions are firstly why should older people get many and varied extra benefits without due consideration to the position of younger people whose work must in part pay for or provide? Secondly how can we create a legal framework which recognises the different transitions which people go through during life and the

diversity within the various population groups with some older and younger people being differentially wealthy and poor, healthy and sick and so on?

Social solidarity is based on both limbs of the concept of equality. The equal treatment principle can deal with formal equality, with discrimination whether direct or indirect, but it does not always achieve full equality in practice. We need a mechanism for resolving tensions.

So far older generations have benefited in terms of social protection most as they are seen as the most disadvantaged group. But some younger persons may become increasingly disadvantaged, whilst some older people will control large estates and incomes.

Moreover there will be places where different forms of disadvantage intersect. There will be immigrants who form a special subdivision of a cohort; there will be gender differences within cohorts. Substantive equality can therefore only be measured by reference to the burden it imposes on others.

Robin Allen believes that we must accept that equality between the ages in the distribution of goods, facilities and services is needed. Benefits should then be subject to a rigorous analysis both under the principle of equal treatment and with a view to achieving substantive equality. However substantive equality is an assessment which is intergenerational and does not ignore the impact one generation has on the next. Thus the pursuit of equality must look comparatively and substantively across a broad spectrum of reasons for disadvantage.

Conclusions

He concluded that it is much better to seek to mould the debate to our own ends now rather than to stand by relatively passively. The position of bodies like AGE as informed commentators on these issues is really important. The pursuit of equality in relation to age matters cannot be left solely to those who are in the older age groups or it will be seen as one sided. The test for any new rights is how they will secure greater cohesion between and within the different age cohorts. Overall it requires that employment and occupation, *and* goods, facilities and services should all be subject to scrutiny to see how full equality in practice can be achieved.

Discussant: Anouk Mulder, Senior Adviser, Expertisecentrum Leeftijd, Netherlands

Responding to the paper, Anouk Mulder welcomed both the analysis of the deficit of the current legal model and the proposal to introduce the notion of substantive equality into the debate on age discrimination. She supported the need to re-examine and be highly rigorous in the underlying notions of age which are used as the basis of policy and recognised that current policy discussion includes each of the three definitions advanced by Robin Allen, often without precision. She also recognised that, in an increasingly diverse population structure and with a growing focus on questions of intergenerational solidarity, that we needed to consider actively cases of age discrimination which both advantage and disadvantage particular sections of the population and be clear about how and when these can be justified.

She set out how this context introduced substantial challenges for the debate on age discrimination and how the notion of substantive equality may mean that some differences in treatment for different age groups will be justifiable if the outcome of the difference in treatment is fair and equitable, and also suggested that there will be the possibility of change within specific policy prescriptions as demographic and socio-economic circumstances change. For example, the role and targeting of social protection systems may change as the balance and needs of the population change. She highlighted how in Sweden these notions are beginning to be put into practice with the use of age pivots in the context of flexibility of pension entitlements and the life expectancy of cohorts.

She also commented on the need to recognise that substantive equality would mean the need to look carefully at inequalities within age cohorts, given the large and increasingly diverse ranges of wealth and income within age cohorts.

She wondered how this debate would create challenges for the age sector. Experience of direct and indirect age discrimination are clear and unjustifiable against older people and need to be addressed. It is also the case, however, that the level of debate within the sector about age discrimination needs to recognise complexity and seek to create equality for people of all ages. She felt that age equality would only be achieved if it was done so within a broader context of equality and that achieving this should be the subject of further discussion.

Paper 4 Age, equality and citizenship

Presenter Niall Crowley, Chief Executive of the Equality Authority of Ireland, Republic of Ireland

Introduction

Niall Crowley said he aimed to look at combating age discrimination drawing from the Irish context and the experience of the Equality Authority. He would look at this in the context of a wider equality agenda which covered the nine grounds of gender, marital status, family status, disability, sexual orientation, race, religion, membership of the Traveller community and age.

