

AGE EQUALITY
COMES OF AGE:
DELIVERING
CHANGE FOR
OLDER PEOPLE

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Executive summary

Faced with an ageing population, a shortfall in retirement incomes, growing evidence of age discrimination, and an EU Directive requiring action, the Government has promised to outlaw age discrimination in employment by October 2006. Its proposals cover age discrimination at any age. Our focus is on the implications for older people.

One third of people over 50 but below state pension age are not in work. The average age of retirement is 61, yet average life expectancy is 77 and rising. It is widely accepted that age discrimination by employers is one significant barrier to raising employment rates of older people. A concerned public considers this to be the most prevalent form of discrimination. But it is also true that many older people no longer expect, or want, to work. Culture change, at work and beyond, will be a significant challenge.

There is also evidence of age discrimination in public services, and that negative stereotypes about older people lead to broader human rights infringements like degrading treatment. The Government has no plans to provide protection from age discrimination in services. Older people who cannot or do not choose to work will therefore not benefit from their proposals.

Medical science confirms that the stereotypes that lead to age discrimination are not supported by evidence. Age is a poor predictor of performance or need. Averages tell us nothing about a particular individual. The EU Directive therefore requires that any age based distinctions that remain must be justified by the employer, with evidence, for a legitimate aim. The grounds on which the Government proposes age discrimination would continue to be permitted are, we suggest, too widely drawn.

Action to address age discrimination can be justified in three ways:

- socio-economic: our need for educated, healthy, older people who remain in employment and defer drawing their pensions
- the needs of business: for staff, in a tight labour market, and with whom an ageing customer base can identify

- concern for the rights and dignity of older people, regardless of the contribution they are able to make

In some circumstances, socio-economic or business objectives could be met by limited improvement in access to jobs or services; or be outweighed by competing objectives. The moral imperative for addressing discrimination is then the value we attach to fairness for the individual and equality as a social good. Equality means more than equal treatment: rather, equal opportunity for older people to exercise choice and autonomy in how they live their lives, including opportunities for participation as citizens in decision making ('Choice and Voice'); a concept of equality underpinned by respect for the dignity of each individual.

What kind of policy framework can deliver these outcomes for society, business and individuals? Where those concerned with socio-economic objectives have traditionally looked to social policy levers, and those concerned with individual rights have looked to legal remedies, it is time to harness both levers for change into a single strategy: in which equality law itself drives the social policy agenda.

The legislation that the Government proposes, while a welcome step forward, is however limited to the minimum that the EU requires. It is defective in three ways:

- **limited scope:** providing no protection from discrimination in services
- **complex:** adding yet another different piece of regulation to more than 30 existing equality laws, 38 statutory instruments and 11 Codes of Practice rather than moving towards a single Equality Act with equivalent protection for all sections of the public
- **weak:** returning to the 1970s model of legislation used for race and gender, it relies on discrimination cases to deliver change: putting the burden on older people to complain their way to equality

The limits of the 1970s model has in the recent past led this Government to introduce an innovative approach to equality legislation in Northern Ireland, for race equality in Britain, and in the responsibilities of each of the devolved administrations: a positive duty to promote equality. It is commit-

ted to extending that model nation-wide to gender and disability – but not age. Coupled with the failure to provide protection from discrimination in goods and services, older people are being offered significantly less protection from discrimination than ethnic minorities, women and disabled people. The proposed equality commission will have to turn away older people, discriminated against in services, whom they could help if discriminated against on other grounds. Older people may, with some justification, feel short changed.

An ICM poll for ippr in September 2003 found 72 per cent of the public think that age discrimination should be illegal in public services (24 per cent disagreed); while 87 per cent think that protection from ageism should be at the same level, or greater, than that in place for race and gender. Only nine per cent agreed with the Government that age discrimination should attract less protection than discrimination on those grounds.

In contrast to the 1970s litigation model, a positive duty on employers and public service providers to promote age equality would:

- Be pro-active and goal oriented, focusing on prevention and on outcomes, not litigation
- Be inclusive, not confrontational, ensuring consultation with employees and service users in identifying barriers to equality
- Require a continuous process of diagnosing the problem, identifying solutions and monitoring change
- Help employers in their defence to some discrimination complaints

The most stark form of age discrimination is mandatory retirement. The Government proposes to make it unlawful in most cases, or to allow a default age of 70. We argue against retention of an arbitrary default age of 70:

- It would undermine the central objective of the legislation that decisions should rest on ability to do the job, not age
- It would reinforce the fear that access to pensions will rise to 70, replacing choice with compulsion

- Many companies have already abolished mandatory retirement successfully
- It would undermine efforts to address discrimination in access to training (denied on the grounds of insufficient years left in employment)
- Concern about managing older workers should be addressed by improvements in performance management, not by forcing older workers to go

The ICM poll for ippr found only three per cent supported the default age of 70. Forty-nine per cent said people should be able to work as long as they want to, and 30 per cent as long as employers think they are competent to do so. Sixteen per cent favoured a retirement age of 65.

Key recommendations

- That the goal should be to promote equality of opportunity, enhancing choice and autonomy for older people, and respect for the dignity of the individual.
- The law should include a positive duty on employers, government and public services to promote age equality. Harnessing broader strategies like skills training, careers guidance and flexible retirement, this responsibility should be monitored in the public sector, like the existing race equality duty, by the mainstream audit and inspection bodies. The private sector, where 82.5 per cent of people work, should be subject to a light touch reporting mechanism.
- Mandatory retirement should be abolished, without a default age, except in exceptional circumstances. The grounds on which the law allows other forms of age discrimination should be narrowly defined.
- The law should provide protection from discrimination in goods and services – on which the Government should proceed by consulting on the terms of the legislation and necessary exemptions. As an immediate step forward, public service providers should, as in employment, be subject to a duty to promote age equality.
- The proposed new equality commission should have a responsibility to promote good practice on age equality in employment and in services,

regardless of whether the legislation makes discrimination in services unlawful. The commission should be able to promote human rights standards alongside equality.

- Provision must be made prior to October 2006 to provide guidance to employers on the substantial changes needed in culture and procedures; and subsequently for advice to older people on their rights and the new opportunities open to them.

A full set of recommendations can be found at the end of the final chapter.

1. Why focus on age?

Age equality has come of age. Less favourable treatment on grounds of race, gender and disability has long been unlawful, but discrimination against older people in jobs and services has been justified by stereotypical assumptions about capacities or preferences associated with age. In some respects, discrimination against older people is even protected by law.

That complacency is now challenged for three reasons: the implications of Europe's ageing population for the labour market and for retirement income; the growing evidence, and public awareness of, age discrimination; and the changing expectations of older people themselves. Tackling age discrimination is now firmly on European and national political agendas. But there is little clarity on the outcomes to which reform should be directed, nor on the policy tools that could deliver.

The UK Government is currently considering the form that legislation might take, spurred on by a European Directive that requires legislation on age discrimination in employment and occupational training by December 2006¹. The Government has undertaken to bring the legislation into force by October of that year. It will cover the public, private and voluntary sectors and, with certain exceptions, make age discrimination in employment and vocational training unlawful (DTI 2003a). The new legislation will not cover age discrimination in the provision of goods and services, despite evidence that such discrimination persists. Moreover, enhanced access to education, transport and health care, in particular, would increase older people's capacity to work. This legislation will nevertheless be the lynchpin of the Government's strategy to address the unfair treatment that older people experience, and a major focus of our analysis.

Although the Directive and proposed legislation cover age discrimination against younger as well as older people, and we are in no doubt that there are significant issues of discrimination to explore in relation to young people, we took the decision to focus in our analysis on older people (in a broad age span) for two reasons. First, the political opportunity that has opened up to address age discrimination focuses on that end of the age spectrum. Secondly, the issues that arise in relation to the young are in some ways different and

deserve a focus in their own right. Nevertheless we regret that we are reinforcing an imbalance in current debates in which it is largely assumed that age discrimination is an issue only for those in the later years of life.

Keeping older people in work

Europe has an ageing population. Advances in medical science and improvements in living conditions mean that people are living substantially longer. In 1901 the life expectancy of men born that year was 45, of women 49; by 2000 it had risen to 75 and 80 respectively.² In 2001 the census found 9.4 million people in the UK were aged 65 and over, an increase of 51 per cent since 1961 and 1.1 million of them were over 85. But fewer babies are being born, so the population of working age relative to that of older people is declining. By 2014 there will, for the first time, be more people over 65 than under 16.³

As this demographic shift began to gather pace towards the end of the 20th Century, it coincided, ironically, with people retiring earlier. In the late 1980s and early 1990s, firms downsized by laying off older workers, while pension arrangements encouraged early withdrawal from the labour market. Meanwhile, shifts from manufacturing to service industries, and changes in technology, have made many older workers' skills obsolete. The period of retirement has thus been stretched at both ends: people retiring earlier but living longer.

Whereas no less than 84 per cent of men aged 50-64 were in employment in 1979 this had fallen sharply to 64 per cent by 1993. Employment rates of those over 50 but below state pension age (65 for men, 60 for women) began to rise again in that year with the economic recovery and continue to rise, reaching 68.9 per cent in the winter of 2002 and closing the gap with the employment rate for the working age population as a whole of 74.5 per cent.⁴

Nevertheless, nearly one in three people over 50 but below state pension age is not in work – some three million people, many of whom depend on benefits. Although participation rates for older people are higher in the UK than in most EU countries, in 2000 only 37 per cent of men aged 64 were still in

work (Cabinet Office 2000). It is thus the exception, rather than the rule, for men to remain at work up to state pension age. Moreover, in 2002 less than one in ten non-working people over 50 were even looking for work.⁵

Yet the challenge is greatest in relation to men and women over state pension age, only 8.7 per cent of whom are working. Increased life expectancy means the period of time over which older people are not economically active is still growing. A man who is now in his twenties has a life expectancy of 85, a woman 88: retirement at 65 would thus still leave them twenty or more years of economic inactivity.

Meanwhile, a range of factors has led to labour and skill shortages in some sectors of the labour market and parts of the country. Some vacancies are being filled by workers from abroad. But the Government's priority is to increase the participation rates of people already resident in the UK and it has launched a series of initiatives to encourage and enable older people to remain or return to work, including its Age Positive campaign and New Deal 50 Plus.⁶

The Cabinet Office estimated in 2000 that the lower participation rates of over 50s between 1979 and 2000 cost the economy £16 billion in lost GDP and the taxpayer £3-5 billion in extra benefits and lost taxes (Cabinet Office 2000). It is thus not only the tight labour market that is behind the drive to keep more older people working. People need to have the option of working for longer in order to ensure that they have an adequate income in retirement from both state and private sources. It is during their 50s that people do most of their saving for retirement, after their children have left home. Many are now approaching retirement having accumulated inadequate pension entitlements, particularly those who have experienced periods of unemployment, and women who have been in part time, low paid jobs, or had gaps in earning to care for children. A minority of pensioners can afford to enjoy their retirement but a significant proportion are poor. Women pensioners have even lower incomes on average than men, having worked for shorter periods, on lower incomes and acquired fewer occupational pension rights.⁷ Isolation and loneliness, aggravated by dependency on public transport and by caring responsibilities, can accompany economic inactivity.

PENSIONS AND BENEFITS

A Green Paper on pensions in December 2002, **Simplicity, security and choice: working and saving for retirement**, set out the Government's proposals to provide greater flexibility in age of retirement, and incentives to remain in work and to save, arguing:

People should not stop work simply because they reach 60 or 65. Far from it – at this point in their lives most people could still have many productive years ahead of them. This is the point at which people **can** start to draw their State Pension, not the point at which they necessarily should (DWP 2002b).

Before 1989 it was government policy to use state pensions to discourage workers from remaining in the labour force (Thane 2000). Receipt of a state pension was subject to a stringent retirement condition penalising those who remained in work. In 1989 these rules were changed, making it possible for pensioners to retain their employment without losing entitlement to pension benefit. In a parallel development, the inequality in pension ages between men and women was found to be in breach of EU sex discrimination law. Instead of lowering all pension ages to 60, the Government decided to respond by raising women's state pension age from 60 to 65 between 2010 and 2020.

The Government's first objective now is to defer the need to draw a pension by those under 65. It proposes, for instance, that new entrants to public service pension schemes should only be able to claim their pension from age 65, not 60; and to increase the minimum age for an occupational pension to 55 by 2010 in the public and private sectors. Yet an equal challenge if we are to narrow the gap between retirement and life expectancy will be to increase employment rates of people beyond state retirement age. Research shows that these older workers are healthier and wealthier than those not working (Smeaton and McKay 2003), yet only one per cent of those currently not working say that they would like to find a job.⁸

The Green Paper proposes that those who do work beyond state pension age will get a higher pension when they do retire and this increment will increase each year of deferral. However, the increase is small – only £15 per week after

five years deferral: thus a man who did not draw any pension until 70 would get only £15 above the level he could have drawn each week for the past five years. It will thus not act as a significant incentive. Significantly, the Government does not propose to increase the state pension age for men and women beyond 65 – hence moves to encourage employment beyond that age are intended to be entirely voluntary.⁹

A majority of those aged between 50 and state pension age who are not working are receiving an incapacity benefit because of a current long-term health problem or disability (DWP 2002b). There has been a near four-fold increase in the numbers claiming incapacity benefits since 1979. Government both needs to reduce numbers claiming this state benefit and encourage those who can to return to the labour market: the subject of a separate ippr report (Stanley and Regan 2003).

In a Green Paper last November, the Government proposed a series of measures to achieve that objective (DWP 2002a). Significantly, it said that it is not only for health reasons that some people are dependent on incapacity benefits:

we know that, for many people on these benefits, poor skills, poor confidence and employer discrimination are just as important obstacles to work as health difficulties (DWP 2002a: 100).

This highlights the inter-relation between employment, education and health, pointing to the need for mutually reinforcing strategies in relation to each of these areas.

The average retirement age for men is currently only 62.6, for women, 60.4, and many leave the labour market much younger (DWP 2002b). If employees are to be encouraged to work up to and beyond 65, the Government knows that it must go further in dismantling the range of barriers they currently face. It proposes, for instance, to end the ban on individuals continuing to work in some capacity for the same employer while claiming an occupational pension; and wants employers to ensure that occupational pension rules do not discourage flexible retirement, allowing those working beyond normal retirement age to continue building up their pension entitlement.

Most significantly however the Government intends, within its age discrimination legislation, to make mandatory retirement unlawful unless an employer can justify retaining it, with the possibility of the law retaining a default retirement age of 70, a proposal we consider in Chapter 4. The law does not currently prevent employers from having a mandatory retirement age, regardless of the employees' continuing capacity to work, and four fifths of public and private sector organisations apparently do so.¹⁰ But the pensions Green Paper argues:

We cannot allow this waste of older people's experience and talents to continue. Using these talents is vital both to the economy and to the quality of life of older people. We must remove the cliff-edge between work and retirement.

Although the Government urgently needs more people to defer drawing a pension and to save, the incentives proposed in the Green Paper are modest. In practice it will be heavily reliant on the success of other policy measures to enable people to work longer, accumulate retirement income, reduce the period of time they draw a state pension, and reduce pensioner poverty. Not least, it is dependent on the success of the measures it proposes on age discrimination.

Discrimination

IPPR has already made a series of recommendations on services and employment practices that would raise participation rates, including those of the over 50s. (Birkitt 2001; Stanley and Regan 2003) While its proposals on ethnic minorities, women and people with disabilities complement a regulatory framework in which discrimination in employment is unlawful, this framework has been absent in the case of older workers.

There is growing evidence that the barriers which older people experience in employment and access to occupational training are, in part, due to discrimination. Research by MORI in 2002 found age to be the form of discrimination **most** commonly cited by the public: 38 per cent of all those who believed they had experienced discrimination in recruitment or at work.¹¹ Surveys of employers have found evidence of age used as a criterion of

recruitment, of managers focusing on older workers when downsizing, use of age limits in advertising, reduced opportunities for training of over-50s, and negative attitudes among employees to older staff. Some employers justify giving preference to younger applicants on the grounds that they will 'fit in better', are more flexible or easier to train, or that younger managers feel uncomfortable managing older staff (Hepple 2003).

Government research in 2001 found age discrimination at work 'common-place' with six out of ten employers preferring not to recruit those over 35 and 40 per cent of companies openly acknowledging using age based criteria. Some restrictions were due to legal or insurance requirements (most relating to minimum ages for young people), others due to perceived health barriers (such as maximum ages in aviation and for train drivers), costs of training relative to returns, or to perceptions of customer preference. Employers in retailing were quoted as saying 'we do not perceive that older people have vision or are as creative' or that 'there are a few older people in senior management who are kept out of sight'; an employer in IT as describing older people as 'having lower technical skills and being technophobic'. Employers who were not facing recruitment or skill shortages were least likely to have questioned and addressed age discriminatory practices (DfEE 2001).

A government review of the evidence on older people the previous year had also concluded:

One of the key causes of declining economic activity among older people is age discrimination by employers, which affects both the retention and re-entry of older workers... There is a widespread perception among many employers that older people have inappropriate skills, are less productive and flexible, and take more sick leave than younger people (Cabinet Office 2000).

Discrimination against older workers is reinforced by statute. Workers over 65 or normal retirement age are currently specifically excluded from protection against unfair dismissal and from the right to redundancy compensation¹², enabling employers to lay-off such workers without the constraints that apply to younger staff.

DISCRIMINATION IN SERVICES

It is not only in employment that treatment of older people has aroused concern. The discourse about age discrimination at work has coincided with criticism about less favourable treatment of older people in a range of services. An ICM poll for IPPR in September 2003 found a third of the public thought older people experience age discrimination in key public services including 39 per cent who think they are discriminated against in the NHS, 39 per cent in education, 31 per cent in social services and 23 per cent in transport (see Appendix for poll details).

A King's Fund review of the treatment of older people in health and social care found direct and indirect age discrimination has indeed been taking place throughout the last decade. While older people are major users of the health service and there are examples of good care for older people, there is evidence across a range of services that older people may be: denied treatment offered to younger patients (including upper age limits for heart by-pass operations and knee replacements); less likely to be offered treatment (evidenced, for instance, by rates of access to treatment for end state renal failure); have to wait longer for treatment (as for forms of heart surgery); experience poorer standards of hygiene and nutrition; and be the victim of decisions not to resuscitate, of degrading or patronising treatment and sometimes of abuse (Robinson 2003). One recent study found that older patients with the same extent and types of lung cancer as younger patients were being less actively treated (Royal College of Physicians 2000).

Less overt but of equal concern are decisions not to prioritise services for older people, the allocation of greater resources to acute diseases than to care for chronic illnesses; lower ceilings for cost of care packages than those available for younger people; and lower pay for staff, potentially affecting quality of staff recruited. Older people are less likely than younger age groups to be offered health promotion advice by GPs; to have their mental health problems recognised; and to be referred by GPs to hospital services. They have been shown to be treated less favourably than younger people in some Accident and Emergency Departments, where they were also less likely to receive appropriate treatment for their injuries and were more likely to die (even when taking into account differences in co-morbidity and frailty) (Robinson 2003).

Robinson suggests that policies requiring older people to contribute to financing their personal care are a good example of indirect age discrimination affecting people with chronic ill-health and long-term disability, of whom the majority are older people. Much of the discrimination that she describes occurs because of explicit or tacit decisions to ration scarce resources using age criteria, justified, if challenged, by the ‘fair innings’ or ‘cost effectiveness’ arguments we examine in Chapter 2.

An NHS audit published in April 2002 found ‘a very small number of policies are explicitly age discriminatory’ across a wide range of policy areas, with considerable variation across the country; the greater problem being that:

In many areas of health and social care, the availability of and access to services by older people is affected by implicit or unintended discriminatory practices.

And that

People’s main experience of age discrimination within the NHS results from non-written policies, from discriminatory elements which result from custom and practice and from the attitude of individuals. As experience from tackling racial and sexual discrimination shows, this type of discrimination is often harder and takes longer to address (Department of Health 2002a).

Robinson reports that, while there is thus acceptance that discrimination exists, we do not know its extent. Nor is there a consensus that all of the practices which treat older people differently in health and social care amount to less favourable treatment and, if so, whether that is nevertheless unjustified.¹³ We address this when considering in Chapter 4 the form which legislation addressing discrimination in health care might take.

Age discrimination also exists in other services. In education, discrimination is most pronounced at a systemic level, only a fraction of the budget being devoted to older people (in contrast to health and social care). There is some direct discrimination, as when grant regulations cite an age ceiling; and research awards are regularly advertised for candidates under a particular age (Schuller 2003). Schuller, himself responsible for the provision of adult education within the higher

education sector, suggests that a secondary factor can be the attitudes of admission tutors, the nature of the curriculum, and the extent to which the arrangements for education are compatible with older people's other commitments.

As younger generations emerge who are better educated, they out-compete older people for jobs. Older people thus suffer cumulative inequality as a result of their lack of educational opportunities while young, and in later life. Those with higher qualifications have greater access to training, indirectly discriminating against older people who may have longer work experience but lack those qualifications (Schuller 2003).

Older people are much less likely to take part in any form of organised learning, with a **growing** gap in participation rates between those aged 55-64 and younger people, and declining participation of those aged 75 and over. Only 11 per cent of those aged 65 and over had access to the internet in 2001, yet IT skills are known to give people a sense of belonging and participation in the modern world. The proportion of those over 40 in higher education, relative to those under 40, was falling in 2001, though overall numbers, while low, have increased by an encouraging 15 per cent.¹⁴ There has also been a significant increase in the number of those aged 60 and over attending FE colleges. Schuller reports 33 per cent of those aged 50-plus have basic skills problems, compared with 20 per cent of the population as a whole; but provision for this group has been a low priority. Older people have less access to training, at all occupational levels, and those with fewer basic qualifications have the least access (Schuller 2003).

Although there is thus little explicit discrimination on grounds of age, these patterns are a direct result of a preoccupation with formal qualifications that undervalues work and life experience and to stereotypical assumptions about older people's capacity to learn that we shall explore in Chapter 2. Yet inequalities in education are a significant cause of other disadvantages in life. Educated people have a better chance of avoiding poverty and the health consequences of poverty, primarily through improving their labour market position.

Lack of provision for adult education is compounded by the low expectation of older people that they should engage in further learning. Older people can lack the confidence to envisage themselves as successful learners, stepping

aside for younger people who are assumed to be better placed to benefit. A recent review of age discrimination in education concluded:

A country that does not have a tradition of state-supported lifelong learning creates and sustains excluded communities and individuals who feel that what is available is irrelevant, too expensive and too far away. The oldest members of society, products of inferior education processes, and more likely to have left school at an earlier age without a qualification and commendation to go forth and succeed, feature highly in that category (Soulsby 2002).

