



What do we mean by age equality?

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The Age of Equality

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When does differential treatment on grounds of age constitute discrimination? And should such discrimination be prohibited by law? Unlike race or gender, age does not define a discrete group. We have all been young, and we will all, if we are fortunate, become old. Thus the basic opposition between ‘self’ and ‘other’ which marks much of racism and sexism is not present in the same way. Yet detrimental treatment on grounds of age is widespread. Older people in particular, are subject to stigma, prejudice and social exclusion. The very old are too often also the poorest in society, and some are vulnerable to abuse. This is not to say that it is always invidious to classify groups according to age. It may be perfectly legitimate to set a minimum age for voting rights, or entry to the job market, or eligibility for pension benefits. Equally, it may be necessary to take measures which are specifically geared to the needs of particular age groups. Do these measures advance equality or obstruct it? To answer these questions requires a deeper understanding of the meaning of equality itself.

It is this which is the task of this paper. Despite the newly popular rhetoric of ‘ageism’, ‘age diversity’, ‘age discrimination’ and ‘equality’, there is surprisingly little consensus as to the aims or indeed the meaning of these notions. I argue that the central aim of equality should be to facilitate equal participation of all in society, based on equal concern and respect for the dignity of each individual. Although age raises many distinctive problems, it is nevertheless possible to draw on the experience of existing anti-discrimination legislation to fashion an appropriate legislative mechanism to advance equality defined in these terms. Central to this is a holistic approach, extending beyond the labour market to all aspects of civic life. The causes and symptoms of the problem permeate an area well beyond the employment relationship and can only be effectively dealt with by recognising the interaction of a series of different elements. Also crucial is a proactive strategy, based on the positive promotion of equality, rather than relying solely on reacting to individual complaints. An individual complaints led model means that the law can only respond in a piecemeal fashion to a particular individual dispute, leaving the main burden of reactive change on the respondent, usually the employer. A proactive method, by contrast, facilitates a systematic and strategic approach, in which employers, the State and other bodies participate actively in resolving the problem.

I begin by sketching the main problems and perspectives which arise in respect of age, both socially and legally. Part II considers potential aims and objectives of equality as well limits of equality. In Part III, I deal briefly with the ways in which these ideas can be translated into particular legislative forms.

Part I: Problems and Perspectives

(i) Background

Until very recently, discrimination on grounds of age attracted little social opprobrium. Images of older people as dependent, burdensome and of no further use to society provided support for detrimental practices, such as early retirement and redundancy, rationing of health care, poorer quality social services, and social exclusion.. Similarly, detrimental treatment of young people is frequently justified as being their ‘best interests’. Lawful parental chastisement, exclusion from the minimum

wage and lack of participation in decision-making on issues closely affecting their lives are just a few examples.

In the past decade, this complacency has been exploded by a complex compound of demographic and labour market factors. Advances in medical science have substantially improved average longevity, while fewer babies are being born. At the same time, recession was deliberately managed by shedding older workers. It is now relatively unusual for people to remain in employment up to retirement age. Thus the period of retirement has been elongated from both ends: people are retiring far earlier and living far longer. The ageing population is perceived as a problem both for governments and business. Governments, concerned to limit social spending, have begun to promote policies of 'active ageing'. With the economic upturn and consequent skill shortages, employers have begun to look to the older age group as a source of labour.