A strategic Framework for Action on Equality

The *Programme for Prosperity and Fairness* put into place a strategic framework for action on equality which involves a vision for a more equal society that incorporates the nine grounds covered by the equality legislation, equality objectives that draw from this vision and seven core dimensions through which activity can be developed: legislation, institutions, targeting, mainstreaming, participation, agenda setting and monitoring.

Vision and objectives

The Equality Authority's vision for equality covers the following four domains.

- Economic - a focus on redistribution and equality in access to jobs, income and social goods such as education, health and accommodation.
- Political - a focus on equality in access to decision making, to shaping one's society, one's local community and the institutions and organisations a person might be involved in.
- Cultural - a focus on equality in access to status with a valuing of difference and identity
- Caring - a focus on relationships and moving away from relationships of abuse, and accessing relationships of care, solidarity, respect and trust.

Having set out the vision and objectives, Niall Crowley moved on to examine developments in the core dimensions.

Legislation

In Ireland the Employment Equality Act prohibits discrimination in the workplace and the Equal Status Act prohibits discrimination in the provision of goods and services, education and accommodation. Both Acts cover all nine equality grounds and prohibit discrimination, defined in terms of less favourable treatment, indirect discrimination and discrimination by association.

Harassment and sexual harassment are prohibited. The only positive duty is for employers and service providers to make reasonable accommodation for people with disabilities - unless these would impose a disproportionate burden on the employer. The legislation also prohibits victimisation and both Acts contain a broad range of exemptions including a number that make specific reference to the age ground.

The Equality Authority has also recommended the inclusion of four further grounds- socio-economic status, political opinion, trade union membership and criminal conviction.

However this equality legislation is adversarial and depends on the commitment of the individual to bring forward a claim for discrimination. .

Institutions

The Equality Tribunal receives most initial claims and can mediate, investigate, hear and decide on claims of discrimination, make financial awards or orders for action to be taken by the employer or service provider. There is concern both at the backlog of cases and at the low level of awards partly as a result of decisions but also because of maximum levels set out in the legislation.

The Equality Tribunal has an investigative function so that there is no onus on complainants or respondents to marshal or present complex legal arguments; there is no risk of costs being awarded and it also allows trade unions and community organisations to support claimants.

The Equality Authority has a mandate both to promote equality of opportunity and to combat discrimination - an enforcement role and a developmental role. Its broad range of functions and powers include providing information to the general public on the legislation, providing legal advice and representation at its discretion in cases that

have a strategic importance, preparing codes of practices that if approved by the Minister can be used in cases under the legislation, commissioning research and conducting reviews and inquiries.

It has developed an integrated approach to equality working at three levels.

Multi-ground work involves bringing forward simultaneously within an initiative all nine grounds covered by the legislation.

Single ground work is focused on a single group. For example the Equality Authority convened an advisory committee to produce a report on implementing equality for older people.

Cross ground work acknowledges the diversity within groups such as older people and challenges all groups to develop a mutual solidarity. Successful implementation of the equality legislation requires a wider advocacy contribution in particular from community organisations; there is a challenge to older people's organisations to take on advocacy roles and a need for funding to enable them to do this.

Targeting

Positive action is necessary if equality for older people is to be achieved. Provision for the general population should include and benefit older people without risking the segregation of older people.

A major concern relates to enforcing standards in services targeted at groups that are powerless such as those in long term care settings.

In the Irish context there has been little progress in establishing rights to targeted provision and the emphasis has been on eligibility rather than entitlement. Equality legislation could usefully be evolved to develop a rights basis, particularly in relation to key community care services. It is also important to identify issues that relate to the inadequacy of funding allocated to targeted measures.

Mainstreaming

Targeting without mainstreaming can generate segregation. Mainstreaming without targeting fails to address the legacy of discrimination and to bridge the gaps that such a legacy has opened up between older people and other groups in society.

Mainstreaming involves decision making processes that ensure that all policies and programmes contribute to equality objectives and to equality for older people. The Equality Authority has developed a voluntary approach to equality proofing with the

key test of a new policy or programme being its capacity to accommodate diversity across the nine grounds covered by the legislation.