There are numerous further examples of age discrimination in provision of goods and services – in the public and private sectors. Older people can face direct discrimination in upper age limits when applying for credit (a store card), hiring a car or obtaining car insurance (despite retaining a driving licence). People over 70 are barred from sitting on a jury. Transport services, while often demonstrating positive discrimination, indirectly discriminate¹⁵ against older people when the design of vehicles, hard-to-read timetables and inaudible public address systems create barriers to travel, when bus-drivers accelerate away from the stop before the person is seated or staff are patronising and unhelpful. A recent review by a former official at the Department of Transport concluded:

In the transport sector, adverse direct age discrimination is not a major issue. There is, however, beneficial direct age discrimination, in the form of concessionary fares on public transport which are intended to offset the adverse indirect age discrimination associated with low income (and perhaps mild disability) in old age (Metz 2002).

This combination of preference shown to older people and less favourable treatment was reflected in the ICM poll for ippr which showed that, while 23 per cent thought older people received a worse service than the young, 39 per cent thought they received a better service – the only public service in which this was the case.

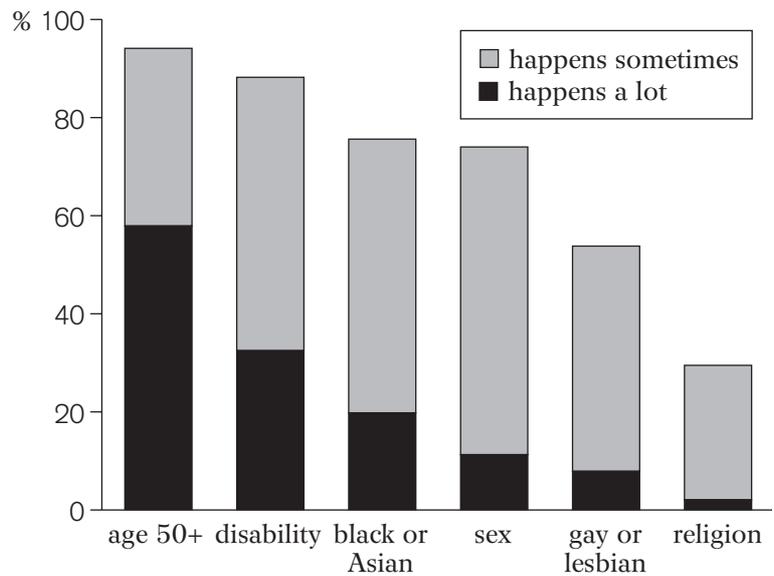
Many former public services, including transport, are now provided by the private sector where developments can significantly affect older people, as the impact of rural post office closures on older people demonstrates. Measures to address inequality in public services alone would therefore not be sufficient. Awareness of

age discrimination in services is less advanced than in relation to employment, and the Government has no plans to make such discrimination unlawful.

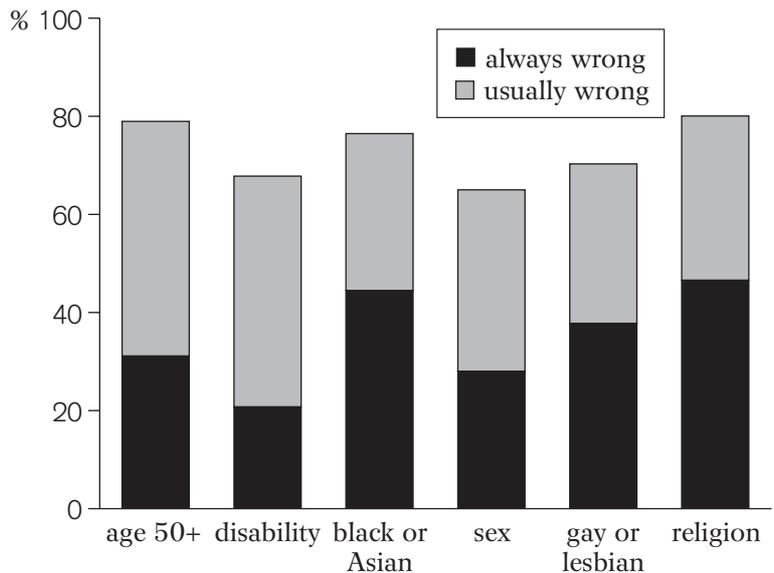
Public concern

Research has shown that the public now consider age discrimination against older people in employment to be more prevalent than any other form of discrimination.

‘How often do you think that employers in Britain refuse a job to an applicant only because of...?’



‘Do you think that employers in Britain would be right or wrong to refuse a job to an applicant only because of...?’



Source: Cabinet Office 2003; Figures provided to the Cabinet Office by Centre for Research into Elections and Social Trends (CREST), based on British Social Attitudes data, 2002

An ICM poll for Age Concern in October 2001 similarly found 70 per cent of the public thought age discrimination occurred, one in five saying that it had happened to them at work. A subsequent poll in 2002 found strong support for age discrimination legislation: 84 per cent supporting 'new laws to make it unlawful to discriminate against people because of their age in the workplace', two thirds believing it to be urgent.¹⁶ The earlier ICM poll revealed broader concerns about the treatment and perceptions of older people, including 14 per cent who had experienced verbal abuse because of their age, and one in five concerned about the portrayal of their age group in the media.

As we expect to live longer, and look ahead to retirement, we are perhaps even less willing than past generations to accept the dependency, welfare model of old age. We not only want to be treated with dignity, but to have a continuing right to develop ourselves and our contribution; to retain some autonomy in making the decisions that determine how we live our lives. Expectations are changing, and with it the pressure on the Government to ensure that those expectations are met. But its proposed legislation on age discrimination at work will only benefit those in, or looking for, work. The current proposals would thus do nothing to meet people's concerns about their quality of life beyond the workplace.

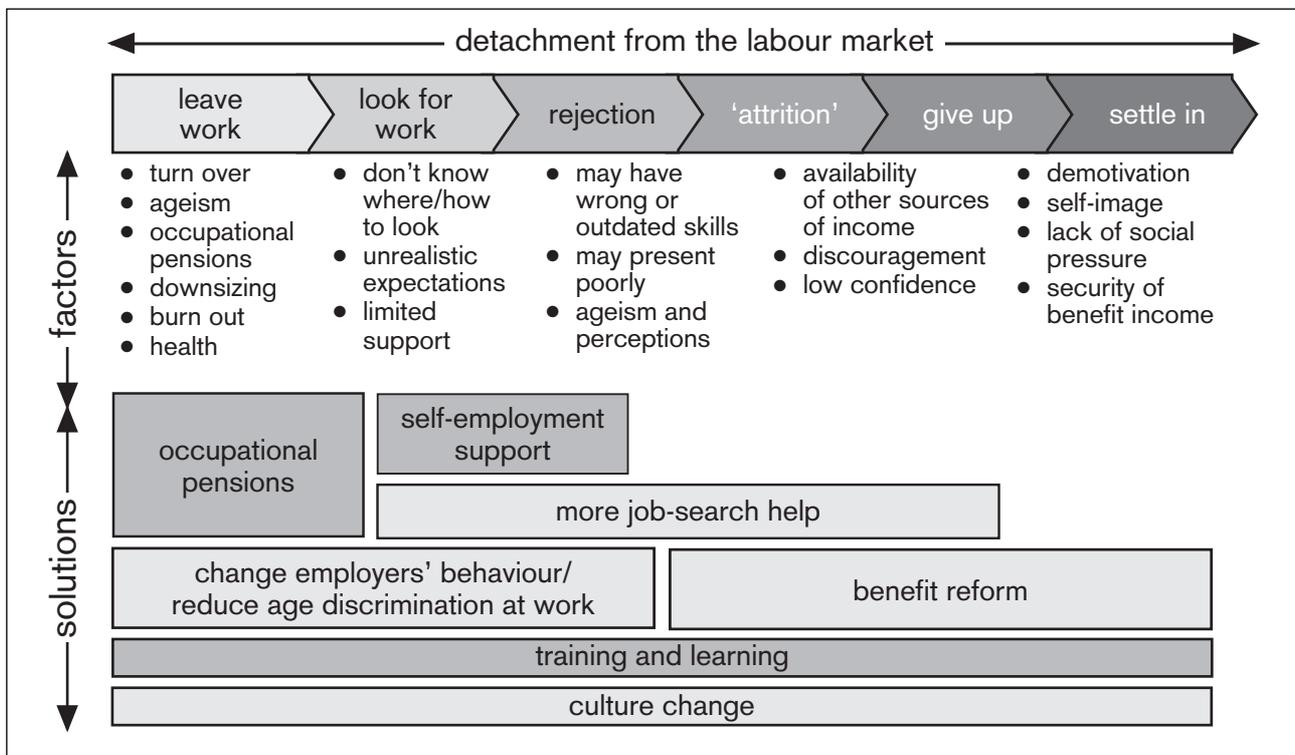
It is also the case, however, that not everyone welcomes the encouragement to remain or return to the workforce. The stigma once attached to early retirement has given way to a widely held aspiration for any who can afford it: 78 per cent of 25-50 year olds in a recent survey said they would like to retire early; while among those over 50, 69 per cent still aspired to do so¹⁷. The Government's proposal that the mandatory retirement age be abolished or raised to 70 aroused more concern that employees would be required to continue working than a welcome that they would be allowed to do so.¹⁸ As one union leader put it, 'We are all for an end to age discrimination but we don't want to see people forced to work until they are 70'.¹⁹ Crucially, therefore, policy initiatives to encourage working beyond 65 will need to provide reassurance that this will be a matter of choice, not compulsion.

The desire to retire may in some instances in fact reflect a desire for change, to leave a job in which the person feels they can make no more progress or

no longer tolerate the pressures or constraints, rather than a rejection of work per se. In that case, they could be attracted by opportunities to take up alternative employment, should flexible options be made available. We consider in Chapter 4 how the legislation could encourage employers to be more proactive in exploring flexible retirement working arrangements.

Action on discrimination

The Cabinet Office report on older people, **Winning the Generation Game**, showed in diagrammatic form where discrimination at work fits into the wider picture of causes and solutions:



Source: Cabinet Office 2000

The UK has had legislation to address race discrimination since the 1960s, gender discrimination since the 1970s and, most recently, legislation to address discrimination on grounds of disability but discrimination on grounds of age has not been unlawful.

The Government's objective in tackling discrimination at work has been to find a balance between legislating for minimum rights and avoiding a regulatory burden on employers. In relation to age, it therefore first sought to

address discrimination at work through voluntary guidance and encouragement, in a Code of Practice. This, it now accepts, is inadequate.

The Code was introduced in 1999 (and revised in 2002) to encourage employers to adopt good practice in relation to recruitment, selection, promotion, training, redundancy and retirement. By 2001 only one third of employers had heard of it, although the use of age as an overt recruitment criterion had declined (DfEE 2001a). A recent survey found only three out of five public and private sector organisations had a formal policy to address age discrimination²⁰ while a survey of employees found one in five employees had been discouraged from applying for a job by age restrictions implied in a job advertisement.²¹ Michael Rubenstein, editor of **Industrial Relations Law Reports** and a long term observer of employer practice on discrimination, says we should not be surprised that the impact of the Code has been marginal:

British employers have far too much on their plate to listen to sermons. The reasons why British employers prioritise complying with the law is not because they are do-gooders but because they want to stay out of trouble. They are pragmatists (Rubenstein 2002).

In Northern Ireland, where statutory provision on equality issues has diverged from that in the rest of the UK, innovative legislation has since 2000 **required** public sector employers and service providers to promote age equality: to ‘have due regard to the need to promote equality of opportunity between persons of different ages’,²² a model we examine in Chapter 3. There is, however, no redress for victims of age discrimination in either the public or private sectors, in employment or services.

In relation to health care, the Government acknowledged the existence of age discrimination in its NHS Plan in 2000. It initiated a significant programme of action in the NHS Framework for Older People in 2001 intent on ‘rooting out age discrimination’ to ensure older people ‘are never unfairly discriminated against in accessing NHS or social care services as a result of their age’ (Department of Health 2000 and 2001), the strengths and weaknesses of which we consider in Chapter 4. It represents an unprecedented recognition by government of the need to address age discrimination in a key public service. Like the Code of Practice for employment, however, it is in essence a

guide to good practice. The mechanisms for ensuring that agencies follow the guidance are not strong; and there is no mechanism for redress for those who believe they have been discriminated against. Research by the Kings Fund found health and social care managers preoccupied with other pressing priorities (Roberts et al 2002).

In contrast, recent steps to improve other services for older people have not been perceived as addressing discrimination. In education, the Government initially placed some emphasis on the need for life-long learning, its White Paper **The Learning Age** (1998) stressing the importance of educational opportunities for older people, not only to enhance their subsequent labour market contribution but also their contribution to society as active citizens and 'learning for its own sake'. In practice, however, the current focus is heavily on resources for 18-30 year olds, marginalising forms of learning most valuable for older people (Schuller 2003) although the recent National Skills Strategy indicates some recognition of the need to address this imbalance (DfES 2003; TAEN 2003).

In some jurisdictions, prohibition of age discrimination has been given statutory force, most extensively in employment but also in goods and services— as in Finland, the Netherlands, Canada and Ireland. EU countries, like the UK, are currently upgrading their legislation to comply with the EU Directive. Finnish law has prohibited age discrimination in employment since 2001 (with earlier constitutional provisions) and eliminated most forms of overt discrimination by employers in recruitment, pay and dismissal. Significantly for our argument, it has had less impact on underlying decision making, and the Government's policy has shifted towards a more proactive approach to tackling the factors that exclude older people from the labour market. The Irish provisions covering goods and services, the Equal Status Act 2000, have proved relatively unproblematic, cases focusing on the access of younger and older people to pubs and clubs (O'Conneide 2003a). In the US, the Age Discrimination in Employment Act 1967 (ADEA) outlaws discrimination against workers over 40. Mandatory retirement ages are prohibited in the USA, Australia and New Zealand, but not in Ireland.

Evaluation of the employment provisions, which differ in the age groups they cover and the exemptions they allow, is difficult. Some of these countries

enjoy higher participation rates of older people but others have lower, (though they might have fallen further without the non-discrimination legislation). The most promising evidence is from the United States where age legislation has been associated with (but is not the sole cause of) significant increases in post retirement age employment rates. 30 per cent of men aged 65-69 (and 19 per cent of women) are still working, as are 18 percent of men aged 70-74 (Friedman 2003; Smeaton and McKay 2003).

EU EMPLOYMENT DIRECTIVE AND GOVERNMENT PROPOSALS

The EU Directive for equal treatment in employment²³ now requires the UK to legislate to make age discrimination in employment and vocational training unlawful. An initial consultation paper on implementing the Directive was published in 2001 (DTI 2001). Subsequent papers set out the options in more detail (DTI 2002a and 2003). Regulations, covering England, Wales and Scotland, will be laid in 2004 to give employers and providers of vocational training two years to prepare. The law will outlaw direct and indirect discrimination in recruitment, promotion, training, redundancy and retirement unless justified by the employer, with evidence, as necessary for a legitimate purpose. Deciding what **is** a legitimate purpose is a key issue to be resolved.

The Directive is a step forward. But it is rooted in an out-dated approach to anti-discrimination law. This matters because the Government plans to recreate that approach in its regulations. It has not been convinced of the need for more effective intervention and faced business opposition to doing more than the minimum the EU requires.

The Directive only requires legislation to outlaw discrimination in employment and training, rather than taking a holistic approach covering discrimination in goods and services (although those are covered by existing UK legislation on race, gender and disability) a key omission we seek to rectify in our proposals. It is also limited because it focuses on individual fault-finding among employers and depends on retrospective investigation of discrimination rather than on prevention. It requires remedies for victims of discrimination, but not that employers take positive steps to identify the barriers to inequality and to have an action plan to remove them.

The original anti-discrimination legislation on race and gender similarly only provided remedies for victims. Recognising the limitations of that approach, the innovative equality legislation on age in Northern Ireland and more recently on race in Britain does do this. Recent evaluation of the race model, the Race Relations (Amendment) Act 2000, has shown positive results, as we explore in Chapter 3. The Government is committed to extending its provisions (in some form) to gender and disability but not to age.

The Government's proposals also address age separately from unfair discrimination on other grounds. The Directive required the UK to legislate not just on age discrimination, but also on grounds of religion and belief, and sexual orientation. Separate regulations on those grounds will be in effect from December 2003. Following this pattern, the Government proposes to introduce separate regulations on age, rather than coherent equality legislation.

As Britain already has three statutory bodies addressing equality issues – the Commission for Racial Equality; the Equal Opportunities Commission (gender) and the Disability Rights Commission, it is impractical to establish separate new commissions to promote and enforce the new regulations on age, sexual orientation and religion and belief. The Government has therefore indicated, in a further consultation paper **Equality and Diversity: making it happen**, that it is minded to establish a single equality commission covering all six strands, including age (DTI 2002b). Those proposals are currently also the subject of intense debate.

Human rights

While freedom from age discrimination thus has, as yet, little protection in UK law, the Human Rights Act (1998) may provide some protection to older people, particularly in relation to public services. A decision not to resuscitate an elderly patient may breach their right to life. Degrading treatment in residential care, such as the practice of feeding older people while sitting on a commode, may breach their right not to be subject to inhuman or degrading treatment; and their right to respect for private and family life may be breached by a range of intrusive decisions (Watson 2002). Help the Aged has argued in evidence to Parliament's Joint Committee on Human Rights that it is not only inequality that older people experience but infringements of these

broader human rights which will not be protected by discrimination legislation alone (HtA 2002a).

The potential of the Human Rights Act to address poor treatment of older people has been undermined by lack of proper monitoring of its implementation. The Government has not yet established a statutory body to promote good practice in relation to the Act, nor made adequate arrangements itself to ensure that public service providers are aware of the standards it requires. A survey by District Audit in 2002 found that, contrary to government advice, the majority of local authorities and NHS Trusts had not reviewed their policies and procedures for compliance with the Act and that 42 per cent of health bodies had taken no action to raise staff awareness. Few had mainstreamed human rights considerations into decision-making or were monitoring compliance. Staff complained of a lack of guidance (District Audit 2002).

Research for the British Institute of Human Rights investigated the impact of the Act on, amongst others, older people (Watson 2002). While it found examples of good practice, the Act had generally had a low impact on the service received:

Participants from this sector presented overwhelming evidence that older people are routinely treated with a lack of dignity and respect that would simply not be accepted in relation to other social groups.

This suggests that provision of guidance and proper monitoring mechanisms are crucial. This could come from a Human Rights Commission or, as is currently under consideration, by giving the proposed single equality body a broader human rights mandate, a proposal we consider in Chapter 3.

Instrumental objectives or individual rights?

It is thus clear that a range of drivers – the needs of the labour market, pressures on state retirement income, public concerns and expectations and, most immediately, the EU Employment Directive – have led to a social policy and legislative reform agenda on age. This convergence of socio-economic, business and equality objectives in relation to older people has created a window of opportunity for policy change. There is a new interest,

in particular, in uncovering the barriers to older people's participation in the labour market, and it is now recognised that one of the causes of exclusion is age discrimination.

The proposals to address age discrimination can thus be justified in different ways:

- By socio-economic considerations: our need for educated, healthy, older people who remain in employment and defer drawing their pension
- By the needs of business in times of shortages of labour or for workers with whom a diverse customer base can identify
- By concern for the rights and dignity of older people regardless of the contribution they are able to make.

Where these interests do converge, they provide a powerful political impetus for change. But these overlapping motives can also cloud the reasoning behind policy and legislative reform. Do we outlaw age discrimination because it is in the interests of society, in the interests of business, or because it is fair for older people, as individuals?

These dilemmas become more acute when instrumental and individual interests do not converge. If addressing discrimination in a particular instance is not deemed to be in the interests of society as a whole, or a 'business case' is lacking, should equality be pursued, or not? Where the instrumental and individual interests do not converge, perhaps because of the expense to the state or business of upgrading a particular service for older people, or because employers no longer have a shortage of workers, should addressing the discrimination faced by older people still be a priority?

The differing objectives may have different policy implications. Do the instrumental objectives always require 'equality' for older people, or simply that we raise the floor of service provision and access to jobs to the extent that those objectives are met? And what is the relationship between the social policy measures used to improve access to jobs and services, and the legislation on discrimination which has been the focus of those most concerned with the rights of the individual?

A key theme of our analysis will be the need for policy on age equality to acknowledge these differing objectives – socio-economic, business and the rights of the individual – and the need to reconcile them, when they conflict. We shall suggest not only that social policy measures and discrimination legislation should be mutually reinforcing but that the new age legislation should itself be a major driver of the social policy agenda. Where those concerned with individual rights have in the past looked to the law for a remedy, and those concerned with socio-economic objectives have looked to social policy, it is time to harness both those levers for change into one, coherent strategy.

Before we can begin to address age discrimination, we need to be clear what it is. While it may resemble discrimination on grounds of race, gender or disability in some respects, in others it may not. Unlike those characteristics, age is not a permanent attribute. Less favourable treatment on grounds of age is moreover, as with those other strands, not necessarily always without justification. But current practice may rest on unspoken assumptions about the need for older people to be treated differently that will not stand up to scrutiny. The imminence of legislation to make age discrimination in employment unlawful requires that these assumptions are reconsidered so that any distinctions on grounds of age which are justified can be separated out from those which are not.

This book

In this book, we explore the assumptions that lie behind age discrimination in employment, goods and services and ask whether the kind of legislation the Government proposes is appropriate for the task. We explore the policy objectives – for society, business and individuals themselves – and question whether legislation that merely penalises discriminatory behaviour and requires older people to complain their way to equality, without promoting positive changes in employment and service delivery, will deliver the vast cultural and procedural change that is needed. We consider what we can learn from developments in Northern Ireland and implementation of the recent race legislation in Britain; and look in particular at one of the most contentious areas for reform, mandatory retirement. Finally, we consider the role of the proposed single equality commission, to be tasked with driving forward the age equality agenda, and the contribution it will need to make if it is to succeed.

In Chapter 2 we thus begin by exploring what is meant by discrimination and equality in the context of age. We examine what the ageing process itself tells us about the legitimacy of treating older people differently, question what the goal should be (are we aiming for equal treatment, equality of outcomes, or something more?) and consider whether age differs in this respect from discrimination on other grounds.

This analysis forms the basis, in Chapter 3, of proposals on the form which age discrimination legislation should take, as one key policy lever to address inequality. Chapter 4 then addresses more specifically how age equality could be delivered in employment and in goods and services, looking at the implications for both the public and private sectors.

Throughout the text there are frequent references to the invaluable papers that were contributed to our age equality project by Professor Sir John Grimley Evans (on the ageing process), Professor Bob Hepple (on employment), Janice Robinson (on health), and Professor Tom Schuller (on education), which are cited in the acknowledgements. They have subsequently been published in an academic volume, **Age as an Equality Issue, Legal and Policy Perspectives** (Fredman and Spencer 2003).

The final chapter of the report, however, contains our own conclusions and policy prescriptions.