This convergence of business, macro-economic and social policy objectives has created a sunny climate of change. The non-binding Code of Practice on Age Diversity in Employment was quickly superseded by the stronger EU framework directive, which requires legislation outlawing discrimination on grounds of age in employment¹. In Northern Ireland, public authorities have a duty to promote equality of opportunity on grounds, inter alia, of age.² Other jurisdictions have also addressed age discrimination. In the US, the Age Discrimination in Employment Act 1967 (ADEA) outlaws discrimination on grounds of age in employment against workers over 40. Legislative provisions on age discrimination are in place in various countries including Israel, Finland, Australia and New Zealand. The South African Constitution and the Canadian Charter of Rights and Freedoms include age as a ground of discrimination. Perhaps the most detailed provisions in Europe are found in the Irish Employment Equality Act 1998 which prohibits age discrimination in employment against workers aged 18 to 65.³

This brief description suggests that the impetus to introduce age discrimination legislation is fuelled by largely utilitarian considerations. It is crucial, however, that such considerations do not obscure the concerns with individual justice and social equity with which should underpin the move to eliminate age discrimination. A reversal of labour market conditions or a change in the demographic pressures to a situation which is again unfavourable to older people, should not in themselves be sufficient to trump the claims of individuals. Nor should the focus be entirely on older people. The problems of an ageing population have tended to eclipse issues affecting younger people and children.

Equality can only be understood in the context of the social conditions it aims to address. The remainder of this part therefore consists of a sketch of the problems which any age discrimination legislation would be expected to deal with. At first glance, it might appear that there is no unifying theme, but instead a cluster of discrete issues. Age-related issues which arise in employment appear to be quite different from those in health care, which differ in turn from education, social security and other public functions. For example, it could be argued that the chief aim of equality legislation in the employment field is to free the labour market from prejudicial and unsupported assumptions about the capability of a worker based on his or her age, so that the best person can be selected, promoted or retained. By contrast, the issues which arise in health care do not concern the relationship of age to capability, but instead the appropriate response, given limited resources, to the needs of individuals. Similarly, the dilemmas and difficulties faced by younger people appear to be qualitatively different from those of older people. However, it will be argued here all these aspects are in fact closely inter-related. An effective response to one issue, such as employment, requires require action in several different areas, including health, training and pensions. Similarly, an effective response in the employment field has positive implications for other areas, such as health, housing

¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

² Northern Ireland Act 1998, s. 75(1)(a)

³ For training, the age range is 15 to 65

and social security. Nevertheless, for ease of description, the issues are described under discrete headings.

Before turning to these issues, it is clear that any description must make some prior decision as to which age bands are being addressed. Although age discrimination is not inevitably concerned only with discrimination against older people, in fact most analyses and policy formulae are concerned with older rather than younger people. The category of 'older' people itself is defined in a variety of ways. If the issue concerns early retirement, then the age band, particularly in government policy documents, tends to be 50 – 64. For health care and social services, the focus is generally on over 60s, but usually more specifically on over 70s or even over 80s. Similarly, the category of young persons is defined in different ways for different purposes. It is usual to consider children under 16 as a single category, allied to the age during which schooling is compulsory. Young people between 16 and 18 are again distinguished from the group between 18 and 25.

It will be argued in this paper that anti-discrimination legislation should not delineate any particular age band, so that younger people as well as older people may benefit from the protection provided. It is true that discrimination against younger people takes a different form from that against older people, and there may be a conflict of interests between younger and older people. It is true too that the major problems concern older people, making it most likely that it is this category which will constitute the major group of beneficiaries. However, age discrimination policies and legislation which deal only with older people run the risk of ignoring questions of inter-generational equity. There may nevertheless be good reasons for making specific provision for different age groups and providing specific exceptions, particularly where children are concerned.

(i) *Demographic trends*

Advances in health, nutrition and medical care have benefited humanity with greater average longevity. In 1998, life expectancy for men in the UK was 74.9 and for women 79.8. This figure has risen steadily and continues to rise: only 14 years before, in 1984, the life expectancy of men was 71.5 years, and of women was 77.4. This has, however, meant that the UK population as a whole is ageing. Thus in 1999, 25.4% of the population were over 60, while only 20.4 % were under 16. The numbers of older people will continue to increase. Although the overall percentage of people over 65 is projected to remain constant for some time at around 15 -16% of the population, the total numbers will increase, from 9 million people over 65 in 2001 to 12.4 million in 2021⁴. Probably the fastest growing section of the population are those over 75. The proportion of the population over 75 reached 7.3% in 1999, up one per cent from 1984.⁵

Not surprisingly, given women's longer life expectancy, the gender structure of older people differs from that of the population as a whole, with women forming 64% of those over 75, but only 51% of people of all ages. Ethnic minorities are a small but growing proportion of the older age group. Although ethnic minorities constitute 6 per cent of the total population of Great Britain, they make up only 2 per cent of the over 60s.⁶ However, the number of older people from black and ethnic communities increased by 168 per cent between 1981 and 1991⁷.