The Equality Authority has pointed to the need to develop a legal requirement to equality proof so that the process can be sustained long term and also applied within the private sector.

Participation

Niall Crowley saw it as important to ensure a hearing for the voice of groups such as older people that experience inequality. This is a key source of information and knowledge as well as a key means to defend and progress the interests of the group. It contributes both to the achievement of equality objectives and to the quality and democratic legitimacy of decision making.

Involvement by organisations of older people expands their focus from an earlier concentration on service provision to include an emphasis on advocacy and negotiation. They require funding and new approaches to governance and participation.

Agenda Setting

The Equality Authority brought together equality organisations, social partners and statutory organisations to negotiate a set of recommendations for implementing equality for older people. The report made a broad range of recommendations covering areas such as legal status, use of age limits, participation in policy making, work, income, health and community services and lifelong learning.

There was concern that: the diversity of older people would not lend itself to a single agenda or strategy and that the exercise might end up posing older people as victims. These fears highlight issues such as a low level of shared identity as older people among older people and a low level of confidence in making a case for change.

Some emerging themes

Casework About 10% of Equality Authority case files under both Acts relate to the age ground. Under the Employment Equality Acts these cases relate almost exclusively to older people whereas under the Equal Status Acts there is a balanced mix of older people and younger people.

Within the employment arena the alleged discrimination relates to recruitment, promotion and job advertising; in the provision of goods and services it relates to insurance, licensed premises and public sector provision.

Some of the practices that flow from ageism include the use of age limits to exclude older people, segregation of older people, negative attributes towards chronological age and a failure to take account of the particular situation, experience and aspirations of older people when decisions are being made.

Multi-ground approach The Irish equality legislation has been a remarkable development. It is simpler for employers and service providers to implement an integrated multi-ground equality strategy rather than nine distinct equality strategies and avoids the need to prioritise. It allows learning between the grounds and a transfer of concepts, strategies and legal perspectives though it is acknowledged that some grounds may not achieve the same visibility as others.

Equality competence Partnership and joint ventures between the Equality Authority and key institutions have been a key means of developing equality competence within organisations. Equality competent institutions are non discriminatory, accommodate diversity and proactively promote equality through their systems and practices and have a commitment to equality and diversity training.

Conclusion

In recent years, there have been valuable developments in the strategic framework for action on equality in Ireland and at EU level and the core dimensions are now in place. It is now important to build an ambitious vision for equality and to reflect this in equality objectives. A new generation of equality legislation needs to be developed that includes positive duties on employers and service providers to promote equality alongside a prohibition on discrimination.

Finally it is important to sustain a focus on the effective implementation of equality legislation. There is a need to build and invest in advocacy roles to be played by trade unions and non-governmental organisations. Equally there is a need to ensure long term adequate resourcing of equality tribunals and specialised equality bodies.

Discussant: Gordon Lishman OBE, Director General, Age Concern England, Board member IFA, UK

Gordon reflected on the current debate in the UK on the creation of a single equality body and the difficulties of building cross-strand relationships. Age in general still has a low profile and the equalities' debate is dominated by the other grounds. Other equality strands need to understand the wider implications of age discrimination and there is much to be learnt from the Irish experience.

Underlying much of the discussion on discrimination is the assumption that age is not quite as bad as other forms. However, in the UK, discrimination on age grounds kills more people earlier than any other kind. Assumptions made about age lead people to be denied treatment and so shortens lives.

In the economic field, restrictions on working in later life affect disproportionately those who need to work, particularly older women, and so condemns them to poverty in later life.

A multi-ground approach becomes very important once a wider perspective is taken of age discrimination.

Gordon also discussed the perceived threat to our social models of increased demand for care services, from growing numbers of older people. Some countries, such as the US, relied on migration to increase the labour supply; this may not be an acceptable solution in Europe. Although one solution is for older people to work and contribute to the economy, there is an even greater issue of demand. He described how supply and demand can work within our changing demography to benefit our now global economies. A larger population of older people could create a world market for goods and services which in turn would stimulate the production to meet this demand.