2. What do we want to achieve?

We have seen that the disadvantage that many older people experience is due in part to their being treated less favourably in relation to jobs and services because of their age. In this chapter we look at the ageing process to see whether the perceptions of older people on which that treatment is based are justified, and then compare age to discrimination on other grounds. We then consider the rationale for addressing age discrimination and the differing policy outcomes that could be our goal.

The ageing process

Discrimination against older people is accepted as the norm because it is assumed that ageing is necessarily associated with a decrease in capacity and an increase in ill-health and physical disability. Decrease in capacity is thought to justify excluding people from the workforce after a certain age. It also makes it appear wasteful to invest in their education and training. Employers are heard to say that older people are hard to train, lack creativity, are over cautious, unable to adapt to new technology or inflexible.

Similarly, discrimination in health care can be based on an assumption of declining capacity to benefit from treatment. Investment in treatment is thought to yield lower returns: that a patient who has been cured of one ailment will soon present with others. There can be an assumption that, in the context of a shortage of resources, older people are less deserving because a burden on society and not gainfully employed, or that their quality of life matters less than that of the younger generation (Robinson 2003). In education, older people are seen as less deserving of education resources because they will not work for long enough to repay the investment (a narrow view of the purpose of education) or that they are too old to learn.

The ICM poll for IPPR in September 2003, which asked why those providing public services might discriminate against older people, found the reasons most frequently cited were that 'younger people are likely to benefit more' (50 per cent), 'older people don't demand as much' (48 per cent) and the perception that 'older people's needs are more expensive to meet' (47 per cent). Twenty-one per cent thought it could be because 'older people are

too demanding or irritating', 20 per cent because 'older people have had their share when they were young' and 18 per cent because 'they contribute less to society'.

Assumptions that age is inevitably associated with declining capacity are, however, not securely based. We have to distinguish between 'true ageing' and other sources of differences which are not due to ageing but frequently mistaken for it. Characteristics apparently associated with ageing are often a result of cultural changes over the generations (cohort effects). People born 70 years ago grew up in a very different world. They were taught to learn in a different way. Moreover, ageing brings a shift from fluid to crystallised forms of intelligence, in which people locate new knowledge within their established cognitive framework, and this can be wrongly interpreted as a lower capacity to learn. They find it easier to memorise information if it is presented in a form readily assimilable into their cognitive framework (Schuller 2003). Failure to appreciate these differences can lead to older people being thought inefficient at learning new technologies or industrial processes. In fact, differences in learning are not attributable to lack of capacity to learn, but to the use of inappropriate techniques of training. Taught appropriately, older people can be as readily retrained as younger people for most new technologies (Grimley Evans 2003).

Secondly, older people may appear to have less capacity, or to suffer greater ill health, not because of ageing but because they are confronted with greater challenges. Thus figures showing higher morbidity and mortality rates for older people due to hypothermia and winter deaths have been shown to relate to poorer housing, rather than age. Similarly, older people may appear to respond less well to health care, but this can be because they have been afforded poorer quality care.

There are of course true ageing phenomena, but their effects are complex. The intrinsic ageing process is based on genes that limit longevity. These interact with a variety of factors such as lifestyle and environment so that there is increasing variation between individuals over time.

In practice chronological age has been found to be a poor indicator of performance; and variations in productivity **within** a given age group found to

be wider than variations between one age group and another (Scutton 1990; Maguire 1998). Grimley Evans, a professor of geratology, finds that there are some people in their 80s functioning well within the normal limits for people of 30. In relation to health care, evidence suggests that measurement of years from birth is also a poor indicator of health compared to proximity to death – because the period of ‘terminal drop’, in the year or two before death, is when mental functioning deteriorates and health costs escalate, at whatever age that occurs (Grimley Evans 2003).

Geratological science thus demonstrates that individuals cannot be assumed to possess the average properties of their age group. We cannot say that an older person will have the capacity or needs of the ‘average’ person of their age group, any more than it would be legitimate to make such assumptions on the basis of gender:

There is predictive validity about some stereotypes about men and women too, but we have long ago decided that we will not accept the use of these stereotypes and that each individual has the right to be treated on the basis of his or her own personal characteristics. So with age (Rubenstein 2002).

There are circumstances, however, in which may be necessary to make decisions on the basis of group averages, when it is not possible to make an individual assessment. It may, for instance, be necessary for public safety to avoid recruitment for certain jobs from age groups with a high risk of, say, cardiac arrest, until such time as the calculation of that risk can be made on the basis of individual clinical assessment rather than that of the group average. For this to be just for individuals, the law must ensure that the probability of risk is calculated on an adequate evidence base, and that the decision is made on the basis of age only until such time as it is possible to be made on the basis of individual assessment. Deciding when age can be a legitimate proxy, and when it would be discriminatory, is thus a key issue, which we explore in Chapter 4.

Comparison to race, gender and disability

It is helpful to divert for a moment to compare age to discrimination on other grounds, on which the UK has more experience of policy interventions. In

some respects, we find that age discrimination is little different from that on grounds of race, gender or disability. Negative perceptions of older people have similarly legitimised their receiving less favourable treatment and evidence has similarly been gathered to challenge those assumptions.

In other respects, however, age discrimination is different. Age does not define a discrete group: rather, our age changes in a way that our race, disability or gender do not. This is significant, first, because it can be argued that older people have had a 'fair innings' when they were young, justifying poorer treatment when they are old, in a way that could never be argued for those other grounds (albeit that this is a fallacious argument we address below). Secondly, there is no 'other' group with which to compare people of a particular age. Hence the solution is not to achieve a proportional allocation of jobs or services for each age group, as one might argue, for instance, for ethnic minorities.

The fact that age does not delineate any particular group means that we have to decide which age bands we are concerned with. The drive to address age discrimination has arisen primarily from concern about older people, but the age groups most affected, in relation to jobs and particular services, differ. Thus, concern about early retirement and age discrimination in applying for jobs is perhaps most relevant for the 50-64 year group; for health care the focus is particularly on those in their 70s and beyond. In education, those over 25 have less access to higher education, but in relation to training the age barriers arise later in the age range. Thus, while we are focusing in our analysis on the over 50s, the focus of public policy needs to be on addressing detrimental treatment **on grounds of age**, rather than that experienced by any particular age group.

Discrimination on grounds of disability has a particular relevance to age as 34 per cent of those aged 50-64 have a long-term disability.²⁴ There may therefore be many cases where discrimination on grounds of age and disability overlap. The proposal to retain separate sets of legislation for age and disability discrimination is therefore problematic.

Why tackle discrimination?

Leaving aside for a moment any right of the individual to be free from discrimination, we have seen that there is a range of socio-economic justifications for tackling age discrimination and, in relation to employment, a business case.

For employers, the business case is that it provides them with access to a wider range of talents and skills in a tight labour market; that age diversity increases the range of experience in staff teams; and that there is a reduction in staff turnover because older people stay longer, coupled with lower absenteeism and higher levels of motivation. Older workers can maintain the 'corporate memory', while older customers welcome dealing with older salespeople or financial advisors (DWP 2001). The aim of discrimination legislation, for employers, is thus to free the labour market from prejudicial assumptions about older people so that the best person can be recruited, promoted and retained.

In relation to health, there are benefits for individuals themselves (avoidance of pain, misery and premature death); benefits for families who bear caring responsibilities and may forego income and become socially isolated as a result; benefits for local authorities that are responsible for financing long term care; and for social security budgets that fund invalidity benefits and carers' allowances.

In relation to education, there are similarly benefits for individuals (confidence, autonomy and choice), their families and for society. It can increase employability, access to information on the consequences of health related behaviour, access to health care, ability to articulate health needs, and to act on advice given:

We have numerous examples of people reporting how much even a minor learning episode could help them in relations with health professionals (Schuller 2003).

Education is particularly important in relation to mental health in improving self confidence and self image and giving structure to daily life. Maintaining better health and autonomy, people of all ages make less demand on public

services and may defer their need for nursing and residential care. Such savings need to be evaluated if these benefits are to be quantified and influential in the allocation of future resources.

Education is also important for older people to communicate with their families, not least their grandchildren, keeping them in touch with new technology and new ideas. The contribution of older people is not a luxury option for the family but often a vital source of stability at times of stress and separation. The self confidence gained from education can be as vital as the knowledge. Involvement in civic activity is known to be correlated with education, partly because of related factors such as wealth but also because of growing confidence, skills and access to opportunities (Davis Smith 1998). Finally, improving access to education for older people is positive for the education process itself: the value that a range of student experience brings to the class. A high degree of age stratification in formal education reduces the opportunity for students to benefit from the diversity of collective experience, and social understanding, which a wider age range can bring (Schuller 2003).

From these examples, we can see that improving older people's access to jobs and services could have significant socio-economic and business benefits. But some of those gains could be achieved simply by improving access to jobs and the quality of services – by raising the floor – without achieving equality **per se**. Moreover, where the case for improving participation rates and quality of services rests on the socio-economic benefits and business gains alone, it is possible for competing priorities to take precedence.

What do we mean by age equality?

The moral imperative to address discrimination then rests on the value which we attach to achieving fairness for the individual concerned. The promotion of equality is then justified, not just for instrumental reasons, but as a central principle of social justice. We therefore need to be clear what we **mean** by equality in relation to age. Is the aim simply to ensure equal treatment, or something more?

Equality is not a single concept. It is defined differently depending on the objective. It can mean:

- equal treatment
- that individuals should be treated according to their merit
- that individuals should be treated according to their need
- equal outcomes
- equal opportunities: facilitating choice and autonomy.

EQUAL TREATMENT

The most basic concept of equality is equal treatment: the Aristotelian notion that likes should be treated alike. This is an intuitively powerful concept. But it begs the question whether two people of different ages are ‘alike’ in any relevant sense.

We have seen that there are many contexts in which it is argued that older people are different from prime age people and therefore that different treatment is warranted. Some of these arguments are based on prejudicial assumptions and some are a legitimate attempts to deal appropriately with difference. Thus, different treatment based on the assertion that older people have poorer capacities or health when compared to younger people is prejudicial. But to shape education or health policies in a way which genuinely addresses and redresses differences is legitimate. The principle that likes should be treated alike does not assist us in distinguishing these different situations. It is also a blunt tool. Only ‘likes’ qualify for equal treatment; there is no requirement that people be treated appropriately according to their differing requirements.

A good example of these difficulties arises in respect of health care organised around age categories. Is it discriminatory to establish ‘special’ units for older patients? Is this equivalent to invidious racial segregation, or are these older people relevantly different? The aim should be to ensure that different treatment is appropriate to the differences, but the quality of care is equivalent.

The concept is helpful in highlighting that less favourable treatment based on prejudicial assumptions about capacity is unacceptable. But equal treatment can lead to unequal outcomes if background disadvantage is ignored. Equal treatment has a further weakness: it includes no minimum standards. Two

people can be treated equally badly, and equal treatment achieved by levelling down, without falling foul of this principle. In itself it is thus inadequate as a basis for public policy on age.

EQUAL MERIT

In relation to employment, the principle of equal merit, that each person should be treated according to the qualities they bring and not according to irrelevant characteristics, has more value. Employers who exclude workers on the basis of stereotypical views about their capacity are precluding themselves from benefiting from a pool of potentially talented workers. The merit principle has therefore been a central plank of business and government promotion of age equality.

In this sense, merit can make a powerful contribution to the promotion of age equality. However, assessments of merit are often permeated with age-related assumptions. Moreover, the individual may not have achieved the formal qualifications used to judge merit, because access to qualifications was less accessible when they were young. The merit principle can also cause cumulative inequality, particularly in the area of training. Older people are offered fewer training opportunities because of an apparently shorter pay-back time; and they are then rejected on merit grounds because of their lack of training.

A focus on 'merit' also assumes that the individual should fit the job, rather than that the job might be adjusted to fit the worker. Yet it can be possible to accommodate the needs of an older worker, effectively modifying the merits test, without undermining the requirements of the enterprise, for instance through the introduction of flexible retirement opportunities.

A disproportionate number of older people may not be able to meet a merits test, perhaps because they have poorer qualifications. Positive action may be needed to enable these employees to compete on a level playing field. The merit principle can thus be valuable in the employment context, but may need both measures to prevent discrimination and positive action (such as skills training) to deliver it.

EQUAL NEED

The merit principle is not, however, usually appropriate to health and social care, as it could translate into preferential treatment to those needed for the workforce. Here, the concept of equal need is more appropriate. This is encapsulated in the National Service Framework for Older People:

Denying access to services on the basis of age alone is not acceptable. Decisions about treatment and health care should be made on the basis of health needs and ability to benefit rather than a patient's age... That is not to say that everyone needs the same health or social care, nor that these needs should be met the same way. As well as health needs, the overall health status of the individual, their assessed social care need and their own wishes and aspirations and those of their carers, should shape the package of health and social care (Department of Health 2001)

The concept of need, however, can be difficult to measure, and is particularly controversial where, as in relation to health care, it includes the concept of capacity to benefit. It may indeed not be appropriate to provide certain treatments to a patient who is beyond cure. However, 'capacity to benefit' has been defined in such a way that disadvantages older people because the concept of 'benefit' includes the number of years during which the benefit can be enjoyed. Even if an older person will gain as much from a medical intervention (such as removal of a cataract) as a younger person (indeed some treatments can be more effective when given to older people (Grimley Evans 2003)) this benefit will not be enjoyed for as many years as by a younger person. These assumptions are then used to justify allocating fewer resources to certain treatments for older people.

Clinical judgements restricting older people's access to health care are, moreover, often based on a lack of evidence on the effectiveness of intervention for people over 65. Yet this lack of evidence is a result of decisions made by researchers and drug companies to exclude people over 65 from their research studies (Robinson 2003).

Finally, the cost-benefit argument is based on a narrow view of 'costs' and 'benefits', that ignores the gains for society of improvements in the health of

older people. Although that individual might benefit from the improved eyesight achieved by a cataract operation for less time than a younger person, society gains from the greater independence of the older people whose sight has been restored. An even stronger argument can be made for hip replacements, which in any event last only ten or so years. As Harris argues:

To define need...in terms of capacity to benefit and then to argue that the greater number of life years deliverable by health care, the greater the need for treatment...is just to beg the crucial question of how to characterise need or benefit (Harris 1997.)

Instead, he argues, the NHS should offer health care on the basis of individual need, 'so that each has an equal chance of flourishing to the extent that their personal health status permits'.

Grimley Evans argues similarly. His three principles of equity are that health care requires equal care for equal need, and that need is defined in terms of capacity to benefit. His crucial third principle is that benefit is to be assessed by the recipient rather than the provider of healthcare:

It is no part of the business of the British State to determine that the lives, and desire for life, of some citizens are worth more or less than the lives and desire for life of others (Grimley Evans 2003)

EQUALITY OF OUTCOMES

Each of the three concepts of equality we have considered so far – equal treatment, equal merit and equal need – focus on how the individual is treated. Here, in contrast, the focus is on outcomes. This approach, which has broad applicability to employment, health and education, recognises that to treat everyone alike can perpetuate disadvantage.

The aim instead is to achieve equal outcomes. Differential treatment to correct inequity can here be acceptable, while differential treatment which increases disparities is not. For example, allocating greater health care resources to a group in order to rectify health inequalities would be acceptable. Free prescriptions and eye tests may be a case in point (although need could in principle be assessed on an individual basis rather than through

blanket provision). But favouring a group which is already privileged would not be legitimate. In this sense, equality is an asymmetric concept.

Because many outcomes can be measured numerically, a focus on outcomes can be strategic. But attention has to be paid to which outcomes are being measured and why.

One answer is provided by the Government and employers' associations' focus on promoting 'age diversity at work'. The objective is to achieve a range of ages within employment, to achieve the benefits for business we cited. However, it can potentially conflict with the merit principle if age is seen as a qualification in its own right; and it reinforces, rather than addresses, the assumption that people do have different characteristics based on their age. It could also operate to exclude people of a particular age group once the desired representation has been achieved. Finally, because it is grounded in a business strategy rather than in redistribution to disadvantaged individuals, this approach can and is rejected by some companies on the grounds that their business will not benefit from age diversity, or by educational institutions which feel that the benefit of allocating places to older students is outweighed by other considerations.

Within health and social services, the distributive aim is particularly complex. If the outcome that is sought is not fair distribution between sections of society but simply improving the health of the nation as a whole, it can be used to justify removing resources from older people (Williams 1997a). The pull towards utilitarianism found in a results-oriented approach can only be balanced by a strong conception of individual rights. The opposition between the two goals is well expressed by Grimley Evans when he asks:

Is the NHS about improving the health of the population so that they may better serve the uses of the State, or as a service to help individual citizens pursue their own life goals? (Grimley Evans 2003)

He poses individual choice as the primary alternative aim.

EQUALITY OF OPPORTUNITY: CHOICE, AUTONOMY AND PARTICIPATION

On this view, equality entails that all people, regardless of age, should have an equal set of alternatives from which to choose and thereby to pursue their own version of a good life: ‘the ability – the substantive freedom – of people to lead the lives they have reason to value and to enhance the real choices they have’ (Sen 1999).

This objective differs from equal treatment in that, to ensure a genuine range of choices, unequal treatment may be required. It also differs from equality of outcomes. Provided the choices exist, there is no reason to expect that everyone will make the same decision. Difference in outcome is then due to choice, not discrimination.

This holds much promise in the field of age discrimination. It requires the removal of explicit age barriers (direct discrimination); but also of practices which, while appearing age neutral, operate to exclude individuals and limit their range of choices (indirect discrimination). Thus equality in health care requires individuals to be given a range of choices, not that decisions be made for them.

Choice must be more than formal. People must genuinely be in a position to make use of the opportunities presented. For example, although many people retired early under what were nominally ‘voluntary’ early retirement schemes, some would have preferred not to have retired and others, with the benefit of hindsight, would like to return to work but find that the barriers against return to a reasonable job in their 50s and 60s are too great.

If equality of opportunities is to make a significant impact, it requires proactive measures be taken to ensure that people of all ages have choices **and** are genuinely able to pursue them. Thus it necessitates not only the removal of age barriers but measures such as skills training, the adjustment of pension schemes, the introduction of flexible working and the appropriate allocation of health care resources and information. For older people, the choice to continue to live at home may only be a genuine one if there is assistance in adapting housing; the choice to work only meaningful if accessible public transport is available. Real choice also entails giving older people the right to choose to continue in work, to enjoy their leisure, or a combination. This

means savings and pensions at a sufficient level to make it possible to give up work should they so wish.

One substantive value underlying equality of opportunity is that of participation. This ideal is strongly reflected in recent EU policy documents which refer not just to the need to augment the workforce with older workers, but also to combat social exclusion including opportunities for older people to participate in civic activity. The EU Charter of Fundamental Rights includes the right of older people to ‘participate in social and cultural life’.²⁵ The importance of involvement in decision-making is also recognised in the National Service Plan for Older People, which stresses the need for representation of older people in decision-making and in setting and monitoring standards. The importance of civic participation as a goal should not be underestimated. Margaret Simey, former County Councillor and Chair of Merseyside Policy Authority put it well when she wrote recently of her unease at the way she finds herself treated, in her nineties, as someone in need of care and company – a dependency role, rather than as someone with a contribution to make:

Peel away the assumptions and what is left is, in fact, a deep sense of exclusion. I don't belong. I am not one of ‘them’. I have no role, no place in our community. ‘They’ come to do ‘good’ to me. My relationship with ‘them’ is all get and no give, a sad and demeaning experience.

The clue to the problem of the exclusion of older people lies in the relationship between those who run the services and those who are supposed to benefit from them. Older people must be emancipated from their present state of helpless dependency. They must be allowed their fair share of responsibility for their own well-being and that of the community to which they belong. (Simey 2002)

DIGNITY

We suggest that there is one final, related, broader human rights principle that must underpin any strategy to deliver equality for older people: that of dignity. As the Canadian Supreme Court has declared:

Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.²⁶

Dignity is also central to the new South African constitution and to the German Basic Law. The EU Charter of Fundamental Human Rights specifically grounds the equality rights of the elderly in the dignity principle, proclaiming the right of the elderly ‘to lead a life of dignity and independence’; and the National Health Service Plan commits the government to providing for ‘dignity, security and independence in old age’ (Department of Health 2000). Finally, the EU Equal Treatment Directive itself bases the right to protection against age-related harassment on the dignity of the person.

Dignity is an irreducible minimum. If it underpins equality, it signals that a ‘levelling down’ solution is not as good as one that ‘levels up’. Equality based on dignity must enhance rather than diminish the status of individuals. Dignity means that equality cannot solely be based on a demonstration of equal merit: a person must be treated with respect, regardless of his or her capabilities. Dignity, moreover, requires not only freedom from degrading treatment (a central principle of the Human Rights Act) but also freedom to live life with some autonomy. Thus, the central aim of an age equality strategy should be to facilitate equality of opportunity, autonomy and equal participation of all in society, based on equal respect for the dignity of each individual.

Recognition of the need to preserve dignity does not always lead to clear prescription on policy reform. For example, it is argued that the removal of mandatory retirement ages could undermine the dignity of individuals, since senior workers could be subjected to degrading personal appraisal instead of the less intrusive mechanism of automatic retirement. We shall examine the limits of this argument in Chapter 4.

Limits on equality

None of this is to say that the right to age equality is unlimited. Like most rights, it can be overridden where the aim is legitimate and the means to

achieve that aim are proportionate. We shall consider in the next chapter the competing objectives which may legitimately override age equality, and how those restrictions might be framed in legislation. Before we do so there are two broad arguments to consider here: that less favourable treatment of older people is acceptable because they have already had a 'fair innings', and that age equality is simply too expensive for business, and for the state.

FAIR INNINGS

One challenge to equality for older people suggests that the rights of an individual need to be considered in terms of his or her whole life-span, not at a particular age. If we all have the same opportunities at some stage in life, there is no inequality. Once older people have been treated to the benefits of society, they should let others have their share.

One defence of mandatory retirement ages is phrased in these terms. Since we shall all be required to retire, the argument goes, there is no breach of the equality principle (McKerlie 1992). Moreover, older people should give way to younger workers who have not yet had an opportunity to develop their career. In the healthcare field, the argument is to equalise the lifetime experience of healthcare of all people in society. Those who have had a good share of health resources should not expect to have as much spent on their health improvement as would be spent on someone who has not yet had their share (Williams 1997b). In education, resources can legitimately be focused on the young as each of us is young at some stage of our lives.

This 'fair innings' argument is, however, fallacious. Two life-spans cannot genuinely be compared. The opportunities 60 years ago were very different to those today. A change in policy opening up new opportunities affects those who happen to be at the relevant age, not those who have already passed it. The individual may or may not have had access to the training, jobs or health care in earlier years that is now denied them; or may not then have had the need that they have now.