⁴ Social Trends 29, 1999, table 1.5 and population estimates mid 19989.

⁵ National Statistics *United Kingdom in figures* (2001 edition)

⁶ Social Trends 31 2001 table 1.5

⁷ National Service Framework

(ii) *Labour market issues*

Longer lifespans have, paradoxically, been associated with shorter periods in work. By the end of the twentieth century, one in three people between 50 and State pension age in Britain did not participate in paid employment⁸. This constituted a total of 2.8 million people. It is now the exception rather than the rule to remain in employment all the way to pension age. Crucially too, the vast majority of non-working people over 50 have left the labour market permanently, in that they are no longer looking for and available for work. Six out of seven non-working men aged 50 – 65 were classified as economically inactive rather than unemployed in 2000.

These effects are not felt uniformly across the workforce. The effects on men have been most dramatic: men's participation in paid work at age 64 has plummeted from 57 per cent in 1979 to 37 per cent in 2000. For women, the pattern is somewhat different, because of the historically low participation rate of all women in the workforce. The trend is therefore best illustrated by comparing the proportions of women aged 30 in the workforce with those approaching pension age. Whereas the younger women are 50 per cent more likely to be employed than 20 years ago, the proportion of those approaching pension age has not increased. Also important are differences based on ethnic origin. People of Indian, Pakistani or Bangladeshi ethnic origin aged between 50 and 65 fare particularly badly. Men in this age group are two thirds more likely to be out of work than whites. The result is that fewer than half of older men in this group are working. For women, the combination of age and cultural expectations militate particularly strongly against the possibility of paid work. Less than a third of older women of Indian, Pakistani or Bangladeshi origin are likely to be in work.

Nor are these trends limited to the UK. Throughout the OECD, people are leaving the labour force at progressively younger ages even though the population is ageing and individuals are living longer. According to the European Commission report on the social situation in the EU in 2001⁹, there were 60 million people aged 65 and over in the EU in 1999, compared to only 34 million in 1960, and this is set to rise to 69 million in 2010. Yet the rate of employment of workers between 55 and 64 in the EU is very low, with only 37 per cent of this age group in employment in 1999. In fact, the UK figures are among the better in the EU, where only Sweden and Denmark have higher rates of participation by older people in the labour market. In France, for example, the decline is dramatic: whereas over 90 per cent of men aged 50 are in the labour force, this plunges to only 40% at age 60. In Belgium, France, Italy, Luxembourg and Austria, fewer than 30 per cent of people between 55 and 64 are working. In the US, by contrast, 67 per cent are still working at 60, as against 90 per cent at age 50. The shrinking workforce is causing serious concern among EU policy makers, who are urging member states to encourage the employment of older people.¹⁰

⁸ Figures in this section are taken from *Winning the Generation Game* (Report of the Performance and Innovation Unit, April 2000, chapter 3)

⁹ EC Commission 'The Social Situation in the European Union 2001' available from the Office for Official Publications of the European Communities in Luxembourg.