General Discussion

There was further discussion on the tension between social solidarity and individual responsibility and rights. Points raised were:

- How to enable older people to maintain spending power to keep younger people in work.
- The continuing demand for greater need for resources for health and care.
- Life course policy is not social solidarity; it brings the burden back to the individual.
- Immigration is used in some countries to provide social care. What happens as the immigrant communities become older? Will immigrants return to their own countries and if so how what will be the effect to the host nation of such a reduction in social security contributions?
- The decline in the number of younger workers is declining as people postpone entry into the labour market.
- The US has laws which relate to all people but they do not provide social solidarity so consequently people do not have investment in those laws.

Session 3 - Ensuring and embedding long term change

Paper 5 From research to legislation: challenging public perceptions and getting results: Case study of the Ontario Human Rights Commission

Presenter *Keith Norton, Chief Commissioner, Ontario Human Rights Commission, Canada*

Introduction

Keith Norton's paper was concerned with the six year journey that the Ontario Human Rights Commission undertook to bring the issue of age discrimination and ageism to the forefront of public discourse. The Commission's efforts have ultimately resulted in a change in law that will now increase opportunity and choice for Ontarians over 65 in the area of employment.

The Ontario Human Rights Commission is the oldest and, by some measures, the largest statutory human rights agency in Canada. Its principal functions are set out in the Ontario *Human Rights Code* (the "Code") and include the promotion and advancement of human rights and the investigation, mediation, settlement and litigation of complaints.

Human Rights Legislation

In Canada the federal government, ten provinces and three territorial governments have anti-discrimination legislation. In Ontario, the *Code* protects against discrimination on the ground of age in relation to accommodation, goods, services and facilities, employment, contracts and membership of vocational associations. The other codes provide protection against discrimination in employment and apart from three of the provincesⁱ, all provide protection in relation to housing, goods and services generally available to the public.

Age was added to the Ontario code in 1972 and at first this focused on the protection of workers between the ages of thirty-nine and sixty-five. In 1982 this was broadened and there is a maximum age for discrimination, namely 65. There is no

upper limit on age in the areas of housing, goods, services and facilities, contracts and vocational associations.

Canada's 1982 *Charter of Rights and Freedoms* affirmed the equality before and under the law of every individual without discrimination because of age, among other grounds.

The *Code* also recognises the so-called "adverse effect", or "constructive" discrimination where although a requirement may seem to be neutral and non-discriminatory, it may nonetheless exclude, restrict, or prefer some persons because of age. The *Code* allows an employer to justify this by showing that it is a "*bona fide* or reasonable" requirement. At the same time, the *Code* allows for preferential treatment of persons sixty-five or older in for example seniors' discounts for goods and services or reduced rates for public transit.

Government Programs for Seniors

Keith Norton listed a number of programmes specifically directed at seniors, such as the National *Framework on Aging (NFA)*, the *National Advisory Council on Aging, Seniors Policy and Programs Database and Income Security Programs*.

Non-Government Advocacy

He then described some of the non-governmental organisations which play a significant role in driving cultural and attitudinal change towards older persons such as *CARP (Canada's Association for the Fifty-Plus)*, *The Canadian Centre for Activity and Aging* and *The Ontario Coalition of Senior Citizens' Organizations*.

Compliance and Promotion through the Human Rights Commission

Keith Norton indicated that under its mandate the Ontario Human Rights Commission can enforce as well as promote and advance human rights for older persons and others on the basis of age. He looked at a number of these functions.

Investigating Complaints, Mediation and Litigation

The Commission receives all complaints filed by individuals claiming an infringement of their rights and parties are offered first mediation and then investigation.

Where there is no resolution, the complaint is referred to the completely independent Human Rights Tribunal of Ontario for a hearing. Tribunal decisions may be appealed

by any party to a higher court and are sometimes appealed to the Supreme Court of Canada.

Most of the age complaints are workplace related. In the last five years, age was cited in approximately 7-9% of cases but it is very likely that many incidents of age discrimination, particularly in the areas of job seeking and accessing services such as health care, remain unreported.

Public Inquiry

The Commission has undertaken a number of inquiries and consultations over the years on a variety of important human rights issues involving race, disability and age.