The argument that older workers should give way, which many older people themselves believe, is similarly based on flawed assumptions: that there is a fixed number of jobs which can be handed from one worker to another. But

driving people out of the labour market at 50 does not create jobs for young unemployed people. Conversely, keeping older people in work does not 'use up' jobs which could otherwise be allocated to the young.

Known as the 'lump of labour' fallacy, this approach ignores the fact that extending employment can in turn create further jobs. The size of the labour market is determined by the scale of demand for jobs; the number is not static. In fact, countries with a high level of employment of older people also have high levels of employment of younger people, not the opposite as might be expected. Similarly, population growth does not itself lead to higher unemployment, if the economy is buoyant. (Cabinet Office 2000; Campbell 1999; Samuelson 1979)

The fair innings argument is also flawed in its application to health resources. It might be argued that health care differs fundamentally from the labour market, since health care resources are finite. Therefore, the use of resources on older people must use up resources that could otherwise be spent on younger people. But the use of health care resources is not a 'zero sum game'. Health care that facilitates independence or improves health can actually pay for itself. The resources spent on interventions such as hip replacements for older people decrease the need for other resource input. Moreover, a healthier older person might care for others. In fact, the fair innings argument only really applies to life threatening illness. Health care resources which are withheld from an older person with a chronic illness or disability will otherwise reappear in the health or social services budget, or be financed from private family income.

COSTS TO BUSINESS AND THE STATE

The cost to business is put forward as a justification for limiting age equality: that the prosperity of the individual business will further the good of all, even if it subordinates particular equality rights. If a business is required to retain less productive workers, or to bear too great a portion of social costs, the business might no longer be viable, causing unemployment and dislocation. This is a complex argument which needs to be dissected into several different issues.

The first is to determine the extent to which age equality is indeed a net cost to business. As has been seen, there are many ways in which age equality is good for business. It opens up a wide pool of talent from which employers can draw, and yields a diverse workforce with a range of skills and experiences. Leading companies such as Tesco, B&Q and Sainsbury's report that employing workers over 50 contributes to high quality of customer service, increased sales and customer satisfaction, less absenteeism and less shrinkage than other stores.²⁷

The argument that age equality will constitute too great a drain on public services also needs to be examined. Here too we have seen that there are many ways in which age equality could reduce expenditure. Money spent in health care aimed at greater independence for older people reduces reliance on social services and housing providers, as well as to individual carers. Moreover, older people able to remain in work are less likely to suffer from mental illness such as depression, and poverty related illnesses. Similarly, the money spent on giving greater educational opportunities to older people may save money by opening up opportunities for them to continue in paid work, to participate in unpaid caring or voluntary work and to take more care of their own health and finances.

It may be argued that there is as yet little evidence base from which we can quantify such savings. In response we would suggest, as Schuller does in relation to his proposal that older people be given a grant to access education, that such initiatives could be piloted and evaluated to quantify the extent of the difference that they can make over time (Schuller 2003). That said, as our case for action rests ultimately on the need to protect the rights of the individual, we do not propose that employers and service providers should have no responsibility to promote equality meanwhile.

This is not to deny that there may be net costs associated with age equality. The next step is to identify these costs and consider who should bear them. It is often forgotten that there is also a cost to age inequality – a cost that is born privately by individuals and their families and thus does not appear in an economists' calculation:

many costs and benefits associated with economic well-being are not captured in the accounting framework adopted by single

organisations; even at the national level, the tendency has been to sum up the estimated costs to individual employers without reference to the effects on other areas of economic and social life. (Humphries and Rubery 1995).

This is particularly true in respect of health and social services. Resources saved to the public purse do not necessarily mean that there is no cost at all. Such costs are currently borne by older people themselves, who experience avoidable pain and misery, disability and even premature death by being denied access to timely and appropriate treatment, care and support. The costs also fall on families – especially female relatives – who care for older relatives who are ill or disabled. These relatives may forego the benefits of a decent salary or pension as unable to hold down a full time job. They also become socially isolated through lack of relief from their caring responsibilities. Families may also be denied the help and support of grandparents. While the Government inevitably focuses on public expenditure, the cost to individuals and families must be taken into account in the context of its wider social justice and social inclusion objectives (Robinson 2003).

The three potential cost-bearers are the employer, the State and the individual and their family. Some costs, such as the costs of training, may be more efficiently born by the State than the individual employer. Even where costs are born by the employer, not all firms face the same level of costs and benefits. These issues have been analysed in some detail in respect of gender discrimination. Although a similar analysis remains to be conducted in respect of age, it is clear from this earlier work that if change is left to the voluntary initiative of the employer, it will not take place at any optimal pace:

There is a disjuncture between what is rational for some individual enterprises...and what would collectively benefit employers in their need for a highly-productive workforce' (Breugel and Perrons 1995)

Ultimately, we have argued that the movement towards age equality rests on ethics – the value attached to fairness and equality as a social good. Certainly, the more evidence that such equality also furthers business and macro-economic interests, the better. Where there is a real cost, however, the solution must be addressed holistically, moving in favour of a fair distribution of costs

between individual, employer and State, rather than assuming that shifting the cost away from the employer is the only dimension of justification needed.

How then should the fairness of the distribution be determined? Certainly the decision in the first instance should be for elected representatives rather than courts – which is one reason why we shall argue that the promotion of age equality should be mainstreamed into policy making and employment decisions, rather than relying predominantly on complaints of discrimination in the courts to provoke change.

Conclusion

An examination of the ageing process reveals that average data on people of particular ages tells us nothing about each individual; that in most circumstances it is no fairer to make decisions on the basis of stereotypes about age than it is on the basis of race or gender. A comparison with discrimination on those grounds shows age to be similar in some respects but different in others: notably, that age does not delineate a distinct group to form the basis of meaningful comparison with others.

We demonstrated strong socio-economic and business arguments for addressing age discrimination but that some of those benefits could be achieved by raising the floor (more older people in jobs and securing access to better services) rather than requiring equality per se. Moreover, the economic and business case is susceptible to being overridden by compelling arguments for choosing competing priorities and resource allocation. Ultimately, therefore, the moral imperative to act on discrimination rests on the value that we attach to fairness for the individual and equality as a social good; hence we need to clarify what we mean by equality in the context of age.

We considered different concepts of equality – from equal treatment through equality of outcomes to equality of opportunity (offering choice and autonomy), concluding the latter to be most appropriate for age but only when underpinned by a broader human rights principle – equal dignity. In relation to each concept of equality (with the possible exception of the most limited, equal treatment) we saw that the objective could not be achieved solely by

legislation providing individual victims with a remedy for the discrimination they have suffered. It requires positive steps to be taken to remove the barriers to opportunity and participation that they face.

This is not to say that the right to equality is unlimited. While we showed that the assumption that less favourable treatment of older people is acceptable because they have had a ‘fair innings’ is fallacious, we recognised that cost is an inevitable consideration. We shall explore the grounds on which equality may be limited in more depth when we consider the options for the legal framework in the next chapters. But we warned that, in making such a calculation, we need to consider who is bearing the costs of inequality – individuals and families – and must take into account the potential savings if we have healthier, better educated, more confident, mobile older people.

3. What kind of legislation will deliver?

Two tasks arise from this analysis: the need to provide remedies for victims of age discrimination and to be proactive in promoting opportunities for greater choice, autonomy, dignity and participation for people regardless of age. To achieve those objectives, change is needed on many levels: from shifts in attitude among employers and older people themselves, through reforms in government policy and resource allocation to adaptation of the policies and practices of employers and service providers, underpinned by the promotion of good practice on equality and on broader human rights standards.

What will be the most effective change levers to bring this about? As the Government intends simply to implement the EU Employment Directive, we begin by assessing its strengths and limitations. We then propose an alternative legislative framework, suggesting how government could address some of the concerns of those in business who do not want it to go beyond the minimum that the EU requires.

What the EU requires

When the Amsterdam Treaty on the European Union came into force in 1999, the EU was given the power to implement the principle of equal treatment not just, as before, in the field of gender, but on grounds of race, religion and belief, disability, sexual orientation – and age.²⁸

A Directive on race was duly adopted in June 2000²⁹ and the Employment Directive on age, disability, religion and belief and sexual orientation, five months later.³⁰ This Directive must be implemented by December 2003 and the regulations on disability, sexual orientation and religion and belief are already published. But the UK has taken advantage of an option to delay implementation in relation to age until 2006,³¹ arguing that the issue is complex and that employers need time to adapt.

The Directive covers employment and occupational training in the public, private and voluntary sectors. It follows the traditional pattern of the UK's domestic discrimination legislation of the 1970s, defining equal treatment as meaning that there should be no direct or indirect discrimination on grounds of age.

The Directive was undoubtedly a step forward. Without it, it is not clear that the UK would have replaced its voluntary code of practice on age diversity at work with enforceable discrimination legislation. But the narrow scope of the Directive and the kind of legislation it requires is in many ways also a step backwards. Reflecting the legislative models the UK adopted thirty years ago, it does not build on the innovative provisions that the Labour Government has itself introduced over the past five years precisely because those earlier models were shown to have failed. Thus the Directive:

- Only covers age discrimination in employment and vocational training – not in goods, facilities and services (such as health, education or transport) which **are** covered by existing UK legislation on race, gender and disability.
- Only requires remedies for discrimination, not that employers and government take pro-active steps to deliver equality. It thus focuses on individual fault-finding among employers and depends on retrospective investigation of discrimination – with the confrontation and stress for individuals that implies – rather than focusing on prevention and the creation of new opportunities to return or remain at work.
- Addresses age separately from discrimination on other grounds. Following this pattern, the Government proposes to introduce separate regulations on age, rather than taking the opportunity to bring the legislation together into a single, consistent, equality Act.

The limited success of the old models of discrimination legislation suggest that the Government will fail in its objectives on age if it adopts this outdated approach.

It is only the narrow terms of the EU Directive that the Government can implement via regulations under the European Communities Act 1972. If it were to go further than the terms of the Directive, as we propose, it would be required to use primary legislation: an Act of Parliament. Primary legislation would also allow opportunity for full parliamentary and public debate. Moreover, a statutory Code of Practice providing guidance to employers on interpreting the legislation can only be introduced under primary legislation. If the Government persists in implementation through regulations, employers

will not have the benefit of a Code of Practice setting out, for instance, the circumstances in which retaining mandatory retirement might be justified, and the clarity and greater certainty this would provide. Employers do have statutory Codes of Practice in relation to discrimination legislation on race, gender and disability.

A holistic approach

Under our alternative approach, the regulatory framework would:

- Tackle discrimination in goods and services;
- Include a requirement on employers and public service providers to be proactive in addressing discrimination and promoting equality;
- Move towards consistency across the six equality strands;
- Establish machinery for effective promotion and enforcement; and
- Include provision for promoting broader human rights standards affecting older people.

TACKLE DISCRIMINATION IN GOODS AND SERVICES

The EU Directive only requires member states to prohibit age discrimination in relation to employment, not in the delivery of goods and services. Yet it is clear, as we have seen, that there is discrimination in a range of other fields, including health, social services and education. If age discrimination is deemed unacceptable, we need to ask why there should be statutory protection for older people in relation to work but not when discrimination occurs elsewhere.

The ICM poll for ippr found 72 per cent of the public agree that ‘it should be illegal to discriminate against people because of their age when providing public services such as the NHS, social services and education’, 60 per cent agreeing strongly with that view. (Twenty four per cent did not agree.)

Even if the aim were only to achieve equality within employment, this approach would be inadequate. It will put a burden on employers which they could not discharge because many aspects of age discrimination interact and

reinforce one another. Better healthcare enhances employability, and employment can improve health. Better housing and transport for older people make it more likely that they will be able to participate actively in society, whether as volunteers or paid workers. Conversely, less access to education makes it difficult for older workers to remain active and productive.

Legislation focussing on employment will be ineffective unless it addresses these wider issues. Yet tackling age discrimination in goods and services does raise complex issues that have scarcely begun to be addressed. We suggest how we might move forward in that respect, in Chapter 4.

REQUIREMENT TO PROMOTE EQUALITY

Experience of race and gender has shown that the 1970s model of complaints-based discrimination legislation can only be of limited effect.

Research, and the level of complaints received by the Commission for Racial Equality and the Equal Opportunities Commission, continue to demonstrate the persistence of discrimination and the obstacles to challenging it effectively through tribunal and court cases.

The 1970s model presumes discrimination consists of a series of individual acts or decisions. The focus is therefore on retrospective investigation to find an individual who is at fault. Not only does this create a heavy burden on the individual litigant; it also prompts a defensive attitude in respondents. The CBI fears that age discrimination legislation will increase the regulatory burden and cost on employers, exposing them to high levels of costly and potentially spurious individual litigation (CBI 2000). The Employers' Forum on Age, based on US experience, suggests that the legislation will cost employers £193 million in litigation costs in year one, the Small Business Federation that it may cost its members £200 million in the first year (EFA 2003).

The problems of sole reliance on individual litigation can also be seen in the US experience. Age discrimination claims centre almost entirely on individual litigation, with a jury trial and the prospect of high damages awards. In practice, therefore, the claim is only available to those who have the financial and emotional resources to pursue a claim. The vast majority of plaintiffs in US claims are indeed white males in high paying, high status jobs (Friedman 2003).

An alternative model is to require employers and occupational training providers to promote equality, rather than just to refrain from discriminating. Recognising that societal discrimination extends well beyond individual acts of prejudice, the duty goes beyond compensating identified victims, aiming to reform institutions so that the likelihood of such litigation is avoided.

Correspondingly, the duty-bearer is not a manager 'at fault' but the organisation as a whole. Nor is it left to the victim to initiate action. Instead, organisations are responsible both for identifying the problem (through data collection, impact assessments and monitoring) and employers and staff participate in its planning and in implementing its eradication. Public bodies are often in the best position to carry this responsibility, but suitably framed, it is also important, as we shall show, to have a light-touch mechanism for the private sector where most people work.

This model has already been adopted for the public sector by the new generation of equality legislation in the UK, in particular the Northern Ireland Act 1998, and the Race Relations (Amendment) Act 2000 in Britain. The Northern Ireland fair employment legislation, covering political and religious discrimination, has for a longer period used this model in relation to public and private sector employers.

Race equality duty

The new legislation on race in Britain is similar in principle, but with differences in practice, from the recent Northern Ireland model. Thus the duty to promote change embodied in the Race Relations (Amendment) Act 2000:

- Requires public bodies to have due regard to the need to eliminate unlawful discrimination, promote equality of opportunity and promote good relations between people of different racial groups.
- Covers discrimination on grounds of race, colour, nationality, ethnic and national origins.
- Applies to around 43,000 public sector bodies (listed in a Schedule to the Act) of which, however, around 26,000 are schools and 9,000 Parish Councils. The full weight of the Act's requirements apply only to the less than 10,000 public sector employers and service providers such as local

authorities, regional health authorities and primary care trusts, police forces and other criminal justice agencies.

- These bodies must demonstrate that they have carried out a series of specific duties to help them meet the general duty: they must publish a Race Equality Scheme setting out which of their functions are relevant to fulfilling the duty (education will be more relevant than road maintenance, for instance); monitor their employment practices; consult, monitor and assess the impact of their policies and services on race equality and race relations; train their staff; and ensure public access to the relevant information on action and progress.

In effect, the Act requires public bodies to identify barriers to race equality in employment and service outcomes and to take action to address them. A statutory Code of Practice, and non statutory guidance giving detailed assistance, for instance on ethnic monitoring, were disseminated by the statutory body charged with promoting the Act, the Commission for Racial Equality (CRE 2002a; 2002b). Monitoring compliance is, however, the responsibility of the mainstream audit and inspection bodies, such as the Audit Commission and criminal justice inspectorates. The CRE has a memorandum of understanding with these bodies, which sets out respective responsibilities, and it has produced a guide to inspection (CRE 2002c). The Commission can issue a compliance notice to authorities that fail to comply with the general or specific duties, for which, if necessary, a court order can be sought. The CRE has indicated that it sees enforcement action as a last resort and, by the end of June 2003, only one compliance notice had been issued.

An evaluation of the race equality duty was conducted by an independent consultancy, Schneider Ross, and published in July 2003. The objective was to establish what progress had been made since the specific duties had come into force on 31 May 2002. One third of public bodies were found to have made strong progress in publishing and implementing race equality schemes, one third to be 'putting the building blocks in place' and one third to be lagging behind, giving weak 'off the peg' responses. Most significantly for our purposes, 70 per cent of authorities said that implementing the duty had delivered positive benefits in improving policy making and service delivery. They saw this enabling legislation as an opportunity, not a burden (CRE 2003a).

The strength of the race equality duty is that it requires authorities to go through a series of steps which, if done well, ensure that it is fully aware of inequalities in its employment and service provision; that this information is public knowledge, thus ensuring a level of accountability for subsequent action; and that its subsequent performance is monitored by the agencies supervising performance across its functions. Crucially, its requirements are proportional: where the relevance of a particular function to race equality or race relations is marginal, the authority is not required to give it any priority in its equality scheme.

A limitation of this model may prove to be that the legislation does not require it to focus on the outcomes that the authority is seeking (whether it be raising the educational attainment of ethnic minority pupils or improving police-community relations), nor to demonstrate that it has delivered outcomes rather than simply complied with process requirements. It also addresses race inequality in isolation from discrimination on other grounds. We seek to rectify this in our proposals on age.

Equality duties in Northern Ireland

Meanwhile in Northern Ireland, legislation requires both public and private sector employers to monitor the composition of their workforces, and where appropriate, to take measures to secure fair participation of Protestants and Catholics.³² This measure has been remarkably effective in reducing the discrimination Catholics experience at work.³³

The subsequent Northern Ireland Act 1998 (S75) now mainstreams equality in the public sector across nine equality strands – including age – by providing that 177 designated public authorities must have ‘due regard to the need to promote equality of opportunity’ in carrying out all their functions including between persons of different ages.³⁴

Public bodies must produce an Equality Scheme setting out how they propose to do this, and submit the scheme to Northern Ireland’s single Equality Commission for approval. A schedule to the Act sets out in some detail what the scheme must contain, including impact assessments on existing and proposed policies and the steps that will be taken to address adverse impact, a timetable, and provisions for consultation and transparency. Members of the

public can complain to the Equality Commission if they think that a public body is not fulfilling its duties.

A recent report from the Commission on implementation of the duty up to March 2002 found good levels of procedural compliance, and public bodies building their equality responsibilities into their mainstream business planning, though lack of resources was affecting implementation (Equality Commission 2003). There were teething problems with new approaches, not least in conducting impact assessments, and a need to harmonise means of measuring progress with Best Value and other existing performance measures. The duty had led to greater consultation with affected groups, including older people, to the collection of more data from which impact could be assessed, greater public access to information and some tangible outcomes in new services. There were many examples of good practice on which to build.

The strength of the Northern Ireland model is, as with the race duty, that it requires a pro-active approach. In this case, however, it does so equally across all of the equality strands, including age (even though most of those strands are not covered by anti-discrimination legislation). That is, the law requires public bodies in Northern Ireland to **promote** age equality, but does not provide remedies for people who believe that they have been discriminated against on grounds of age. The chief executive of the Equality Commission reports that by February 2003, 154 equality schemes had been approved by the Commission, that there was evident increased commitment to the equality agenda at senior political and executive levels, greater involvement of marginalised groups in policy making (though also evidence of consultation fatigue), increased training, resourcing of implementation and monitoring, and growing evidence of good practice.³⁵

The weakness of the Northern Ireland model, again, may be that the specific requirements of the legislation require a focus on process rather than also on outcomes. Moreover, because the requirements for each strand are identical, and there is no requirement on either public bodies nor the Equality Commission to report separately on each strand, it is possible for attention to be focused on those strands which are most contentious, on which there is most data to conduct impact analysis, or on which there is already anti discrimination legislation, at the expense of age which cannot compete on any of those criteria.

Voluntary organisations working on age issues in Northern Ireland do indeed report that it is not yet possible to identify many specific outcomes from the new legislation that have benefited older people, despite the proliferation of equality schemes that they have been consulted on over the past two years. However, they agree with the Equality Commission that the legislation has led to greater awareness within public bodies that age is an equality issue that must be taken into account, and to an increase in data collection to facilitate impact assessments.³⁶

Positive duties on equality have also been placed on the UK's devolved authorities. Section 120 of the Government of Wales Act 1998 requires the Welsh Assembly to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people, a responsibility which is credited with having driven a distinct equality agenda in Wales including pay audit and contract compliance initiatives, the mainstreaming of equality in to policy making and procedures, and initiatives to encourage greater diversity in public appointments (O'Conneide 2003c; Chaney and Fevre 2002).

The Greater London Assembly has a similar statutory responsibility, specifying age as one of the grounds on which the authority must promote equality of opportunity, with an annual reporting requirement. As a result, the GLA has developed various tools and structures to enable it to deliver the duty, including building equalities into its performance indicators and procurement process, and new consultation networks including a London Older People's Assembly (O'Conneide 2003c).

The Scottish Parliament is empowered to encourage equal opportunities and to impose a duty on the Scottish Executive and public bodies to ensure that they have due regard to the need to meet equal opportunities requirements. That is here defined as the prevention, elimination or regulation of discrimination on a series of grounds, including age. The Scottish Parliament has used this power to impose such a duty on a number of occasions including recent housing and local government legislation (O'Conneide 2003c). While these devolved models have evident strengths – not least in being non-prescriptive – the obverse is that the absence of specific duties and of any enforcement mechanism mean that delivery relies too heavily on the political will of the controlling party.

Building a positive duty to promote age equality into future legislation on age in Britain, in some form, would have many advantages:

- It would not rely solely on complaints by older people to stop discrimination.
- The burden would not be solely on employers and service providers – the state would equally have a responsibility to secure change – through changes in pension rules, provision of careers advice and training, ensuring availability of transport to work, and so forth.
- It would be goal-oriented, not retrospective.
- It would be inclusive, requiring participation by employees and service users, not confrontational; thus contributing to the participatory goal of the equality strategy
- It would focus on prevention, not litigation.
- It would require a continuous process of diagnosing the problem, identifying solutions, and monitoring impact.

Representatives of the private sector, however, while accepting that the Government must legislate on age, do not want the provisions to include a positive duty of this kind. The fear is that it would be a bureaucratic burden over and above the provision of remedies to employees or job applicants who successfully claim that they have been discriminated against. However, this anxiety overlooks the fact that effective action to address age inequality would reduce the chance of litigation: prevention is cheaper than cure. Second, the duty could be formulated as a light touch requirement; while evidence that an employer had taken appropriate steps to implement the duty could be used at an employment tribunal to support a defence to a complaint of indirect discrimination.

If legislation on age discrimination were to include a positive duty to promote equality, the question then becomes what kind of duty: whether it should cover only employment or also service delivery; how general or specific, how it would be monitored and enforced, and how it might be extended from the public to the private sector in some form. Moreover, if such duties are eventually to be extended across the six equality strands, should this

responsibility (as we shall suggest) be brought together for employers and service providers into a single Equality Duty, taking account of the specific requirements of each strand? We address these questions when we look at the law in relation to jobs and to services in the next chapter.