¹⁰ See also *Winning the Generation Game* para 3.1

There are several reasons for these trends. Most importantly, labour market policies were specifically designed to manage the recessions of the early 1980s and 1990s by removing older men from the workforce.¹¹ An added impetus to retire early was created by the increased availability of occupational pension schemes, and the fact that many specify earlier pensionable ages than the state scheme without penalties. The European Commission in its 2001 report raises concerns about the way in which current pension systems encourage early exit from the labour market, and are frequently used by employers who wish to reduce staff levels while avoiding redundancies¹². Equally serious have been the disincentives created by the benefit system. For example, until recently, incapacity benefit has not been tied to a requirement that the claimant be actively seeking work.¹³ Incapacity benefits are often higher than the amounts a claimant might expect to earn, and therefore create a disincentive to seek paid work.

It might be expected that the end of the recession and the change in labour market policies would have solved the problem. However, the newly restructured economy has created fresh problems. The shift from manufacturing to a service economy, accompanied by dramatic changes in technology, have meant that many older workers' skills are obsolete. Older workers tend to have fewer formal qualifications than their younger counterparts, and employers are reluctant to invest money in training workers from whom they see little prospect of recouping their investment. Notably, non-working older people are less likely than average to have post-compulsory education, and the number of graduates is particularly low. Moreover, older workers do not tend to take up opportunities for education or training in later life. In addition, down-sizing has meant that there are fewer options for older workers to move into less demanding work. To the contrary, those that remain employed by the new leaner businesses have more work to do, so that older workers feel 'burnt out' more quickly. These trends are aggravated by the fact that some pension schemes are not portable, and do not permit flexible working.

It should be stressed that 'voluntary early retirement' is a misnomer. There is certainly a group of high-earning, well educated professionals who retired voluntarily on a good occupational pension and savings, and who enjoy their increased leisure time. However, this group is a privileged minority. For those under state pension age, as many as two thirds of the early retirees would have preferred to stay in work, many for financial reasons. Many had hoped to gain further employment, but have been unsuccessful, or are reluctant to take low paid work which would jeopardise their benefit income.

The effects of recession and technological advances have not only affected older workers. A central concern in the EU as a whole is the high rate of youth unemployment. In 2001, 16.3 per cent of active young people between 15 and 24 in the EU were unemployed.¹⁴ Research has shown that the majority of young people believe that there is age discrimination at work, and a significant minority feel they

¹¹ *Winning the Generation Game*. Para 4.1

¹² EC Commission 'The Social Situation in the European Union 2001' available from the Office for Official Publications of the European Communities in Luxembourg

¹³ A some pilot areas, claimants must demonstrate that there are barriers to their working before they can claim incapacity benefit (www.one.gov.uk)

¹⁴ EU Employment Report 2001 (see http://europea.eu.int/comm/employment_social)

have been discriminated against at work or when looking for work on grounds of their age. In addition, there remain significant areas of negative discrimination, both in State policy and in the labour market as a whole.

The fact that both older and younger workers are affected makes policy formulation particularly difficult. As will be seen, it is commonly argued that older workers should 'give way' to younger workers on the grounds that the former have had a fair innings. This makes it appear as if it is impossible to deal with youth unemployment and older unemployment simultaneously. However, it will be argued below that this is based on a simplistic representation of the labour market.

Discrimination against older and younger workers in the labour market is reinforced by statute. Thus workers over 65 or normal retirement age are specifically excluded from protection against unfair dismissal and from the right to redundancy compensation¹⁵. Similarly, minimum wage legislation permits a lower rate for younger workers, defined broadly to include employees under the age of 26.¹⁶ Workers under 18 are excluded entirely, and those between 18 and 21 receive a lower minimum wage than older workers.

(iii) *Material Disadvantage*

Although older people who do not work have a wide range of incomes, they are on average poorer than the rest of the population. For those under pension age, early retirement can have significant effects on their financial position for the rest of their lives. It is during their 50s that people do most of their saving for retirement, once children have left home. Retirement at age 50 is therefore likely to lead to greater poverty in old age.¹⁷ Nor is everyone covered by an occupational pension: as many as 57 per cent of workless people aged between 50 and 65 live in households without occupational pensions. These are nearly twice as likely than average to be in the lowest fifth of the overall income distribution. But having an occupational pension does not mean that a household is well off. In fact their income varies widely, from £326 per week to no more than £72. It is not surprising therefore, that as many as three quarters receive some benefit income and nearly half rely on benefits for more than half their household income. The vast majority of those on benefit are on sickness and disability benefits.