Following the 1999 International Year of Older Persons the Commission developed an initiative to inquire into human rights issues in relation to ageing in the areas of employment, housing and goods and services. This involved three stages:

Discussion paper: In May 2000, the paper identified issues seen as problematic for older persons: stereotyping and negative attitudes, income, employment, housing, health care, institutions and services, elder care, elder abuse and neglect.

Public consultation: a paper was issued on *Discrimination and age: Human rights issues facing older persons in Ontario*. Over 100 written submissions were received in response and local consultation meetings were held.

Findings: the Commission launched its consultation report, *Time for Action: Advancing Human Rights for Older Persons* which presented its conclusions and recommendations. It covered all the topics in the original discussion paper and put forward twenty-nine recommendations for government and community action, including a recommendation to amend legislation and end mandatory retirement at age 65.

The report found that ageism persists as a problem in services and facilities. Myths and stereotypes impact on the level and quality of service available to older persons. Also, ageism results in the real needs of older persons not being taken into account, for example by designing public transit services without considering the needs of older users.

There seems to be more tolerance for age discrimination than there is for discrimination on other grounds such as race or sex.

Policy Development

Arising from *Time for Action*, in 2002 the Commission released a new *Policy on Discrimination Against Older Persons Because of Age*. It focused particularly on workplace issues, addressing myths and stereotypes about older workers and providing guidance for distinguishing age discrimination from legitimate, non-discriminatory decisions in key employment matters. It also clearly identified the responsibility of employers to create inclusive workplaces and to deal with circumstances where discrimination occurs.

At the same time, the Commission, in partnership with CARP, began a public awareness campaign on ageism and age discrimination in employment, health and housing. It targeted Ontario's seniors, employers, educators, service providers and the general public.

Advising Government and Other Institutions

Between 2003 and 2004, following the issuing of the policy, the Chief Commissioner worked to introduce legislation that would provide older workers with more flexibility and choice in the area of retirement, removal of a mandatory retirement age of 65 and provision of human rights protection in the workplace.

Monitoring and Reporting on Results

The initiative prompted an extensive debate on mandatory retirement. Two successive Ontario governments have proposed legislation to remove the age cap of 65 in the *Code*. The current Liberal government has proposed *Bill 211, Ending Mandatory Retirement Statute Law Amendment Act*, which will amend the *Human Rights Code*. It is expected that the bill will proceed through the legislature once the government resumes sitting in Autumn 2005.

Conclusion

The public is generally receptive to the Commission's comments on mandatory retirement since a significant proportion of Ontario's population is entering their 50s and 60s. The issue was ready to be raised and, in many ways, the Commission was a catalyst through its research, consultation, policy development, education campaigns, monitoring and public reporting. The general public has a better

understanding of the issues and governments and civil society are responding with positive change. Meanwhile, individuals who continue to experience discrimination because of their age can still rely on the Commission's complaints mechanism to help resolve matters.

Discussant: Yitzhak Brick, President, International Federation on Ageing, Israel

Responding to the presentation, Yitzhak Brick thanked Keith Norton for the scope of his presentation and for outlining the process of development of the work of the Ontario Human Rights Commission.

He reflected on the long term challenge that dealing with age discrimination represented and the importance of developing an evidence base, as had been the case in Ontario. He also highlighted the need for both political and legal action, but also for culture change activities, and that these were mutually re-enforcing.

He also highlighted the value of building a partnership between organisations working from different sectors and points of view to create a broad movement against age discrimination and recognised the role of both Government sponsored Equality agencies and non-Governmental organisations representing people facing discrimination. It was a challenge to both achieve the creation of equality bodies and to achieve high levels of organisation amongst organisations of older people and older people themselves.

As President of the IFA he committed the organisation to continuing to work to raise age discrimination as a key issue and to seek to improve the lives of people it effects.