The Select Committee on Public Administration has endorsed the desirability of extending the duty to promote equality across all of the equality strands, including age, in its recent report on public appointments, arguing that this should be delivered through a single equality Act, the issue to which we now turn.³⁷

CONSISTENCY ACROSS THE SIX EQUALITY STRANDS

EU legislation reinforces the notion that different types of discrimination should be dealt with separately. The Employment directive, as we have seen, covers age, religion or belief, disability and sexual orientation. There are separate directives on sex discrimination and on race. This fragmented approach replicates the jagged pattern of UK law which has 30 separate Acts, 38 statutory instruments and 11 Codes of Practice (Hepple et al 2000).

This approach is problematic. First, because it makes anti-discrimination law difficult to understand and apply. Employers and service providers want to operate a single equality policy, reflecting some differing requirements across the equality strands but not have to take account of inconsistent provisions, definitions and requirements. A fragmented approach also makes it difficult to address discrimination experienced on more than one ground, for example on grounds of age **and** disability. As a third of people over 50 have a long-term disability, this will be a significant issue. If the fragmented approach persists, older people will have to choose whether to claim age or disability discrimination, a choice which is all the more difficult given the narrow, medically-based definition of disability in the Disability Discrimination Act.

Fragmentation is also problematic, however, because it masks the fact that the legislation to protect older people will be considerably weaker than that which exists to protect ethnic minorities, women and people with disabilities. On this issue, critics of fragmentation are not united. While business would like greater consistency in the legislation, it does not want each

strand, including age, to be harmonised by ‘levelling up’. While levelling up by extending the positive duty to promote equality to age would be likely, at least initially, only to cover the public sector, harmonisation would also mean covering age discrimination in provision of goods and services by the private sector, which we consider in Chapter 4.

The ICM poll for ippr explored whether the public think the law on age discrimination should offer less protection than exists for race and gender, as the Government proposes. It found only nine per cent of the public agree, 57 per cent saying that age discrimination merited the same level of protection and 30 per cent that it merited **greater** protection than against discrimination on those other grounds.

The Northern Ireland Executive is actively exploring the options for a single equality Act bringing together Northern Ireland’s disparate equality provisions.³⁸ In Britain, Lord Lester has tabled an Equality Bill providing a single framework for eliminating discrimination (and in some cases to promote equality) across eight grounds, including age.³⁹

The Government’s approach will make it appear as if age discrimination is a separate issue that does not share common principles with other grounds of discrimination. In fact, the core principles of equality, namely the right of individuals to autonomy, dignity and participation, apply to all kinds of discrimination. An individual who suffers discrimination on grounds of his or her religion, sexual orientation or age should be entitled to no less protection than those who suffer discrimination on grounds of race, gender or disability.

The Government has sought to harmonise key definitions between the three new sets of regulations, for instance on indirect discrimination and harassment. This is helpful, as a first step. We suggest the Government, while able to legislate only on age discrimination in employment by the 2006 deadline, should indicate its longer term intention to move towards a consistent single equality Act, the model already adopted in Australia, South Africa, Canada and New Zealand.

EFFECTIVE PROMOTION AND ENFORCEMENT: A SINGLE EQUALITY COMMISSION

Delivering age equality, or the more limited goal of eliminating discrimination, requires changes in policies and procedures, for which guidance is needed. The Government proposes that a single equality commission be established in Britain – in 2006 or later – absorbing the CRE, EOC and DRC in some form, and that this body would have the task of promoting good practice guidance on age discrimination to employers, and provide advice (and in some cases legal assistance) to individual victims.

It is regrettable that the single equality commission will not be established prior to the age legislation coming into force to provide employers with advice on changing their employment practices in the months leading up to that date. Written guidance is likely to be prepared by ACAS but a campaign to motivate employers to review their policies and practices will be needed prior to October 2006, and provision for one to one guidance made, if many are not to be caught unawares when their new responsibilities come into force.

Once established, the single equality commission should be resourced to provide guidance in a range of accessible media – written and electronic, and through training conferences and workshops – alongside its guidance on other equality issues. The Government's proposals will require significant adjustment in employment practices and the development of performance management systems that enable line managers to make fair decisions, not least on the declining capacity of an employee when mandatory retirement ends. Employers, particularly small businesses without human resource departments, must have access to guidance, both written and tailored to their individual needs.

The new commission must be strategic in its use of resources and should not therefore be expected to provide individual advice to employers or service providers, unless resourced to do so. Consideration could be given to the establishment of a self financing consultancy arm that could provide one to one guidance to organisations, as well as running conferences and workshops on good practice and compliance. Small firms are those most likely to employ people over 65, so potentially most likely to face

discrimination claims if they want to terminate their employment. Yet these employers are the most difficult to reach with information and guidance. The commission will need to develop a targeted strategy to meet their particular needs.

The legislation will be of little value to older people experiencing barriers to accessing jobs and services unless there is a local agency they can approach for advice. The difficulties older people have in securing information and assistance is well documented. One finding is that people want information that is topic – not agency-based.⁴⁰ As older people who have difficulty accessing jobs and services, or are ill treated, are unlikely to identify this as an equality or human rights issue, the priority may be to ensure that existing advice agencies, such as Citizens Advice, are resourced and trained to be the first port of call for information and advice.

If and when there is a positive duty to promote age equality, the commission's good practice guidance role would focus on delivery of that duty. As in the case of the race duty now, inspection for compliance should be mainstreamed into the work of the existing audit and inspection bodies such as OFSTED, the Commission on Health Improvement, the Audit Commission and the criminal justice inspectorates. (The Audit Commission already encourages this approach in local authority practice.)

In addition, workplace representatives ought to play a central role. Such a role could easily be incorporated as part of the implementation of the new EU Directive on Information and Consultation [2002/14/EC] which gives workplace representatives wide-ranging rights to information and consultation. It should also extend to small workplaces, which are not covered by the Directive.

The commission will be empowered to represent individuals at an employment tribunal, although it is likely that the resources it will have available to do so will be minimal, potentially limiting it to supporting test cases. Applicants should be able to get legal aid if they would otherwise be unable to pursue a meritorious case. The commission should also be able to support the individual in a conciliation process.

GUIDANCE ON HUMAN RIGHTS STANDARDS

It is also of particular importance to older people that the commission be able to provide good practice guidance to service providers on broader human rights standards such as the avoidance of degrading treatment, and protection of the rights to family life and to privacy. Adding to the protection for older people provided by the Human Rights Act, the Government proposes that the age legislation will provide protection from harassment at work if the individual can show that their dignity has been violated or that they have been subject to an intimidating, hostile, degrading, humiliating or offensive environment. Employers need guidance on how to handle such incidents.

As we saw in Chapter 1, inadequate provision was made by government to assist public bodies implement good practice on human rights and the Joint Committee on Human Rights in Parliament concluded in March 2003 that the case for a Human Rights Commission in some form is ‘compelling’. Its preferred option is, as IPPR recommended in its evidence to the committee, that this provision be part of the single equality body.⁴¹

Conclusion

In this chapter we have looked at the legislative mechanism that we could use to address age discrimination and promote age equality in order to achieve greater choice, autonomy, dignity and equal participation. We explained the severe limitations of the old fashioned legislative model proposed in the EU Directive, demonstrating that some existing UK equality legislation has already superseded that approach because it was ineffective.

Our alternative, regulatory framework would address discrimination in goods and services; build on the innovative provisions Labour has introduced on other equality issues (namely a requirement on employers and service providers to be proactive in promoting equality); work towards consistency in provisions across the six equality strands; establish machinery for effective promotion and enforcement; and include provision for promoting broader human rights standards affecting older people.

Arguing that the Government should go beyond the requirements of the EU Directive, we noted that the age legislation could then not, as the

Government proposes, be introduced through regulations under the European Communities Act but would require primary legislation, allowing a full parliamentary debate.

In Chapter 4 we consider the precise form that the legislation might take, responding in part to the proposals that the Government has put forward in its recent consultation paper, **Equality and Diversity: Age Matters** (DTI 2003).

4. Programme for reform

Having set out the optimal framework for age equality legislation, we look here at the options the Government is considering in relation to employment and vocational training, and set out some alternative proposals. We examine the circumstances in which the Government proposes that less favourable treatment on grounds of age might continue to be allowed, and the particular case of mandatory retirement, before setting out the form which a positive duty to promote equality in employment might take in the public and private sectors. We then explore options for extending the legislation to cover discrimination in goods and services and the role that the single equality body could play in promoting good practice in that sector.

The barriers to increasing the employment of older people extend beyond those within the control of employers, not least to the health, skills, mobility and expectations of potential employees, whose situations differ. Some want to continue working up to and beyond 65 in the same job with the same employer; some to continue in work but with a different job or employer. Some seek to return to work; while others may not expect, want or feel able to do so (Grattan 2003). Legislation on employment and on services needs to meet those differing circumstances.

The Government's proposals

In broad terms, the Government's proposals necessarily comply with the requirements of the EU Employment Directive. Most of our analysis in earlier chapters has focused on the Government's reluctance to go beyond what the Directive requires: to cover discrimination in goods and services and incorporate a positive duty on employers to promote equality. However, there are some issues within the proposals as they stand that need to be considered.

The law will put new obligations to avoid age discrimination on employers, providers of vocational training (including higher and further education institutions and private training providers), trade unions and professional bodies (in relation to their members as well as employees). It will provide protection to people who are working, those applying for jobs, and those applying for or undertaking employment related training. People who are members of, or

who apply to join, trade unions or professional bodies will also be protected. The legislation, surprisingly, does not cover those applying for, or doing, unpaid work.

With certain exceptions – and these are key – the legislation will make it unlawful to discriminate in decisions relating to employment and vocational training: in recruitment, access to training and promotion, and decisions on retirement and redundancy. Harassment of employees on grounds of age, and victimisation of those who have made complaints, will also be unlawful.

This protection for older (and indeed younger) employees is unprecedented in the UK and very welcome. But the impact of the law could be limited if the proposed exemptions are adopted.

How will age discrimination be defined?

The extent to which older people are protected by the legislation will depend on the way in which discrimination is defined, and the exceptions which are permitted. The Government proposes, first, to make **direct discrimination** unlawful. According to the consultation document, ‘direct discrimination occurs when a decision is made on the basis of a person’s actual or perceived age.’ This approach is preferable to that in the EU Employment Directive which defines direct discrimination as occurring ‘where one person is treated less favourably than another is or has been or would be treated in a comparable situation on [grounds of age]’.⁴² That definition is problematic because it depends on finding a comparator of a different age who has been treated more favourably. Since age is a process rather than a fixed quality, it would not have been clear whom a relevant comparator would have been.⁴³ We argued in our response to the first consultation paper on age (DTI 2002) that this comparative approach should not be adopted and it appears that the Government has accepted this point. This follows the trend set in relation to pregnancy⁴⁴ and disability⁴⁵ discrimination.

Our proposals would, however, have provided that it is discriminatory to subject a person to a detriment because of his or her age. Instead of outlawing all decisions made on the basis of age, our proposed definition is confined to detrimental treatment on grounds of age. This means that positive action does

not necessarily breach the principle. We also propose that the definition should include all situations in which a detriment is imposed because of the individual's age, in the sense that 'but for' her age, the detriment would not have been imposed. This would avoid the problems which have arisen in the US where courts have tended to hold that unless age was an express reason for the dismissal, no age discrimination occurred. For example, it was held that terminating an older worker's employment shortly before retirement to prevent his accruing his full pension was not a dismissal on the grounds of age, but in order to save costs.⁴⁶ Yet it was clear that, but for his age, the detriment would not have been imposed.

The Employment Directive specifically exempts payments made by state schemes, including social security;⁴⁷ and permits age criteria in occupational pension schemes, provided this does not result in sex discrimination.⁴⁸ So the state pension age will not be not affected.

The new law will also make **indirect discrimination** unlawful: that is, a policy or practice that applies to everyone but which puts people of a particular age at a particular disadvantage compared with other people. Indirect discrimination is often inadvertent, but can be justified by a legitimate aim provided the means are appropriate and necessary, whether or not this effect is intentional.

The principle of indirect discrimination performs an important complementary function to direct discrimination, capturing instances of apparently equal treatment which impact more heavily on people of a particular age. For example, a stress on formal qualifications might exclude a disproportionately large number of older people, since they tend to have fewer such qualifications. Such a set of criteria or practices would be indirectly discriminatory, unless it can be shown that formal qualifications are necessary for the position.

Despite its potential, indirect discrimination in other areas has proved difficult to operate, largely because of the complexity involved in measuring and assessing differential impact. Much litigation has been generated simply in respect of the comparison, since the data can vary substantially depending on which groups are chosen. In relation to age, for instance, should the comparison be between two age groups in the population as a whole or in the

relevant workforce? Or should it be between two age groups all of whom are qualified for the job? Once this has been settled, it is still necessary to decide whether a small difference in impact is sufficient.⁴⁹

Some attempt has been made to resolve these issues in the Employment Directive, which defines indirect discrimination as having occurred where ‘an apparently neutral provision, criterion or practice would put persons having ...a particular age...at a particular disadvantage compared with other persons’. It is notable that the Directive simply refers to the need to compare persons of ‘a particular age’ with ‘other persons’.⁵⁰ This seems to indicate that a comparison between persons of a particular group with any other person should suffice, and a particular disadvantage can be established if any detriment is proven. This avoids much unnecessary litigation on the threshold question.

The Government says it proposes to adopt the same approach to indirect discrimination as used in sexual orientation, religion and gender legislation. The published regulations on sexual orientation and religion and belief, however, contain a definition of indirect discrimination which requires not only that the policy or practice exists but that ‘an individual can show that he/she has suffered that disadvantage’. This follows the approach in the Sex Discrimination and Race Relations Acts, which require proof that the individual has suffered that disadvantage. But the extra requirement of individual disadvantage is not expressly mentioned in the Directive.

Defending direct discrimination

It is unusual for direct discrimination to be justifiable. Direct discrimination on grounds of sex, race, religion or sexual orientation cannot be explained away, except under the very limited exceptions for genuine occupational qualifications. Direct discrimination on grounds of disability can be justified, but this is mitigated by a duty to make reasonable adjustment for the disabled person. Unusually, however, the Employment Directive permits differences of treatment on grounds of age, which would otherwise be direct discrimination, if three conditions apply:

- they are objectively and reasonably justified (that is, with supporting evidence); 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.⁵¹

The Directive does not specify what would count as ‘legitimate aims’ but gives three examples. The first allows special provision to be made for particular age groups to promote their integration into the labour market. Examples would include the New Deal; or positive action taken by an employer to encourage age groups that are under-represented to apply for jobs, or be given training for promotion.

The second example would allow minimum ages, experience or seniority to be criteria for access to employment (or advantages linked to employment); while the third would allow a maximum age for recruitment if it is based on the training requirements of the employer, or the need for a reasonable period of employment before retirement.

In each case, the ‘legitimate aim’ and the ‘appropriate and necessary means’ tests would still need to be met. As the second and third of the EU’s examples could allow age to be used to restrict access to employment and training, the way in which the legitimate aims are defined in law, and the appropriate and necessary tests are applied, will be crucial.

The Government proposes that legislation should set out specific aims which will be capable of justifying direct discrimination on grounds of age if employers and others can show that the practices are appropriate and necessary. It has proposed the following aims:

- Health, welfare and safety (for example for the protection of younger workers).
- The training requirements of the post, giving the example of air traffic controllers who have to undergo 18 months at college followed by on the job training.
- The need for a reasonable period of employment before retirement (where, for instance, the cost of training would not be repaid by a sufficient period of work).

- Encouraging and rewarding loyalty.
- Facilitation of employment planning – for which its example is a business with a number of people approaching retirement age at the same time.

These aims, however, seem to go beyond both the express terms of the Directive, and the underlying purpose of its proposed exceptions. A decision based on age should not be lightly held to be permissible since the result is to justify denying an individual a job, or training, or to require them to retire. Two of the Government's proposed aims are particularly at odds with the objectives of the Directive: it is difficult to see why age should be the basis of a scheme to encourage and reward loyalty, rather than, for instance, years worked for the employer. Even more problematic is the proposal to permit age to be used to facilitate employment planning: this would reinstate the stereotypical approach to age that the legislation aims to prevent, simply for the convenience of employers. The latter has been included to justify mandatory retirement, which we reject below. There is nothing in the Directive which makes these aims legitimate: the Directive refers only to a maximum age for recruitment if it is based on the training requirements of the employer, or the need for a reasonable period of employment before retirement.

Given the potential breadth of age-based justifications, it is essential that there is not only a legitimate aim but that the means are necessary, that is, a proportionality test. Recent US Supreme Court jurisprudence supports this view. US legislation permits age discrimination 'where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.' In a 1985 case,⁵² flight engineers challenged their employers' policy of compulsory retirement at age 60. The airline company argued that the requirement was 'reasonably necessary' to the safe operation of the airline because the physiological and psychological capabilities of persons over age 60 could suddenly undergo a precipitous decline which could not be detected in time by medical science. Conflicting expert evidence on this question was presented by the flight engineers.

The Supreme Court rejected the airline's case. It emphasised that the standard of justification was a high one. Age could only be a legitimate proxy for safety-related job qualifications if it was impossible or highly impractical to

deal with older employees on an individual basis. The standard was one of reasonable necessity, not reasonableness. Therefore the employer must establish more than a rational basis in fact for believing that identification of unqualified persons cannot occur on an individual basis. Even in cases involving public safety, the Act did not permit the court to give complete deference to the employer's decision.

Some of the age limits that are used by employers reflect conditions imposed on them by legislation. For instance, road hauliers operate a lower age limit for their drivers because of the age limit on obtaining an HGV licence. The Government will exempt these employers from the age legislation. Similarly, if the employer could not obtain insurance for the worker because of their age, the regulations would permit discrimination on those grounds. However, this begs the question whether refusal of insurance on age grounds is always justified, an issue to which we return when we consider discrimination in goods and services below.

Finally, employers will in very limited circumstances be able to claim that age per se is a genuine characteristic required by the job, for instance to act a particular part on stage and if challenged would have to demonstrate to an Employment Tribunal that the characteristic was genuinely needed.

Defending indirect discrimination

Employers will similarly be able to argue that indirect discrimination is justified, but in this case the Employment Directive does not require the law to specify the aims that the employers can use in their defence. They will, however, as with a defence to direct discrimination, have to show that the disparate impact is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

Fears have been expressed that indirect discrimination could have absurd effects, since almost any criterion or practice can be potentially indirectly discriminatory. Can older people challenge a literacy requirement for a job on the grounds that older people are significantly more likely than younger people to be illiterate?

The key, however, is job-relatedness. Indirect discrimination does not outlaw criteria which are job related. If a practice or condition can be shown

genuinely to be necessary for the job then it passes muster. There are in fact advantages to both business and the State to show that the criterion is necessary for the business or to further public policy aims. The threat of an indirect discrimination claim should have the positive effect of requiring employers to revisit their criteria for selection or promotion to be sure that they do produce the best person for the job. A requirement of formal qualifications might exclude those with relevant experience and thereby preclude the employer finding the best person. For example, a degree in media studies might not be a necessary requirement for a job as a journalist.

Age limits for recruitment, selection and promotion

There are three specific exceptions to the direct discrimination provisions that the Government considers in the consultation paper: age limits for recruitment, selection and promotion; pay and non pay benefits based on seniority; and mandatory retirement.

Specifying (or implying) an upper age limit for recruitment to a job, or for promotion, will be unlawful direct discrimination, unless the employer can objectively justify so doing. The Directive allows, as we have seen, an age limit if justified by the training requirements of the post or need for a reasonable period before retirement. The Irish Employment Equality Act contains a specific exception along these lines.

The Government proposes, as we have seen, a wider list of legitimate aims that would, for instance, continue to allow 'Graduate recruitment schemes' where employers can demonstrate that it helps them to plan their staff intake. While we do not accept employment planning as a legitimate aim, a graduate recruitment scheme is not itself objectionable if a graduate is genuinely needed for the requirements of the job, and it is clear that a graduate can be of any age.

It is crucial, moreover, that age is not permitted to be a proxy for skills or competence. It should therefore not be justifiable to require a worker to be over a given age before they are given access to employment (subject of course to an exception for schoolage children) without the precise justification for the age requirement being spelt out. Experience could well be an appropriate criterion, provided it is proportionate and genuinely job related.

But seniority alone, without proof that it brings with it the necessary experience, is again no more than a proxy for age. It should be noted that seniority as a criterion can in any case be indirectly discriminatory on other grounds, such as sex or race.

The exception permitting a maximum age for recruitment to be set can be justified by extreme examples (an employer refusing to employ someone a few months short of retirement age for a post that required training, for example) but we must guard against an extreme example being used to open the door to widespread rejection of older people on these grounds. We have seen that assumptions about the lack of capacity for training of older workers are misguided and prejudicial. Moreover, as changes in retirement provisions will mean people working longer, assumptions that the individual will not work long enough to provide a return on the training investment will need to be reconsidered and justified in each instance.

We are concerned that a refusal to train an employee on grounds of cost could effectively prevent the employee doing their job. Moreover, as changes in retirement provisions will mean people having the option of working longer, assumptions that the individual will not work long enough to provide a return on the training investment should prove out-dated. An employer that wanted to refuse training on age grounds should have to show that the refusal is proportional to the cost of the training. It would be more difficult to justify refusal of training that did not involve a significant investment, than training that is very expensive. An employer could also stipulate that the individual be contracted to work for the firm for a specified period after completion of the training.

Benefits linked to seniority

Age-related pay would infringe the aims of anti-discrimination legislation, but should well established systems linking pay (or for instance extra annual leave) to seniority or experience be permitted? Under the indirect discrimination provisions, these could well amount to indirect discrimination and would therefore need to be justified as necessary and appropriate, if they were to be allowed to continue. Sex discrimination cases have already found that seniority alone is not sufficient, but must be linked to experience.

The Irish Employment Equality Act prescribes a three-year period for phasing out age-related pay. At the same time, the Act states that it is not age discrimination to provide different rates of remuneration or different terms of employment based on seniority or length of service in a particular post or employment.

The Government found support among employers and employees for allowing pay and non pay benefits to be associated with length of service or experience. They are justified as a means of rewarding loyalty, to provide an incentive to stay. However, as the consultation paper says, ‘employers feel that this has nothing to do with age’ as all employees will be eligible if they remain in service. But this demonstrates that an employer who rewards loyalty based on length of service is not making the reward on grounds of age. An 18 year old with ten years’ service could qualify at 28 while a 48 year old employed at 45 might not qualify. There is no direct age discrimination and so no need for an exemption arises. Length of service criteria may of course be indirectly discriminatory in that it is possible that substantially more older people than younger people have sufficient service. But if this is the case then the employer has a right to justify the differential impact in the usual way.

Clear guidance is needed for both the courts and employers on how the legislation should be interpreted. If the legislation is introduced under regulations, no Code of Practice can be issued to provide this guidance, as it has been under race, gender and disability provisions. We therefore suggest that the regulations make it explicit that pay structures based on age must be phased out, while the use of seniority is only legitimate if it can be shown to be necessary not to reflect age but a job related criteria such as level of experience (thus offering higher pay and benefits to those in posts requiring more skills or experience is acceptable, but on the basis of age would not be). Similarly, it should be stated clearly that age is not a proxy for skills or competencies and therefore cannot be a reason for refusal to promote a particular individual.

Mandatory retirement

The issue which has attracted most controversy, among employers and trades unions is the fate of mandatory retirement ages. A recent survey of private

and public sector organisations found four out of five retained a set age at which employees are required to retire.⁵³ Yet 31 per cent of employees over 50 say they would like to work beyond 60 and two thirds of employees say retirement should not be compulsory.⁵⁴

UK law has no statutory age for retirement, only for eligibility for a state pension. It is employers that can currently choose to impose retirement because those over the organisation's 'normal retirement age', or 65, cannot currently claim unfair dismissal if forced to retire. Employers normally specify age 60 or 65, but some staff like police officers and pilots are required to retire – and may claim an occupational pension – earlier. By contrast, judges can stay in office until 70. A requirement to retire at a particular age is direct age discrimination and will be unlawful under the Directive unless it can be objectively justified by reference to the specific aims set out in the legislation, and is shown to be appropriate and necessary.

Some companies, such as Marks and Spencer, have already moved ahead and withdrawn mandatory retirement ages. Their experience has been positive, with some employees choosing to remain beyond state pension age and the company benefiting from their experience and corporate memory.⁵⁵

The Government wants 'to send a positive signal that employees must be allowed to pursue options for continuing to work beyond the traditional age for retirement' (DTI 2003a). It has put two options on the table: that mandatory retirement be abolished entirely, or that a default age of 70 (or above) is set when employers could require their staff to go. In either case, employers would 'exceptionally' be able to justify earlier retirement ages: if they could demonstrate a legitimate aim and that requiring retirement was necessary to achieve it.

The state pension age will not be raised beyond 65 (the current age for men and being phased in for women). Thus it will rightly be a matter of **choice** for individuals whether they choose to go on working beyond that age, **not compulsion**.

Proposing a new mandatory retirement age of 70 may inadvertently have fostered the perception, evident in the press coverage of the consultation proposals⁵⁵ that it is the state pension age that will be raised and thus that employees would be **required** to stay until 70.

While some companies, like the Nationwide Building Society, have themselves chosen 70 as their age for mandatory retirement, the proposal may not prove entirely popular. The Chartered Institute for Personnel Development rejected it immediately, arguing that retaining any mandatory retirement age would ‘undermine commitment to eradicate ageism’.⁵⁷ The ICM poll for ippr found only three per cent of the public favoured this option. Forty-nine per cent thought employees should ‘be able to work for as long as they want to’ and 30 per cent ‘as long as employers think they are competent to do so’. Sixteen per cent thought there should be retirement at 65.

The case for complete abolition is that a blanket requirement that an older person leave their job, without any assessment of their capacity to do that job, is arbitrary and discriminatory. It would send, as the consultation paper says, a ‘stronger signal’ than retaining a default age of 70. For many older people being forced to leave work is, in practice, distressing. Overnight their daily life and income change and the consequences can be detrimental to self esteem and to health. Moreover, it is not only the individual who loses out. A blanket retirement policy at any age means that the employer loses people with skills and experience that are still needed, alongside those whose contribution is less valued.

In those circumstances the case for retaining mandatory retirement at 70 would have to be strong to be acceptable. The Government cites the argument of business, particularly that of small businesses, that retirement age is a tool which enables them to manage their workforce ‘sensitively and with the minimum of bureaucratic burdens’. In essence, it enables them to predict when older people will leave and thus when vacancies will occur; but more significantly avoids the need for appraisal systems to assess whether the individual is still performing to capacity. It is argued, further, that such systems can be degrading for the older person whose capacity has declined and is forced by this process to face up to that, rather than retire with dignity. Moreover, there would be cost implications for employers who had to manage an ageing workforce.

We find this argument, while having substance in current employment practices, ultimately unconvincing. It cannot be justified to take a job away from

every employee in order to protect a few from recognition of their declining capacity. Most employees in that position will retire before required to do so, and are certainly likely to do so before reaching 70. Moreover, appraisal systems are now an increasingly standard part of employment practice and have broader merit as a way of avoiding unfair treatment on other grounds. The argument on the cost of managing an ageing workforce is inadequate as encouraging older people to stay in work is indeed one of the principal objectives of the legislation – current retirement ages, coupled with current levels of saving and life expectancy, are not tenable in the long term.

The Government's proposals reflect its rejection of most arguments that are used to defend mandatory retirement, such as that mandatory retirement protects job opportunities for older workers. As one business participant in our seminar series put it:

Ultimately few managers like making choices, like disciplining and dismissing the staff that work for them. So it is easier to wait for the retirement age; but if there is no end in sight then they will do it...and it means that employers will be loath to take on older workers because if they do, they then face the risk of litigation down the track.

As another participant replied, however:

Should bad managers be defended, who are so incompetent at performance management that they run all the risk of productivity and output loss for anything up to the last 10 years of someone's employment because they cannot coherently manage that person and give them the additional training they need?⁵⁸

A further argument against abolition is based on intergenerational equality and thus fairness to the young. Mandatory retirement ages are said to open up opportunities for younger workers, both in hiring and in promotion. As well as allowing older workers to hog all the jobs, it is argued, abolition would redirect the company's income to older workers. To compensate for the obligation to pay older workers higher than their level of productivity, the next generation's pay rates will be depressed (Issacharoff and Harris 1997).⁵⁹ But it is not necessarily true, as we saw when we examined the 'fair innings' argument, that retirement of older workers opens up opportunities for

younger people. Business needs change: often jobs of older workers are frozen and not re-filled; or there is room for the creation of more jobs overall. To base a policy of retirement on a model which assumes a fixed and unchanging job structure would be misguided.

Finally, there is the argument, articulated at the same seminar, that:

there are some people who hang on in power far longer that they should do, in ways that bring no credit on themselves and is damaging to the organisation.

The answer in some such posts, for instance Dean of an academic faculty, can be to rotate the responsibility for key decisions among senior colleagues (as an office holder for a fixed period of years), not to have an automatic policy of getting rid of all incumbents regardless of their individual merits. Alternatively, a post could be for a fixed term, regardless of age. However, there may be posts – in academia or the judiciary for instance – where the low physical demands of the job would enable employees to remain into their eighties and beyond, creating, where there is no expansion in the number of jobs, an imbalance in the age structure of the profession. Here the case for retaining a retirement age might be objectively justified by the need to bring in a new generation of employees with differing education and experiences from their older colleagues.

Mandatory retirement age has been abolished in the USA, Australia and New Zealand, in some cases by raising it incrementally first (Friedman 2003). The US experience is not, however, entirely comparable with the UK as employers can offer financial incentives to employees to retire, and there is a high level of occupational pensions for those who have worked 30 years, with low accrual rates thereafter.

Other EU member states are, like the UK, currently considering what approach to take. Many continue to consider 65 as the default age, beyond which mandatory retirement would be lawful.

JUSTIFYING RETAINING MANDATORY RETIREMENT

Under what conditions then should an employer be able to justify retaining mandatory retirement? The employer would, as we have seen, be required to

demonstrate not just that the retirement age was a rational means of achieving employment policies but that the aims were legitimate and the means appropriate and necessary. If the standard is too lenient, protection against age discrimination could be wholly undermined. This is demonstrated by a Canadian case,⁶⁰ where a University's mandatory retirement policy was challenged on the grounds of age discrimination. The Supreme Court held that the University simply had to show that retirement age was a rational means to achieve its objectives, namely academic excellence. Staff renewal was a rational means to achieve academic excellence, because it was likely to achieve an infusion of new people and new ideas. However, the Court did not require the University to prove that there were no alternative non age-based methods of fostering the prospects of younger workers. The assumption that mandatory retirement is necessary to infuse the institution with new ideas can simply replicate assumptions about older people having declining capacity, whose services can easily be dispensed with. It is therefore particularly important that the legislation requires mandatory retirement (including the default age of 70, if it is adopted) to be justified as appropriate and necessary, as required by the Directive.

Of the proposed 'legitimate aims' that the Government has put forward, there are three that could apply to retirement: health, welfare and safety; the facilitation of employment planning; and the training requirements of the post in question. We have suggested that employment planning is insufficient justification for forcing an individual to leave their job. Health and safety conditions could do so, but only if, in the circumstances, it is not feasible to test each person individually, as age is not – as we have seen – a good indicator of risk or ability. It should also be clear that an employer could not justify retaining mandatory retirement throughout the enterprise. The same arguments could not apply to everyone from the door staff to the managing director. Rather, the case would need to be made only for those posts to which the objective justification genuinely applied. The third possible aim, training requirements, is circular in the context of retirement, since it is only if there is a mandatory retirement age that the person can not stay long enough in the job to repay the investment. In any event, in times of great labour mobility, there is a risk attached to any investment in training that the employee will move to another job before the investment in training has paid off. This is a

problem which needs to be dealt with by a broader training policy, rather than by permitting mandatory retirement ages.

FLEXIBLE RETIREMENT

In practice many older people would choose not to stay in full-time employment but to scale down their time commitment to part-time work, were that option available. This would enable many more people to remain in work, and be compatible both with a desire for greater leisure, caring responsibilities, or declining health. The limited, anti-discrimination provisions that the Government proposes would not require employers to offer these flexible working options. But a positive duty to promote age equality would lead employers to investigate such options as a way of increasing applications from older people and encouraging existing employees to stay. It would also motivate government to act on the obstacles to flexible retirement in pension rules, under consideration in the pensions Green Paper.

Unfair dismissal and redundancy compensation

An employee currently cannot claim compensation for unfair dismissal – whether on age or other grounds – if she or he has attained the ‘normal retiring age’ in the organisation, whether that is above or below the age of 65. If there is no normal retirement age in the firm, protection ceases at 65.⁶¹ There is also no right to a redundancy payment if the employee has attained the age of 65, or the normal retiring age if that is **lower**.⁶² So if there is a normal retiring age of 60, but the employee is kept on and is then made redundant, or unfairly dismissed, there is no remedy.

The Government proposes that employees should be able to claim unfair dismissal **on grounds of retirement** up to the age of 70 (unless an employer has objectively justified a lower retirement age). Beyond 70, however, it proposes no protection from unfair dismissal on those grounds (although one assumes that, should no default age be set unfair dismissal protection would similarly extend to any age). The employee could claim unfair dismissal on other grounds, for instance a false claim of misconduct, until any age. A claim of unfair dismissal could also be made if the procedure for dismissal on the grounds of retirement was not fair.

On redundancy, the Government argues it would not be appropriate to remove the upper age limit all together, as it could act as a disincentive to keeping employees on beyond retirement age. Rather, it should be the normal retirement age for the job (which would have had to be justified, if under 70), or 70 – because being made redundant would not remove any legitimate expectation of employment beyond those dates. However, if – as we recommend – there is no default retirement age, the Government agrees that entitlement to redundancy payments would equally continue indefinitely. It is difficult to see why this should act as any more of a disincentive to keeping a worker on over 65 than it does to retaining a younger worker (especially since the Government does not propose to increase the maximum entitlement to redundancy payments of 20 years' service).

We support the thrust of these proposals. If an employee remains in employment, there is no good reason why he or she should not be protected in the same way as a younger person. It has been argued that it is fair to dismiss a worker over retirement age in order to make way for a younger worker. We have already shown that it is disproportionate to attempt to advance this aim by removing protection. It has also been argued that the entitlement to a pension justifies removing entitlement to redundancy payments or compensation for unfair dismissal. Again, this is not a good reason. In any event, state retirement pensions are not linked to actual retirement.

On redundancy pay, the Government proposes to remove the weighting in favour of those over 40 in calculating redundancy payments. Currently, employees receive 1.5 weeks pay for every year worked over 40, compared to one week's pay for every year worked between 22 and 40, and half a week's pay per year of service up to the age of 21. The proposal is to specify one week's pay per year of service regardless of age – in other words, to equalise by levelling down. While it is certainly necessary to remove the age criteria, this levelling down option is probably illegitimate in EU law, which does not permit the removal of existing benefits. Given that there is almost always a longer span of work over 40 than under 21, the proposal to equalise at one week's pay will disadvantage many workers. Compensation for redundancy is already low enough: it is difficult to justify reducing the overall award which an employee with long service can obtain on being

made redundant. The same argument applies to the Government's proposals for the basic award for unfair dismissal. Our proposal is therefore that employees eligible for redundancy compensation or a basic award for unfair dismissal should receive one and a half week's pay for each year worked regardless of age.

A duty to promote equality

Inequality, as we have seen, has broader causes than discrimination. We thus argued in Chapter 3 that the age legislation should go beyond providing a remedy for individual acts of discrimination, to require employers and government to identify structural barriers to inequality, and address them: setting out in some detail the benefits of introducing a positive duty to promote age equality.

A duty to promote age equality in employment would bridge the gap between the two traditional approaches to tackling inequality at work: the legal strategy, via discrimination legislation; and social policy, through targeted initiatives such as the New Deal, or encouragement of flexible working. The duty uses the force of legislation to encourage appropriate policy initiatives. It would, moreover, provide employers with protection from litigation in two ways: by ensuring that they address practices and omissions which, if left unchallenged, could lead to claims of indirect discrimination; and by providing a defence to an indirect discrimination claim should it reach an employment tribunal.

What in practical terms might employers and government be expected to do if they were subject to such a duty, beyond what would be done to avoid discrimination under the proposed provisions? We explained in Chapter 3 the nature of existing duties to promote equality in UK legislation, but argued that a positive duty on age could not be identical to that, for instance, on race. An under-represented 'group' cannot be identified in the same way; nor would equal representation of each age group be an appropriate goal. Older workers, unlike women and ethnic minorities, are not segregated into particular job categories, and differences in pay are not necessarily a result of invidious age discrimination. They can be due to legitimate factors such as training, effort, skill and responsibility. There can therefore be no requirement that the

age structure in any particular firm reflects the precise age structure in the population as a whole.

The question is what form the positive duty should take. Should it be a general duty without specific requirements, or set out particular steps that the employer should be required to take? And how can we ensure that, unlike the existing duties, the law encourages employers to focus on outcomes, not on process? Moreover, as there is an existing duty to promote race equality and a government commitment to extend it in some form to gender and disability, is it appropriate to have a specific duty on age, or (as we suggest) would an 'Equality Duty' covering all grounds of discrimination be more consistent with our desire to harmonise the equality legislation and make it more user-friendly for employer and employee alike?

We do not have to look too far for the answers to these questions. The wording of the existing Code of Practice on Age Diversity in Employment provides an excellent basis for a positive duty, which in the words of the Code, is seen as 'part of a wider personnel and equal opportunities strategy to create a flexible and motivated workforce.' The Code asks employers to review requirements related to age to ensure that they are necessary for the job, to change training expectations so that older people are fully included, reconsider upper age limits on recruitment and training and consult members of the workforce in devising new arrangements. Much of this will be necessary for employers simply to ensure that they comply with the age discrimination provisions and avoid legal challenge. But the Code goes further in urging employers to change the workplace culture so that age and capacity are not automatically linked and all age groups are treated with equal respect and given equal opportunities.

In many respects, the Code is an excellent example of 'mainstreaming' equality into employment practices, encouraging employers to avoid using age limits in job adverts, to think strategically about where advertisements are placed, to use a mixed age interviewing panel and ensure interviewers are trained to avoid prejudices and stereotypes. It states that age should not be a barrier to training; and different learning styles and needs are addressed. In relation to redundancy, it is stressed that flexible options such as part-time working should be considered.

Such positive measures could be used to deter or defend indirect discrimination claims. For example, the peak age for caring is between 45 and 64, nearly a quarter of adults in that age group having such responsibilities. An employer's failure to provide flexible working arrangements for carers could therefore be challenged as indirect age discrimination. However, introducing more flexible arrangements would assist in a defence to such a claim. As one employment expert put it at the final seminar in the ippr series:

Many policies and practices are going to have an adverse impact by definition on one age group or another. It's almost inevitable. And for the employer to say we looked at this and we saw that this would discriminate, for example against young people, but we felt in the context that it was appropriate as part of our equality scheme to do this, I think would be very convincing.⁶³

But positive measures should not only be geared to deflecting discrimination claims. Organisations like Employers Forum on Age and the Third Age Employment Network, and the Government's own Age Positive Website, give many examples of good practice on age diversity that go beyond those necessary simply to avoid discrimination. A priority would be the introduction of flexible working patterns, to allow employees to alter the balance of their working and personal lives, and responsibilities as carers, in preparation for later full retirement.

In relation to recruitment, the employer could use employment agencies which themselves champion age diversity, brand the company using symbols and language that are 'age friendly', and target some recruitment material specifically at over 45s, if under-represented in the workforce, having first established the age profile of the organisation and set up systems to monitor how it changes. The Government proposes to provide for positive action which prevents or compensates for disadvantage linked to age. If an age group is under-represented in a work-force, the employer may encourage applications by advertising vacancies in publications aimed at that age group. The employer cannot, however, discriminate on grounds of age at interview or selection.

What form should the positive duty take to ensure that employers take these steps? Hepple suggests what would be appropriate, in relation to employment, would be a duty to take reasonable steps to ensure that the provisions of the existing Code of Practice are being observed (Hepple 2003). That could be a general duty without a requirement to undertake any specific tasks. Alternatively, as with race and the Northern Ireland model, there could be a requirement to produce an Equality Scheme setting out the current position in relation to age and the steps that will be taken to promote the Code or, more loosely, to promote age equality, in a given time scale. Crucially, to ensure a focus on outcomes, the duty should require not only that the employer report annually on what has been done to promote age equality, but on what has been **achieved**.

In contrast to the Northern Ireland model, which requires organisations to promote equality of opportunity ‘between persons of different ages’, the requirement should be to promote equal opportunities for ‘persons generally without regard to their age’ (for which no comparators are needed).

Government, meanwhile – were it to have a duty to promote age equality only in relation to employment – would need to do no more than other employers. We shall suggest below, however, that the duty should apply also to provision of services, in which case government would, for instance, have an incentive to review the provision of careers guidance for all ages (currently seen as a priority only for the young); or the current cut-off age of 65 for Disability Living Allowance which includes a mobility component. If that age bar remains people who become disabled after that age and want to work will be disadvantaged compared to those who became disabled before 65. The Government is not required to remove this age discrimination by the EU Directive but could do so as one means to implement a duty to promote equality.

For the public sector, compliance with the duty would, as outlined in the previous chapter, be monitored by the existing audit and inspection bodies (such as the Audit Commission) as part of their mainstream work and, as a last resort, be enforced through a compliance notice by the new equality commission.

Equality duty in private sector employment

Some 82.5 per cent of all employment is in the private sector.⁶⁴ It is therefore particularly important that this sector go beyond the avoidance of age discrimination to open up job opportunities for older people. Many larger companies have already taken steps to do so, as the ‘age champions’ on the Government’s Age Positive website demonstrate. Nationwide, for instance, already set diversity targets that include age, and include delivery within the performance management of its personnel and development staff.⁶⁵ Yet the Government is particularly concerned to avoid further regulatory burden on the private sector; and, unlike the public sector, there is no existing inspection framework to monitor compliance with an equality duty. Moreover, most firms are small, some employing fewer than ten people, and even medium sized enterprises would not have the capacity to carry out some of the specific duties associated with the public duty such as consultation and impact assessments. It is important that any arrangements proposed are proportional to the capacity of the sector, while ensuring that it secures the benefit of the duty in avoiding litigation.

In the private sector, employers would undoubtedly be well served by examining their employment practices to address discrimination before facing individual complaints. This is no more than the good practice many employers, like the members of the Employers Forum on Age,⁶⁶ already adopt. Firms which have scrutinised their practices for criteria that are age discriminatory, and removed them, should reduce their risk of litigation (as well as ensuring that they employ the best person for the job). Private employers in Northern Ireland are already familiar with this approach in relation to fair representation of Catholics and Protestants in their workforce, and many acknowledge that the outcomes have been positive.

The concern from employers is how exacting the requirements of the duty would be, how bureaucratic to administer and how rigorously enforced. It was suggested to us by business representatives, moreover, that such proactive action might simply awaken employees to the existence of discriminatory practices and lead to more, not less, litigation. Business will only be sympathetic to the positive duty approach if it is confident that it would indeed reduce the possibility of individual cases being taken against them, lead to

broader business benefits, and that the monitoring and enforcement mechanism would be light touch.

In **Equality: a new framework**, Hepple et al suggested that private sector firms should have a specific duty to conduct workforce reviews and, if barriers to equality were identified, to devise and implement an employment equity plan covering access to employment and training. The focus of the proposals was on under-representation and equal pay, and in the report and subsequent Equality Bill it was suggested that this responsibility should apply only to race, gender and disability (Hepple 2000). We have argued that under-representation is not the only manifestation of age discrimination, so that monitoring the age profile of a workforce is not the only or even the primary means of identifying age discrimination. The duty of the employer to promote age equality should not therefore be confined to quantitative outcomes, such as the age profile of the workforce, but should extend to qualitative measures, including the nature of the training offered, the working time requirements and the culture of the workplace. Given that there is already agreement on the value of the existing Code of Practice, the real issue is not too much the content of the duty as the way in which it is enforced.

A means of accountability must be identified that would not be onerous but would ensure that each firm take the responsibility seriously. This, we suggest, could be achieved, first, by enabling employers to produce evidence of implementation of an equality scheme to support their defence to a claim of indirect discrimination, as a public body can do now in relation to race equality.

Second, an incentive can be provided through the public procurement process. Public sector contracts will increasingly favour companies which are seen to have sound equality strategies. Public authorities spend billions of pounds each year on contracts with private and voluntary organisations for goods and services. Where the authority is itself bound by a duty to promote equality, it remains responsible for meeting the duty when its functions are carried out by those organisations. They therefore have to build equality standards into the procurement process and the Commission for Racial Equality has provided detailed guidance on how to do this in relation to race, within European rules governing competition for contracts, which could be extended

across other equality grounds. (CRE 2003b) There is also useful experience of contract compliance in public procurement in Northern Ireland.

Thirdly, a light touch reporting mechanism will be needed, as the audit and inspection bodies largely cover only the public sector. Whereas the Equality Commission in Northern Ireland does have responsibility for ensuring compliance with the Fair Employment legislation that does cover the private sector, it would not be feasible, even if desirable, for Britain's new equality body to review the employment practices of all private sector employers.