Paper 6 Evaluating the outcome of action on discrimination
Presenter Judy Hogben, Executive Director, Office for Seniors Interests and Volunteering, Western Australia

Australian national legislation

Judy Hogben began by admitting that there is a need for further research into the longer term impact of legislative action on age discrimination. She looked first at the Australian national legislation. The *Age Discrimination Act 2004* is a federal law which addresses age discrimination in many areas of public life. It is applicable in all Australian States and Territories. It covers employment, education, accommodation and goods, services and facilities but exempts superannuation, insurance and credit, migration and citizenship, taxation and social security laws, some health programs and youth wages or direct compliance with industrial agreements and awards

Western Australian legislation

Judy Hogben said she would draw primarily on the experience of the state of Western Australia, with some reference to the experiences and findings in other states. Each State and Territory enacted legislation to cover various aspects of discrimination during the latter part of the 20th century. In Western Australia, the *Equal Opportunity Act 1984* makes it unlawful to discriminate against a person in employment. Amendments to this Act prohibiting discrimination on the basis of age came into force in January 1992. It has been unlawful to require employees, contract workers and partners to retire on the ground of age since August 1995, although there are exceptions.

The statistics

She indicated that studies into the impact of age discrimination legislation in terms of their access to employment and goods and services were limited. However, she would begin by examining various data relating to work force participation to assist discussion and she presented a Western Australian snapshot:

- In April 2005, approximately 67,000 (21%) of Western Australia's seniors (people aged 60 years and over) were in full-time or part-time paid employment. This included 29% of males and 14% of females.

- Senior males were more than twice as likely to be working full-time as part-time. Senior females, however, were nearly twice as likely to be working part-time than full-time.
- Less than 1% of seniors (2,100) were registered as unemployed, a large majority of these being males.
- 79% of seniors were no longer in the labour force: 86% female and 70% male. All seniors aged 65 years and over were much more likely to be out of the labour force than those aged 60 to 64 years.

Looking at Australian national data participation rates in the labour force, males in older age groups have remained steady over time although rates in the 60 to 64 age group steadily decreased to a low point of 45 % in 2000 and have steadily increased over the last four years to 52.7% whilst labour force participation rates for older females have increased steadily over time. However no direct link to Age Discrimination Legislation can be established.

Looking at the unemployment rates for people aged 45-64 there has been some improvement from about 1992 onwards, when States and Territories began to enact their legislation but this downward trend may be due to economic conditions or may be due to a cultural change by employees away from early retirement and/or a cultural change by employers to retain older employees. Has the legislation been responsible for this? The legislation makes it clear that certain actions are unacceptable but it could be argued that legislation is often introduced after community views have changed; therefore the legislation is simply an indicator of change.

One point is certain, however, without such legislation there is no leadership by government on this issue and leadership is abdicated to the market.

Western Australian complaints

She investigated the age of complainants in Western Australia to try to determine whether there was an increase over time in the proportion of complainants being 40 years of age or over. This question was asked because there is an assumption that older people may take longer to accept that they can use legislation to settle complaints. She also wanted to see whether age discrimination impacts more on older people than on younger people.

She found that the largest proportion of complaints is from the 40 to 64 years of age group but no general upward or downward pattern emerges over time as far as the age of the complainant is concerned. Therefore, the question about older people becoming more comfortable with the legislation over time remains unanswered.

However, it was clear that the majority of complainants are older (over 40) rather than younger (under 40) which seems to suggest that older people experience more age discrimination than younger people. Although on the other hand it could also mean that middle-aged people are the group most aware of the legislation and are the group most comfortable with using it.

Western Australian complaints by area of complaint

These statistics demonstrate that the major reason people use age discrimination legislation is in relation to employment. Over an eleven year period it averages out at 61.5% of all cases of aged discrimination. Over the last five years, the average is 59.2% while for the first six years it was 63.6%.

Age discrimination involving goods, services and facilities make up the second largest proportion of complaints and average out at 22.4% of cases across the eleven year period. These include shops, restaurants, doctors, insurance, and government services.

The average for the first six years was less at 18.7% whilst over the last five years is 26.9% which indicates that this is an area that may require further examination. Judy Hogben believes that the increase should be seen as positive, indicating that people are becoming more aware that age discrimination occurs outside as well as in the workplace.