One possible mechanism would simply require employers to make public what action they are taking, so that staff, shareholders, interested members of the public and relevant bodies such as the equality commission, can access that information. The approach taken in relation to gender in Norway offers one way forward. Companies are required to include progress reports in their annual reports, which are monitored by the gender ombudsman and the company law authorities.⁶⁷

A current initiative in the DTI may offer a vehicle for taking this forward. The Task Force on Human Capital Management is currently looking at best practice in the public and private sectors in reporting on issues such as work force profile (including age), motivation, training and development, remuneration and fair employment. In a consultation paper issued in May 2003, **Accounting for People**, it suggests that 'what is not measured is not properly valued and cannot be effectively managed', and that both employers and investors need better information on these management issues, given the 'growing body of evidence linking effective high performance human capital management practices to the financial performance of an organisation' (DTI 2003b).

The Task Force is inclined to recommend that companies be required by company law, through the Code on Corporate Governance, to report on such human capital management issues; for listed companies this could be in proposed Company Operating and Financial Reviews. Reporting would be the responsibility of the company board and would start with minimum reporting standards that would develop as measurement capacity increases over time. We would also propose that companies should have the duty to inform and

consult with workplace representatives over the content and implementation of the equality plan. This could be achieved as part of the implementation of the new EU Directive of Information and Consultation [2002/14/EC], which gives workplace representatives wide-ranging rights to information and consultation within the undertaking but should also extend to small workplaces, which are not automatically covered by the Directive.

Such an approach chimes with the level of reporting that we suggest is necessary to ensure that companies take a duty to promote equality seriously, while leaving flexibility in how it might be implemented. The pre-requisite, however, should be that companies, like public bodies, report not only on what they have done in relation to age, but on what outcomes they have achieved. There would then need to be a correlative power for the equality commission to monitor returns as appropriate, and to initiate discussions with a company that needed guidance on improving its equality performance. The Commission should, as a last resort, be able to bring compliance proceedings. It is also possible to provide that an individual with sufficient interest has standing to bring enforcement proceedings in an employment tribunal.

Equality duty when providing goods or services

The age legislation proposed by the Government will provide no protection from age discrimination in goods and services, nor require providers of goods and services to take steps to promote age equality.

Equality legislation in Northern Ireland has since 2001, as we have seen, required public bodies to promote age equality not only in employment but also in service provision, building up a body of experience on which public bodies in Britain could draw. In Britain, the law already requires public bodies to promote race equality in services, and Help the Aged has recently recommended to Regional Assemblies that they adopt this model voluntarily in relation to age (Help the Aged 2003). Thus it recommends that Regional Assemblies establish the age profile of their population and the needs of different sections of that community; that they assess the impact of current and proposed policies on older people; consult older people and involve them in identifying changes in policies and services that would meet their needs; and monitor the effectiveness of services, participation and user satisfaction.

Crucially, as with race, the effort the authority makes should be proportional to the relevance of the policy or service to older people. This approach would not only ensure a better fit between the authority's services and the needs of older people but would treat this section of the community not as recipients but as citizens.

Turning to health and social care, an equality duty would in effect mean putting in place mechanisms to ensure implementation of the NHS plan (2000) and the corresponding National Service Framework for Older People (2001). The NHS plan commits the government to take positive steps to eliminate ageism and promote the autonomy, dignity, security and independence of older people. This was taken forward, as we saw in the previous chapter, in the National Service Framework, the aims of which expressly include ensuring that old people are never unfairly discriminated against in accessing NHS or social care services due to their age. It aims to remove 'arbitrary policies based on age alone', for instance in respect of resuscitation policies.

The NSF contains some of the crucial components of a successful positive action strategy. It encourages participation, requiring every NHS council and local authority with social services responsibilities to ensure that older people are properly represented in decision-making (Department of Health 2001); requires transparency of decision-making, and involves older people in agreeing their own personal care plan. It is intended to ensure extra resources to promote independence through intermediate care, anticipating that this could save other resources by freeing up beds in acute wards.

The weakness of the NHS Framework model is that it is a voluntary exercise, 'a good practice guide' lacking an effective enforcement mechanism (Robinson 2003). The monitoring mechanism set up by the Department of Health is not designed or resourced to provide the Department with detailed information on what service providers have done, nor is any change of practice presented as a result. An intrusive monitoring exercise by the Department would run counter to the current priority of decentralisation of responsibility to the local level, but the Commission on Health Improvement is now beginning to mainstream it into its inspections. Research by the Kings Fund had found little evidence of implementation because staff had other pressing pri-

orities, like reducing hospital waiting lists; nor did they feel under any great pressure to do so (Robinson 2003).

Officials believe that the Framework has made a significant difference in putting age on the agenda and that policies and practices will shift as a result.⁶⁸ However, there is no sanction for authorities that fail to comply (nor remedy for individuals who have been discriminated against). And when authorities fail to meet the deadlines set for reviewing their policies and providing results, officials have not been given the authority to require them to deliver – in contrast to the race equality model in which the Commission for Racial Equality can, as a last resort, issue a compliance notice.

What then would a duty to promote age equality in health care entail? It would require authorities to promote age equality when funding, organising and delivering services, proportional to the relevance of that service to older people, and to demonstrate that they had given older people equal opportunities to live a quality of life characterised by independence and social participation.

This would require service agencies to identify the factors that can prevent older people from enjoying an equal opportunity to exercise genuine choices, including participation in the community within which they live; and to take action to address the barriers to equality within their own organisations. In order to monitor the effectiveness of such strategies, it would be crucial to collect and analyse age data about referrals, treatment, care and support provided. Local variations in provision can, Robinson suggests, reveal evidence of ‘hidden’ discrimination that results from the decisions of hundreds of health professionals (Robinson 2003).

The NHS Framework for Older People therefore, like the Code of Practice in employment, is an excellent example of a positive duty. The real issue is how to ensure compliance. In this case, responsibility for monitoring implementation should be that of the new Commission for Health Care, Audit and Inspection, with enforcement by the new single equality body.

The positive duty to promote age equality is not only relevant in relation to health. More accessible transport, for instance, is vital for many older people if they are to take up new job opportunities, or retain their job when they

become less mobile, to access health and education services and to participate in their community. Adaptations such as low floor buses facilitate mobility and research shows that concessionary fares significantly increase the number of journeys they make. Moreover:

The limited evidence available confirms that there are quality of life benefits for poorer pensioners from increased autonomy and social involvement and also from the cash savings from reduced fares for essential journeys (Metz 2002).

Older people benefit from the adaptations that are being made to accommodate people with disabilities, but there are broader considerations affecting their mobility that public bodies with a duty to promote age equality would need to consider, as they are disproportionately disadvantaged by cracked pavements, poor lighting, and lack of benches and pedestrian crossings. A positive duty to promote equality entails too that older people have a say in, for instance, the siting of crossings and other adjustments that make journeys feasible and safer. Significantly, the largest survey of UK transport needs, the 2001 survey, only collected information on those under 75. An age equality duty, in requiring monitoring of needs, give us the data needed to know whether current adjustments for older people are fair and adequate, or whether they are still left at a disadvantage relative to the rest of the population: 'There is a rather large gap in our understanding of how mobility enhances quality of life in old age, and of the impact of each of the measures aimed at improving mobility' (Metz 2002). Evaluation, moreover, should extend beyond the immediate benefits of transport improvements as their greater mobility may reduce the need for other services such as Meals on Wheels.

A duty to promote age equality would reinforce current efforts by education authorities and Learning and Skills Councils to enhance the education and training opportunities for older people, balancing the pressure they are under to give priority to the young: to provide courses that are relevant and accessible, and to make clear in their marketing that older people will be valued as students and are not 'too old to learn'.

Providers of leisure services would similarly be required to consider the relevance and accessibility of their facilities, and consult older people on new

provision. Providers of social care could draw on the growing evidence on what matters to older service users and build on the innovative approaches now taken by some authorities to involve older people in commissioning and setting standards, to enhance independent living (Henwood 2002). Promotion of an age equality duty in social care would go hand in hand with the promotion of human rights standards such as the avoidance of degrading treatment, protection of privacy and the right to family life.

PRIVATE SECTOR SERVICE PROVIDERS

We do not propose that the positive duty to promote age equality should be extended to private sector service providers directly. For most service providers there is no inspection system to monitor compliance. Private firms do not share the same level of responsibility that public bodies have to the community, nor do most have the capacity to consult. Yet some key services for older people, not least residential care and transport, are run by the private sector. Where services are provided on behalf of public bodies, or under public licence, the public body would, under our proposals, itself have a responsibility to ensure that the private service provider promoted equality, in the same way that they do now in relation to race equality. Extensive privatisation of transport services, for instance, means a mechanism is needed to ensure that private providers promote age equality. The Department of the Environment, Transport and the Regions recognised this in its report on older people's transport needs, which recommends that local authorities should monitor customer service performance on contracted services and implement penalties on operators that fail to meet the agreed minimum standard (DETR 2001). This approach could be significant too in relation to the provision of postal services in rural areas; (but would not impact on services such as banking run entirely by the private sector). The Commission for Racial Equality has published guidance for public bodies on how to ensure compliance with the race equality duty through the procurement process, launched by Treasury Minister Paul Boateng, with support from the CBI, in July 2003 (CRE 2003b).

Should there be an individual right to complain of age discrimination in services?

In contrast to anti-discrimination provisions, an advantage of the duty to promote age equality in public services, as Robinson argues, is that implementing the duty would be non-confrontational and attract support from staff. Under these provisions, rather than being at risk of being called to account for individual acts of discrimination, the focus would be on the outcomes achieved for older people.

Scrutinising services to identify age discrimination, on the other hand, can be complex and contentious. Age based differences in practice are not necessarily discriminatory, and it can be difficult to distinguish between those which disadvantage older people and those which do not (Robinson 2003). Does a specialist geriatric service provide better or worse treatment, for instance, than treatment within a general medical ward? Forming a judgement on whether discrimination had occurred would in some circumstances therefore be difficult. Even where agreement can be reached that a practice is discriminatory, there may be no agreement on whether it is justified, for instance because of the cost of providing equal treatment.

A public sector duty to promote equality in goods and services of the kind we have recommended need not necessarily be underpinned by legislative provisions giving an individual right to complain of age discrimination in these areas. As we have seen, public bodies in Northern Ireland have a responsibility to promote age equality, with specific procedural requirements attached, but there is no individual right to be compensated for age discrimination.

The Equality Commission (NI) reports that, despite the absence of legislation for an individual right to redress for age discrimination, the responsibility on public bodies to promote age equality, to include age within their Equality Schemes and conduct age impact assessments on relevant policies, has led them to a new engagement with age equality issues and to consult NGOs representing older and young people. Moreover, the lack of data on age related outcomes has led to developments in data collection, necessary to assess the potential impact of new policies on people of different ages. It could be argued that a duty to promote age equality should be introduced

first in Britain, to provide an opportunity to review policies, raise awareness and gather evidence, before moving to the next stage of anti-discrimination provisions.

In practical terms, this proposal would mean that progress would be made in promoting age equality, but an authority could still implement a policy or service that is age discriminatory. The authority would only be required to have 'due regard' to the need to promote equality; and could be more likely to give priority to those areas of discrimination – race, gender and disability – where the law does go further and provide for individual redress. Moreover, a failure to promote equality can only be enforced where that failure is on a broad canvas; it is unlikely that a compliance notice would be issued in respect of a single example of a discriminatory policy, although experience of enforcement of the race equality duty in Britain and the Northern Ireland model has yet to test the scope of the law.

Finally, were service providers only to be subject to a duty to promote equality, an individual victim of discrimination would not be able to challenge that treatment in court. Yet, if a provider of goods or services were to discriminate in this way on grounds of race, gender, or disability, it would be unlawful and the individual could seek a remedy in the courts.

The alternative approach is to give individuals a right to redress for age discrimination with respect to services. Following the model the Government proposes on employment, it would then be direct discrimination for a goods or service provider to subject a person to detriment because of their age; and indirect discrimination to adopt apparently neutral provisions which put people of a particular age at a disadvantage. Providers could continue to differentiate on grounds of age if they could show that their reason for so doing was objectively and reasonably justified in pursuit of a legitimate aim, and that the means were appropriate and necessary. Legitimate aims could be set out in statute, as in the Irish example, and guidance provided in a Code of Practice.

In Ireland, as in Canada, age discrimination in goods and services is now unlawful, providing experience from which we can learn. The Irish Equal Status Act 2000 prohibits age discrimination in the provision (and advertising for) goods and services, housing, private clubs (unless specifically aimed at a

particular group) and education (with exemptions for pensions, insurance and other actuarial calculations where it is reasonable to rely on data for commercial or underwriting calculations). The Irish Equality Authority has been proactive in challenging unsupported age distinctions in car and other kinds of insurance. It insists that age alone is not a determining factor for assessing an insurance risk, and has found that insurance companies are ready to withdraw some age distinctions when challenged⁶⁹ (O’Cinneide 2003a). The legislation also allows age distinctions in the provision of sporting facilities, if reasonable and necessary, in entertainment, in age requirements for adoptive parents, in allocation of places to mature students, and if the goods or services are only suitable for particular age groups. Finally, goods and services can be provided to benefit the interests of particular age groups, such as holiday packages for older or younger people. Few cases concerning older people have yet arisen, but a 72 year-old man successfully challenged his exclusion from a bar which was found to be on grounds of his age.⁷⁰ The Act has, however, led to the removal of inappropriate age bars in access to pubs, bars and hotels (O’Cinneide 2003).

Those we consulted in our seminar series were, as we have shown, divided on whether there should be an individual right to complain. Some argued that voluntary approaches, particularly the National Service Framework in the NHS, should be given an opportunity to deliver. They emphasised that establishing what constitutes discrimination would in some cases be difficult; and that litigation is a poor way to promote organisational change. Others suggested, however, that voluntary initiatives had been shown in other areas of discrimination to deliver poor results. They point out that legislation on disability discrimination had been opposed on the same grounds but was proving workable. Furthermore, the duty to promote equality would be the catalyst for organisational change while the anti-discrimination legislation would provide remedies for individuals and constitute a moral standard leading to an appropriate age-awareness in service deliverers and policy makers. The ICM poll for ippr, as we saw in Chapter 3, found strong support for protection from discrimination in services and for parity of protection from age discrimination to that from discrimination on other grounds.

It is also our view that older (and indeed young) people should be entitled to the same level of protection from discrimination as those protected from discrimination on other grounds. The evidence of age discrimination in services is clear, and experience shows that voluntary initiatives are given insufficient priority within organisations to deliver. A duty to promote age equality in services would be a significant step forward and should be included in the forthcoming legislation. We recognise that moving beyond that to the introduction of age discrimination legislation giving an individual right of redress requires detailed consideration, particularly in respect of the exemptions that would be needed. The next step, in our view, is for the Government to consult providers of goods and services in the public and private sectors, and the public, on the options. It should indicate that it is minded to make age discrimination in goods and services unlawful, once it has consulted on the form that the legislation should take.

One of the most difficult questions for consultation is the extent to which cost should be permitted to justify continuing discrimination. Avoiding disproportionate costs would certainly need to be a consideration, though we addressed in Chapter 3 the counter argument that provision of better health care, for instance, would lead to savings elsewhere, and that any calculation must take into account the cost to older people and their families of failing to make such provision. However, it could be difficult to assess the cost of providing treatment against the anticipated benefit to the individual. It is estimated, for instance, that 1500 lives could be saved each year if women over 70, were, like those aged 50-64, called up for breast screening. How do we measure the benefits of extending the programme to that age group against the cost? And do we measure it on instrumental grounds – perhaps future health savings – or in terms of the benefits of equality and dignity for the individuals themselves?

Nevertheless, we believe that legislation, sensitively crafted, could make a positive contribution. For example, there would need to be an exemption for positive action, paralleling the exemption allowed by the Directive in relation to employment. This is particularly necessary in relation to provision of goods and services, where preferential treatment is currently given in order to redress existing inequalities. Age-based categories are for example used to redress

health and income inequalities: people over 60 are entitled to free prescriptions and eyesight tests.

It may be necessary, however, to pay closer attention to the reasons given for using age bands rather than some other means of classification for the purposes of preferential treatment. Where age is used as a proxy for poor health and low incomes, it may turn out to be too crude a classification, and therefore not be justifiable under the proportionality test. At the same time, it should be permissible to take into account the cost of alternative methods of classification: means testing, for example, may be more accurate than age but disproportionately expensive. Finally, in deciding whether positive action of this sort is permissible, it is necessary to ask whether the age group which does not share in the benefit (for example of free eye tests) is being unfairly discriminated against. In a recent Canadian case, for example, a young widow who was not eligible for survivors' benefits available to older bereaved spouses claimed she had been discriminated against on grounds of her age. The Canadian Supreme Court rejected her claim on the grounds that her age group had not suffered historic disadvantage and that the denial of the benefit to her did not undermine her dignity.⁷¹

Discrimination by private sector providers

A further question for consultation on this issue is whether age discrimination legislation should extend to private providers of goods and services, such as private transport providers and private hospitals, as legislation on race, gender and disability already does. We have seen that there is evidence of age discrimination by this sector, a significant provider of services to older people.

Once government has consulted on the terms and exemptions from such legislation, there would seem no justification for exempting private providers, including small businesses. There is no reason why a privately owned residential home or travel company should be able to discriminate against a person on grounds of age any more than one run within the public sector. This is particularly so given the increasingly fluid boundaries between public and private bodies. The complex relationships between public and private providers developed over the past two to three decades often means that the distinction is difficult to draw. The limitation in the Human

Rights Act to public authorities has already led to costly litigation in order to define the boundaries; and the resulting definition is not necessarily rational or predictable.⁷²

Promotion role for the new equality commission

If the Government continues to be unwilling even to require public service providers to promote age equality at this stage, or to introduce non-discrimination provisions, the least it should do is charge the new equality commission with responsibility for promoting good practice in this sector. Although goods and service providers would have no statutory duty to respond, those minded to do so would welcome guidance from the commission, and a body of good practice knowledge could be developed and shared. The commission would, in practice, simply promote good practice on age alongside its existing role of promoting race equality in service provision (and, in time, good practice in relation to the other four equality strands).

Package of options for goods and services

In addition to our recommendations on employment, we are thus proposing a range of options, starting with the most ‘light touch’:

- In the absence of any legislation making age discrimination in the provision of goods and services unlawful, nor a duty to promote age equality, the new equality commission should at least be given a responsibility to promote good practice on age equality in goods and services.
- A step further would be to put a positive duty on public sector providers of goods and services to promote age equality, as is already the case in Northern Ireland. This duty could, through procurement provisions, be extended to parts of the private sector. There would still be no individual right to redress on grounds of age discrimination.
- The next step would be for government to consult on the terms under which an individual would have a right of redress in respect of discrimination on grounds of age in the provision of goods and services, with exemptions where appropriate.

- Legislation outlawing discrimination, plus a positive duty on public services to promote equality, as currently exists in relation to race in Britain, would be the most comprehensive.

Conclusion

Having set out our objectives in Chapter 2, and the regulatory framework that could deliver these objectives in Chapter 3, we have considered here in more detail the way in which that framework would apply in relation to employment, goods and services.

The Government's proposals, in providing some protection from age discrimination in employment and training, would be a considerable step forward, but we showed that their impact could be limited by the breadth of the proposed exemptions. In particular, we questioned the Government's suggestion that rewarding loyalty to a firm, or employment planning, are legitimate grounds for discriminating against an individual on grounds of their age. In relation to retirement we argued that the justification for retaining a mandatory retirement age of 70 is weak, as the same arguments for removing an earlier retirement age still apply; and suggested alternative ways to meet employers' concerns. Noting the importance of extending flexible retirement options, although these would not be required by anti-discrimination legislation, we cited this as one significant benefit of a duty on employers to go further and promote equality. We welcomed the proposal to extend protection from unfair dismissal to older workers, but thought that it was wrong to use this opportunity to decrease redundancy compensation by levelling down the formula rather than harmonising upwards.

We explored the form which the positive duty to promote age equality might take in relation to public and private sector employers. Arguing that the precise form that the positive duty currently takes in relation to race would not be appropriate on age, we suggested that the duty could be based on the provisions in the current Code of Practice on Age Diversity in Employment, but statutory backing would require that employers implement those measures and be seen to do so. The extent to which public sector employers delivered on this agenda could be monitored by the existing audit and inspection bodies which already fulfil this function in relation to

the race equality duty. For the private sector, however, this monitoring role does not exist. We therefore suggested that firms be required simply to make public, in their annual report or in another form, what action they had taken and outcomes achieved, on the lines currently being considered by the DTI Taskforce on Human Capital Management.

Finally, we set out a series of options for providers of goods and services, from the most light touch – promotion of good practice by the new equality commission – through a duty on public bodies to promote equality, to anti-discrimination legislation providing remedies for older people if they are discriminated against. It is only this full package which will provide older people with the same level of protection from discrimination as already provided for ethnic minorities and to which the Government is committed for women and people with disabilities. Providing no legislative protection from age discrimination in goods and services should not be an option.

5. Conclusions and recommendations

From December 2006, age discrimination in employment and vocational training will be unlawful. The Government has been prompted to act by the EU Employment Directive but the motivation to address age inequalities has been driven in the UK, as in Europe, by the need to increase the participation of older people in the labour market and by public concern that treating people less favourably simply because of their age is unfair. The new law, in providing remedies for some forms of age discrimination, is a significant step forward. But the particular form of legislation the Government proposes, and its restriction to discrimination in employment, mean that its impact will be limited and unlikely to achieve even the Government's narrow employment objectives.

There is growing evidence not only of discrimination at work, but also in the provision of goods and services to older people, whether by the public or private sector. The Government has initiated a voluntary programme of action to address discrimination in one vital area, health and social care, but thus far proved unwilling to extend statutory protection from age discrimination beyond employment. It is doing only the minimum that the EU requires. Nor has it adopted the innovative model of equality legislation that it has introduced in relation to race equality, and in Northern Ireland for age: requiring public bodies to be pro-active in taking steps to promote equality. Rather, it intends to introduce age discrimination legislation based on the old model used in the 1970s for race and sex discrimination, in which change is brought about by victims of discrimination taking their complaint to an employment tribunal. Older people will have to complain their way to equality.

In limiting protection from age discrimination to employment, and failing to put a duty on employers and public service providers to promote equality, the Government is giving older people far less protection from discrimination than that provided to victims of discrimination on grounds of race, gender or disability. As a consequence, the new equality commission will have to turn away individuals who have experienced age discrimination in health care, education or transport provision, for instance, but could help them if the discrimination were on other grounds. Older people may with some justification feel they have been short changed.

Discrimination is only one of the barriers older people face in employment, whether they are seeking to remain in work up to and beyond state pension age or to return to the labour market. Opportunities to develop education and skill levels, improved health, transport access, and increase self confidence, as well as shift personal expectations of work beyond 50, are among the other factors that need to be addressed. In public services, policies and practices which inadvertently or overtly discriminate on grounds of age need to be reconsidered, and the attitude of some staff – that older people have had a ‘fair innings’, that they are less deserving or less capable of benefiting from the service – need to be challenged.