There had been a slight decrease in the proportion of complaints from paid employment over the eleven years since the amendments came into effect in 1992. On the other hand the proportion of age complaints by people looking for work has increased steadily since 1997/98. It appears that age discrimination legislation is used more by people in employment than people who are looking for employment. Thus future work should give particular attention to recruitment practices.

Across jurisdictional data – findings across three Australian states

Judy Hogben then looked at a report published in 2001 by the Victorian, South Australian and Western Australian Equal Opportunity Commissions and the Australian Employers Convention *Age Limits: Age-related discrimination in employment affecting workers over 45*.

The joint project was established to:

- identify perceptions held of and by older workers underlying age discrimination in Australian workplaces.
- Identify forms of age discrimination in the workplace, for instance in recruitment, retention and training.
- Examine the extent and trend of utilisation of age discrimination legislation in Australia and overseas and barriers leading to its under utilisation.
- Make recommendations to protect the rights to employment of older workers.

The report found that

- the number of age discrimination complaints is less than those for other types of discrimination but there is evidence that it is a significant workplace issue for people aged over 45.
- the impact of age discrimination on overall economic performance as a result of people taking early retirement over the period 1994-2001 was \$42.6 billion
- if older persons labour force participation rates do not rise by 2031 Australia's ageing population will cost an extra \$42.8 billion per year, due to health costs and losses in superannuation and social security
- discrimination at the recruitment stage and a lack of understanding by older people of their rights
- there was discrimination in training, particularly for older women
- pressure to retire was still prevalent as were age stereotypes and attitudes
- older workers are still seen as expendable in favour of younger workers.

Conclusion

Age discrimination legislation came into effect in Western Australia in 1992 and most other states at approximately the same time. The long term impact of discrimination legislation should result in a diverse workforce, where individuals of all ages and abilities are recruited, trained and valued without fear or favour.

Judy Hogben felt that the research she had presented above suggests a mixed result. The diversity of the workforce as measured by the participation rate of older workers is increasing but age stereotypes and barriers arising from these stereotypes are still common in the areas of recruitment and training.

It is clear from the data presented that more consumers are starting to use the legislation to improve access to goods and services.

Where to from here

She concluded firstly that the difficulty encountered in measuring the long term impact of age discrimination legislation indicates a need for further research in this area. Secondly, it appears that people in paid employment are greater users of the legislation than are people who are searching for employment. The factors behind this need to be ascertained.

And finally, the continued use of age discrimination legislation by people in employment, people seeking employment and people seeking access to goods, services and facilities establishes that there is an on-going need for such legislation.

Discussant *Dan Kohrman, Senior Counsel, AARP, USA*

Dan Kohrman agreed that was important to ensure that actions which were being taken were successful and that evaluation was available, both to demonstrate this success and also to enable learning and development. He compared the Australian research with that of the US with particular regard to the greater experience of the US in age discrimination legislation. He also offered some suggestions for evaluating the impact of age legislation in the future.

One key finding of the Australian research which was important for all economies, was the cost of early retirement. Between 1994-2001 the cost was \$42.6B and if there was no change in older workers' participation in the labour force, by 2031, the cost would be \$42.8 billion per year. This cost data alone makes the "business case" for combating age bias.

It was very difficult to evaluate the impact of age discrimination legislation on labour market participation, separate from the many other forces operating in the labour market simultaneously. There were too many other cultural and economic trends to be able to credit only the legislation. Specific variables included the size of age cohorts such as the baby boom generation and assisted programmes for disability, as well as the increase in divorce leading more women to seek work.

One way to measure the effectiveness of a law, is to examine the enforcement activity, and count the number of cases brought to court. Ineffective age discrimination legislation can be counterproductive and give a false sense that action has been taken to address bias. Good age discrimination legislation will include a duty to educate the public and employers and providers of services.

On data collection, unlike Australia, the U.S. only collects complaints data on the basis of older age, and for people aged over 40. Australia might benefit from further disaggregation of its data for people aged 40+, to allow comparison between complaints from different age cohorts up to 70 years old.

He also warned against making assumptions from the data which was available. For instance, although there was little data on hiring in the Australian research, it did not mean discrimination was non-existent in this area. Although there are no age limits

in the US, they still exist but are applied more subtly. Age bias at the hiring stage is the most difficult to prove.

However limiting age legislation may seem, it conveys a key message to the target population.

Many studies have been undertaken in the US to assess the effectiveness of legislation but findings from such studies remain limited whilst they continue to be based on reported cases only. The data can describe general trends in age discrimination as shown in the two AARP studies; the first in 1987 showed most cases were brought by white males in their 50s, and the second in 1997, by women in their 40s. Reported cases were not an accurate reflection of the incidence of age discrimination because most cases were settled before reaching the final stage, if indeed they are ever reported at all.

Further research is needed on the incidence of age bias and in particular more evaluation for the “business case”. Better data collection and funding is also needed.

General Discussion

Points raised included:

- There was a lack of recognition of diversity amongst older people. The UK has “one size fits all” services.
- Age is marginalised within other equality strands.
- There is considerable evidence that those who experience discrimination on other grounds throughout their lives are disadvantaged and they carry this disadvantage through to older age, where it is compounded by age discrimination.
- Many older people add to their own disadvantage by describing their older years negatively. Research in Sweden shows when asked about activity in retirement they say they do “nothing”. Older people need to have self worth after retirement.
- Having looked at jurisdictions where mandatory retirement has been abolished, there is no significant shift in the age of retirement. It is around 62 in Quebec. This is a human rights issue of how and when to choose and plan for retirement.

Annex 1: List of seminar participants

Name	Organisation	Country
Andrew Harrop	Age Concern England	UK
Anouk Mulder	Expertise Centre, Age and Lifecourse (LBL)	Netherlands
Barbro Westerholm	Swedish Organisation of Senior Citizens	Sweden
Carlos Nunez-Ferreya	Confederacion Espanola de Organizaciones de Mayores (CEOMA)	Spain
Carmen Ng	Hong Kong Council of Social Services	Hong Kong
Christine Harvey	Age Concern England	UK
Colm O'Cinneade	University College London	UK
Dan Kohrman	AARP	USA
David Deans	COTA National Seniors Partnership	Australia
Deborah Howe	Equality Authority of Northern Ireland	UK
Dorthe Wille	DaneAge	Denmark
Geert Decock	AGE, European Platform for Older People	Belgium
Gerrard Grace	AMD Alliance International	Canada
Gordon Lishman	Age Concern England	UK
Grace Clark	International Centre of Global Aging	USA
Greg Shaw	International Federation on Ageing	Canada
Helen Hamlin	Social Work Consultant	USA
Jacqui Spradbery	Age Concern England	UK
Jane Barratt	International Federation on Ageing	Canada
Judy Hogben	Office of Seniors Interests, Government of Western Australia	Australia
K R Gangadharan	Heritage Hospital	India
Keith Norton	Ontario Human Rights Commission	Canada
Konstantina Safilou-Rothschild	Sextant	Greece

Marja Pijl	Netherlands Platform Older People and Europe (NPOE)	Netherlands
Marjan Sedmak	Mestna Zveva Upokojencev Ljubljana	Slovenia
Mark Gorman	HelpAge International	UK
Myong Juch	Korean Association of Retired Persons	Korea
Niall Crowley	Equality Authority	Ireland
Patrick Boyle	Commission for Equality and Human Rights	UK
Richard Baker	Age Concern England	UK
Robert Chagnon	Quebec Association of Gerontology	Canada
Robin Allen QC	Cloisters	UK
Sharad Gokhale	Community Aid & Sponsorship Programme (CASP)	India
Stephanie Harland	Age Concern England	UK
Stuart Flynn	Southern Cross WA	Australia
Suzanne Wait	International Longevity Centre	UK
Tessa Harding	Help the Aged	UK
Valdas Dambrava	Office of Equal Opportunities Ombudsman	Lithuania
Yitzhak Brick	Association for the Planning and Development of Services for the Aged in Israel (ESHEL)	Israel