The legislative framework that is needed is thus one that does not only penalise unfair treatment. It needs to drive forward culture and policy change within and beyond the employment sphere to create conditions in which older people are encouraged and enabled to continue working, if they choose to do so, up to and beyond state pension age. We have thus argued that social policy measures and discrimination legislation should not only be mutually reinforcing but that the age legislation – by requiring government, employers and public service providers to promote equality – should itself be a major driver of the social policy agenda.

Discrimination legislation that relies on older people making complaints of discrimination to bring about change will not create the momentum to deliver the broader changes in culture and practice needed. Moreover, in a climate of blame and confrontation, it engenders a defensive response from employers and public service providers in contrast to the constructive, inclusive approach engendered by a positive duty to promote equality, in which consultation and transparency are part of the change process.

Where the law imposes a duty to promote equality it can, as in the case of race, be in addition to provisions banning discrimination or, as in Northern Ireland in relation to age, a light-touch responsibility to promote equality without legal remedies for victims of discrimination.

Where negative attitudes towards older people lead to degrading treatment, infringements of privacy or neglect of the older person’s right to family life (or to life itself through failure to resuscitate for instance), those broader

human rights issues need to be addressed alongside initiatives to tackle discrimination.

The Government proposes to bring together the three existing statutory equality bodies – the Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission – into a single equality body the remit of which would cover age, and discrimination on grounds of sexual orientation, religion and belief. It seems likely that it will, as we have recommended, also have a remit to promote good practice on human rights standards, a particularly important role in relation to age. We therefore suggest that it should be called the Equality and Human Rights Commission.

The decision to introduce age legislation that only covers employment and training, and to provide remedies for discrimination but no duty to promote equality, means that the new body will be built on a hierarchy of rights and responsibilities that will make it difficult to provide a unified service for employers, service providers and members of the public. It may also prove divisive when those concerned with the rights of older people see other discriminated against groups being provided with a more extensive service and protection. We argued that the Government should indicate its intention, over time, to harmonise the rights for individuals and responsibilities on employers and service providers across the equality strands (age, race, gender, disability, sexual orientation and religion and belief), preferably in a Single Equality Act.

The happy coincidence of instrumental, socio-economic and business pressures for tackling age discrimination – society's need for an educated, healthy older workforce, business needs in a tight labour market, and public concern for the rights and dignity of older people regardless of the contribution they are able to make – has created a powerful political impetus for policy change. But the overlapping arguments used for reform can cloud the reasoning behind it: whether we are banning age discrimination because it is in the interests of society, or the interests of employers, or because it is fair for older people. The danger in relying on instrumental reasons alone is that, in a particular instance, the desirability of investing in promoting age equality is overridden by competing interests; or those interests might be satisfied simply by some levelling up of conditions for older people, not by the provision of

equality per se. The moral case for addressing discrimination and promoting equality rests on protecting the right of the individual; not their right simply to equal treatment but to equality of opportunity – providing the greatest possible level of choice and autonomy, underpinned by equal respect for the dignity of the individual.

Freedom from discrimination is not, nevertheless, an absolute right. The EU Directive cites grounds on which it should still be lawful for employers and training providers to continue to discriminate on grounds of age, and the Government has proposed its own list of circumstances. We suggest these are too broad – that they would provide too little protection for older people from discrimination – but welcome the Government's acceptance that every exception would have to be objectively and reasonably justified with supporting evidence, to achieve a legitimate aim, demonstrating that age discrimination is both appropriate and necessary in the circumstances.

One form of age discrimination which will be addressed by the legislation is mandatory retirement. The Government is right to recognise that the reasons put forward for continuing to allow it are outweighed by the unfairness to the individuals forced to leave their jobs, but we question whether the strength of its argument is not undermined by its proposal that a default retirement age of 70 is retained. While in practice this would be a significant step forward, allowing (but in no way requiring) individuals to continue working, we are not convinced that employers should have the right to dismiss someone from their job at any age, on grounds solely of their age, if they are still competent to do the job. The announcement of the intention to 'scrap the retirement age', led to widespread concern that employees would in practice be forced to work until 70 before they could claim an occupational or state pension. It is essential that Government provide reassurance that that is not the intention behind the proposals: the objective is choice, not compulsion.

For employers, implementation of the age legislation and management of older employees will require adaptation, not least in performance management systems and sensitive handling of individuals whose competence is found to have declined. The new equality commission, and agencies such as Equality Direct, will need to be resourced to provide employers with the guidance they need. A statutory Code of Practice interpreting the legislation

would assist employers in judging which age related practices could be objectively justified, and which must be withdrawn.

Finally, we recognise that, while we have focused on policy reform on age, it should not be implemented in isolation from parallel developments on race, gender, disability, sexual orientation and religion and belief.

Employers and service providers, where they do address equality issues, necessarily address equality and diversity across the board, not for each equality 'strand' separately – while taking account of any specific issues that arise in each strand. Individuals have multiple identities and may not be certain on what grounds they have been unfairly treated. The equality commission should be able to promote good practice on all grounds, and it will be more effective the greater coherence there is between strands in the advice it is able to give. For this reason, and to ensure equal protection for individuals regardless of the grounds on which they are unfairly treated, we have advocated the greatest possible harmonisation of the equality legislation. Where we have proposed a new duty on employers and service providers to promote age equality, we would welcome that duty being a generic 'equality duty', with subsequent Codes of Practice and guidance drawing out the particular issues for employers and service providers in relation to age.

We therefore make the following recommendations:

The goal of public policy on age discrimination in relation to older people

- The goal should be to promote equality of opportunity, enhancing choice and autonomy for older people, underpinned by equal respect for the dignity of the individual.
- Equality should be sought not only in relation to jobs and training but in relation to goods and services and to participation in public life.
- Age provisions should be introduced through primary legislation, not regulations under the European Communities Act, to allow full parliamentary debate, and to enable their extension beyond the minimal requirements in the EU Directive.

- Equality should be promoted alongside broader human rights standards important to older people, including respect for privacy and family life and avoidance of degrading treatment.

Age discrimination in employment and training

- The legislation should not rely solely on complaints from older people to address discrimination but require employers to take positive steps to identify and remove barriers to equality. Effectively putting the Government's current Code of Practice on Age Diversity in Employment on a statutory footing, a duty to promote age equality would require employers to review their policies and practices, to develop an equality scheme or action plan setting out the steps they intend to take, to consult and assess the impact of their reforms, to lead a process of culture change within the enterprise and to make public on an annual basis the steps they have taken and, more significantly, what outcomes they have achieved.
- This duty should be harmonised with the duty on employers to promote race equality, and equality on other grounds into an 'Equality Duty', to simplify the process for employers, avoiding different requirements for different equality strands wherever possible.
- Evidence of effective implementation of the duty could be used by an employer to support their defence to a claim of indirect age discrimination.
- Monitoring of implementation in the public sector should be mainstreamed into the work of the existing audit and inspection bodies, as is already happening in relation to race equality.
- Private sector employers, responsible for 82.5 per cent of all employment, should also have a duty to promote age equality, with a responsibility to make public on an annual basis, whether through the proposed Company Operating and Financial Reviews or through another means, the steps they have taken to promote equality of opportunity and what they have achieved.
- Mandatory retirement of employees who are still competent in their job should not be lawful at any age, unless the employer can show that it is

objectively justified and reasonable and necessary in the particular circumstances. A statutory Code of Practice should provide guidance to employers on this and other aspects of implementing the age legislation.

- Protection from unfair dismissal should consequently be extended to employees of all ages.
- Employers, within their responsibility to promote age equality, should introduce flexible working arrangements for those below and above state pension age, wherever feasible to do so, to enable older people to combine work with caring responsibilities and other needs they may have to work shorter hours.
- The current discrimination in redundancy payments, in favour of those over 40, should be addressed by levelling up the payments to those made redundant at a younger age.
- Protection should be extended to unpaid workers where there is a relatively formal arrangement between the volunteer and the organisation.
- The grounds on which age discrimination could be justified by an employer should be more limited and tightly defined.

Age discrimination by public and private providers of goods and services

- Public bodies should have a duty to promote age equality in provision of services – in health, education, transport and leisure services for instance – as a positive and inclusive approach to addressing the barriers to equal opportunities for older people. As with employment, and as currently already happens for race equality, this should be monitored by the mainstream audit and inspection bodies.
- Public bodies should ensure through the procurement process that private bodies providing public services equally take action to promote equality for older people.
- The Government should consult on the terms in which age discrimination by public and private providers of goods and services should be made unlawful, so that victims of discrimination can seek redress, with appropriate exceptions where continuing discrimination on age grounds

can be objectively justified as reasonable and necessary for a legitimate aim.

Promotion and enforcement

- The proposed single equality body, an Equality and Human Rights Commission, should have a responsibility to promote good practice on age equality not only in employment but also in goods and services, regardless of whether the age discrimination legislation is extended to service providers (and thus whether providers of goods and services have any statutory responsibility to take account of the advice they are given).
- The Commission should be able to promote human rights standards alongside its promotion of equality standards, and investigate breaches of those standards when conducting inquiries, for instance, into conditions in residential or psychiatric care.
- Provision must be made – whether through the Commission (once established) or through other agencies – for older people to have access to advice on their rights and on opportunities open to them, and for employers and service providers to get one to one guidance on how to change their policies and practices to implement age equality good practice.
- Interim arrangements should be made for 2004-6 for provision of guidance to employers to enable them to prepare for implementation, before the new commission comes into existence.

The following table demonstrates what we are proposing, how it differs from current arrangements on race, gender and disability, from provision in Northern Ireland, and from what the Government is currently proposing on age.

Table comparing ippr proposals on age equality with existing legislation on race, gender and disability, provisions in Northern Ireland (NI) and the Government's proposals on age

Statutory remit	Race	Gender	Disability	Government proposals on age	Current and proposed NI provisions on age	ippr proposals
Employment						
Remedies for victims	Yes	Yes	Yes	Yes	Yes	Yes
Duty to promote equality in public sector	Yes	Promised	Promised	No	Yes	Yes
Duty to promote equality in private sector	No	No	No	No	Yes – political and religious discrimination only	Yes – light touch
Goods and services						
Remedies for victims	Yes	Yes	Yes	No	No	Yes
Duty to promote equality in public sector	Yes	Promised	Promised	No	Yes	Yes
Duty to promote equality in private sector	No	No	No	No	No	No
Single equality commission						
Support complainants in employment	Yes	Yes	Yes	Yes	Yes	Yes
Support complainants in goods and services	Yes	Yes	Yes	No	No	Yes
Promote good practice in employment	Yes	Yes	Yes	Yes	Yes	Yes

Implementation of ippr's proposals would provide the same level of protection for older people as that provided from discrimination on other grounds, while taking the equality agenda forward onto a more positive, proactive footing – requiring government, employers and service providers to take steps to address the inequality and human rights infringements that can blight the lives of older people, rather than wait for them to complain. There are strong societal and business arguments for addressing age discrimination, but the bottom line is the value we attach to fairness and respect for the dignity of the individual.

Individual aspirations for quality of life after 50 are changing. Expecting to live for twenty to thirty more years, people increasingly want to retain autonomy and control over their lives, to make a continuing contribution to their families and society, and to be free from ill-considered, ageist assumptions about their needs or capacity to deliver. As Benjamin Franklin said, in the last century, 'All would live long but none would be old'. Our aspiration, in writing this book, is to improve the lives of older people so that in the 21st century, in Britain, that is no longer true.

Endnotes

- 1 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
- 2 www.statistics.gov.uk/cci/nugget.asp?id=168
- 3 Social Trends 29, 1999, table 1.5 and population estimates mid 1999; Social Trends 31, 2001; National Statistics United Kingdom in Figures, 2001 edition.
- 4 ONS Labour Force Survey Winter 2002-3
- 5 ONS Labour Force Survey Autumn 2002
- 6 www.agepositive.gov.uk
- 7 22 per cent of pensioners were living in households where income was below 60 per cent of the median. **Households below average income** Department of Work and Pensions 2002
- 8 ONS Labour Force Survey Autumn 2002
- 9 IPPR has proposed raising the State Pension Age to 67, between 2020 and 2030 in order to raise expectations that we should remain longer in work, and to ease the cost of pension provision, in line with rising life expectancy. There is evidence that raising the State Pension Age does extend labour force participation. Nevertheless, ippr was aware, in making this proposal, of the fair criticism that it would be regressive, because poorer people have a lower life expectancy. The Green Paper proposes an interesting alternative way forward: that the age at which people can draw their pension be based on how many years they had worked rather than their age. This would benefit less skilled workers who enter the workforce earlier than those with further education. However, there are a number of issues to consider, and ippr may do further work on this proposal. (Brooks et al 2002)
- 10 Survey of 83 private and public sector organisations by IRA Employment Review, Issue 782, August 2003.
- 11 MORI research on age discrimination, December 2002, DWP Age Positive website.
- 12 Employment Relations Act 1996 ss109, 156

- 13 See, as one example, the disagreement whether electronic tagging of confused elderly patients is insulting to the dignity of older people and will become a substitute for personal nursing care or, as others argue, a means to preserve their independence and save lives. **Observer** 27 April 2003.
- 14 University and College Admissions Service (UCAS) data on acceptances 1996-2001, quoted in Schuller 2003.
- 15 Direct and indirect discrimination are defined in Chapter 2.
- 16 www.icmresearch.co.uk/reviews/2002/age-discrimination-survey-dec-2001
- 17 Survey by Chartered Institute of Personnel Development, www.cipd.co.uk 20 March 2003.
- 18 TUC press release 2 July 2003.
- 19 Bob Crow, leader of the RMT, quoted in **Daily Mail** 3 July 2003.
- 20 IRS Employment Review survey of 83 organisations, Issue 782 August 2003.
- 21 Survey by Chartered Institute of Personnel Development, www.cipd.co.uk 20 March 2003.
- 22 Northern Ireland Act 1998, s75(1)(a)
- 23 EU Framework Directive for Equal Treatment in Employment (2000/78/EC).
- 24 Estimate by Disability Rights Commission from Labour Force Survey Summer 2002.
- 25 Article 25
- 26 *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5.
- 27 See the Government's age positive website www.agepositive.com.
- 28 Article 13 EC
- 29 Council Directive 2000/43/EC of 29 June 2000.
- 30 Council Directive 2000/79/EC of 27 November 2000.
- 31 Subject to a requirement that progress is reported annually.

- 32 Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998 No 3162 (NI 21) Article 55.
- 33 Fair Employment Act 1989, now contained in Fair Employment and Treatment (Northern Ireland) Order (FETO) 1998, Part VII; McCrudden C 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) 22:4 Fordham International Law Journal 1696.
- 34 Northern Ireland Act 1998, s75; and see McCrudden C 'The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis' in **Equal Rights and Human Rights – Their Role in Peace Building** (Committee on the Administration of Justice (Northern Ireland), 1999) pp11-23.
- 35 Evelyn Collins presentation to conference organised by the Equality Authority in Ireland, 'Mainstreaming Equality Conference – Models for a statutory duty', Dublin, 27 February 2003.
- 36 Meeting with NGOs Belfast March 2003
- 37 Select Committee on Public Administration (2003) **Government by Appointment: Opening Up the Patronage State** Chapter 3 'Building a new civic tradition: more diversity and better access'.
- 38 According to a recent report from the Office of the First Minister and Deputy First Minister 'The aim is to harmonise all existing anti-discrimination legislation as far as is practicable and update and extend taking account of developments in Great Britain, the Republic of Ireland and elsewhere'. Race Equality Strategy Consultation Document, 2003.
- 39 See www.odysseustrust.org
- 40 See for instance this study for Joseph Rowntree Foundation www.jrf.org.uk/knowledge/findings/socialcare/623.asp and Third Age Employment Network 'Challenging Age, 2003', which sets out, on the basis of research, the kind of advice and support older people need.
- 41 Joint Committee on Human Rights (2003) The Case for a Human Rights Commission, Sixth Report of Session 2002-2003, Volume 1 HL Paper 67-1, HC 489-1; Volume II (containing evidence from IPPR on the relationship between human rights and equality protection).

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- 42 Article 2(2)
- 43 In a recent case in the US, it was argued that the relevant comparator had to be under 40. The US Supreme Court rejected this argument, holding that as long as there was a significant age difference, discrimination could be proved by showing that the complainant had been treated less favourably than a person within the protected group.
- 44 Case C-177/88 Dekker [1990] ECR I-394; Case C-32/93 Webb [1994] I-3567 (after the end of maternity leave, however, the comparative approach reasserts itself); *Brookes v Canada Safeway Ltd* (1989) 1 SCR 1219.
- 45 *Clark v Novacold* [1999] 2 All ER 977 (CA)
- 46 *Hazen Paper Co v Biggins* 507 US 604 (1993); *Sperling v Hoffmann La Roche Inc* 924 F Supp 1396 (1996) (US District Court).
- 47 Article 3.3
- 48 Article 6.2
- 49 *R v Secretary of State ex p Seymour Smith and Perez* (No.1) [1994] IRLR 448 (DC); [1995] IRLR 464 (CA); [1997] IRLR 315 (HL); [1999] IRLR 253 (ECJ); (No.2) [2000] IRLR 263 (HL).
- 50 Article 2(b)
- 51 Article 6
- 52 *Western Airlines v Criswell* No 83- 1545
- 53 **IRS Employment Review** 782 Survey of 83 organisations August 2003.
- 54 Survey by Chartered Institute of Personnel Development. See www.cipd.co.uk/press for results of survey of 599 working and retired people, 20 March 2003. A separate survey by Barclays of their own employees found 40 per cent of staff expressed an interest in staying on beyond age 60. See case study on www.agepositive.gov.uk.
- 55 See case studies on www.agepositive.gov.uk.
- 56 See for instance the **Daily Mail** headline 'Work till you drop' and **Daily Mirror** 'You stop at 70: retirement age shake up' 3 July 2003.

- 57 Press release 2 July 2003 www.cipd.co.uk.
- 58 IPPR seminar on age equality in employment, 11 December 2002.
- 59 Issacharoff S and Worth Harris E 'Is Age Discrimination Really Age Discrimination: the ADEA's Unnatural Solution' (1997) 72 New York University LR 780-840.
- 60 McKinney v University of Guelph (1990) 76 Dominion Law Report (4th) 545
- 61 Employment Rights Act 1996, s109, as interpreted in Nothman v Barnet LBC [1979] Industrial Cases Reports 111, House of Lords.
- 62 Employment Rights Act 1996, s156(1)
- 63 IPPR seminar at the Nuffield Foundation, 'Delivering Age Equality', 6 February 2003
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Appendix: Survey results

Age Discrimination Survey, 3-4 September 2003

prepared by ICM Research Ltd for IPPR

ICM Research interviewed a random sample of 1012 adults aged 18+ by telephone 3 and 4 September 2003. Interviews were conducted across the country and the results have been weighted to the profile of all adults.

Table 1

Q.1 How much do you agree or disagree with the following statement?
 ‘It should be illegal to discriminate against people because of their age when providing public services such as the NHS, social services and education.’

	Total	% by gender		% by age					
		male	female	18-24	25-34	35-44	45-54	55-64	65+
Agree strongly (+2)	60	63	58	41	58	66	71	66	55
Agree slightly (+1)	12	13	11	19	12	12	9	11	12
Neither agree (0) nor disagree	3	2	4	7	5	1	1	2	3
Disagree slightly (-1)	7	6	8	12	9	5	3	8	7
Disagree strongly (-2)	17	15	18	20	15	16	16	12	22
Don't know	1	1	1	-	1	-	1	-	1

Base: All respondents

Table 2

Q.2 Discrimination against people because of their race or sex is already illegal. Should future laws on age discrimination offer the same levels of protection, greater levels of protection or less protection as those currently in place for race and gender?

	Total	% by gender		% by age					
		male	female	18-24	25-34	35-44	45-54	55-64	65+
Greater protection	30	29	30	37	28	26	29	33	30
The same levels	57	57	58	52	56	65	65	52	51
Less protection	9	11	6	10	13	7	4	10	9
Don't know	4	2	6	1	3	3	1	5	11

Base: All respondents

Table 3

Q.3 At present, employers can set the age at which people must retire, but the law is going to change and they will usually not be able to do so in future. Which of the following best describes your views on those approaching retirement age?

	% by gender			% by age					
	Total	male	female	18-24	25-34	35-44	45-54	55-64	65+
They should be able to work for as long as they want to	49	47	51	63	49	42	50	42	53
They should be able to work for as long as employers think they are competent to do so	30	29	31	27	36	36	26	27	25
They should have to retire at 70	3	3	3	1	4	3	3	4	3
They should have to retire at 65	16	19	12	7	10	16	18	25	18
None of the above	2	2	2	1	1	2	3	2	1
Don't know	1	1	1	1	1	1	-	-	-

Base: All respondents

Table 4

Q.4 Do you think older people usually receive a better or worse service than young people from...?

	% by gender			% by age					
	Total	male	female	18-24	25-34	35-44	45-54	55-64	65+
Education									
Better	15	16	14	23	13	12	12	13	19
The same	29	29	29	31	23	19	35	37	34
Worse	39	39	39	41	52	48	39	33	22
Don't know	17	16	18	6	12	21	14	17	25
The NHS									
Better	19	21	16	37	24	19	13	10	15
The same	34	35	32	32	36	29	35	38	33
Worse	39	36	42	21	33	42	47	45	42
Don't know	8	7	9	10	7	11	5	7	10
Social Services									
Better	21	24	17	33	21	20	17	20	18
The same	29	29	29	32	31	24	30	29	30
Worse	31	29	33	19	34	36	35	34	25
Don't know	19	17	21	15	14	20	18	17	27
Public transport									
Better	39	42	35	45	46	40	29	39	35
The same	30	28	32	29	25	22	38	35	34
Worse	23	21	24	20	25	29	24	16	19
Don't know	9	8	9	6	4	9	9	10	12

Base: All respondents

Table 5

Q.5 Why do you think older people receive a worse service?

	% by gender			% by age					
	Total	male	female	18-24	25-34	35-44	45-54	55-64	65+
Young people are likely to benefit more	50	50	51	45	50	43	50	55	58
Older people don't demand as much	48	49	48	30	45	49	56	46	56
Older people's needs are more expensive to meet	47	49	45	47	41	52	49	52	42
Older people are too demanding or irritating	21	24	19	20	31	21	12	17	24
Older people have had their share when they were young	20	22	19	22	21	18	16	19	25
Older people are entitled to less because they contribute less to society	18	20	17	18	18	19	13	18	22
None of these	10	8	11	11	16	9	11	7	6
Don't know	2	1	3	–	2	1	2	3	4

Base: All respondents who think older people receive a worse service