For those over State pension age, poverty and disadvantage are endemic, and older pensioner households tend to have even lower income.¹⁸ This is not surprising given the limited amounts available from the State pension. The basic pension in 2000-2001 was £67.50 for a single pensioner, per week, rising to £72.50 in 2001-2002. Even this is only available to those who have made full contributions throughout their working lives; those who did not will get only a proportion. Inevitably, then, pensioners tend to rely on state benefits: in 1997/8, 71% of pensioner households depended on state benefits for at least 50% of their income (although a surprisingly

¹⁵ Employment Relations Act 1996 ss109, 156

¹⁶ National Minimum Wage Act 1998, s.3

¹⁷ Winning the Generation Game para 3.3

¹⁸ *Pensioners' incomes series 1997/8*, DSS Analytical Services Division, 2000, Section 2.

high number do not claim their benefits)¹⁹. The Income Support level represents a minimum income level below which a person could be considered to be living in poverty. The fact that 1.63 million people aged 60 and over in Great Britain received income support in August 2000 demonstrates the extent of poverty among older people. Another way of measuring poverty is to examine the proportion of expenditure on housing, fuel and food. For pensioners living alone who are mainly dependent on state pensions, nearly 50% of their expenditure goes on housing, fuel and food compared to 36% in other households²⁰.

Many older people live in poor accommodation. As many as 10 per cent of all households where one or both members are over 60 live in homes which require essential modernisation; and this in turn signifies poor insulation and high heating bills. The ability of older owners to undertake repair and maintenance is demonstrated to be lower partly because of income constraints but also because of mobility and other problems.²¹ In terms of private renters, 149,000 older privately renting households have regulated tenancies and are often living in property in the most unsatisfactory physical condition.²² At the poorest end of the spectrum are the homeless. It is estimated that 834 older people were sleeping rough in London in 1999-200. Nearly 40,000 others are living in inappropriate hostel accommodation or in bed and breakfast hotels. The older homeless are particularly vulnerable, but have largely remained invisible and outside public consciousness.²³ Although there is an obligation under the Housing Act 1985 to house those who are 'vulnerable because of old age', this only applies to those over 60. This is a clear example of an arbitrary age-related criterion. It excludes many homeless people who are under 60 but prematurely aged and equally vulnerable.²⁴

Within the group of pensioners, women fare particularly badly. A lifetime of discrimination in the paid labour market has cumulative effects. Many women have been in the types of jobs which do not carry with them occupational pensions, a position aggravated by active discrimination in access to pension schemes for part-time workers, the vast majority of whom are women. Women's lower earning pattern also means that pensions are correspondingly low.²⁵ The result is that women pensioners are one of the poorest groups in society. In 1998-9, 62 % of single women aged 85 and over were living just on their state retirement pension and income support.

It should be stressed, however, that average figures such as these conceal a wide range of differences in material circumstances. The term 'retired population' spans

¹⁹ *Income related benefits - estimates of take up in 1996/97 (revised) and 1997/98*, DSS, 1999, tables 1.1, 2.1 and 3.1.

²⁰ *Family spending: a report on the 1998-99 Family Expenditure Survey*, [National Statistics](http://www.statistics.gov.uk), © Crown Copyright 1999,

²¹ English House Condition Survey, 1996

²² DETR, *Quality and Choice for Older People's Housing - A Strategic Framework Appendix I Housing Circumstances of older people* (<http://www.housing.dtlr.gov.uk/information/hsc/olderpeople/11.htm>).

²³ UK Coalition on Older Homelessness, Facts and figures (www.olderhomelessness.org.uk) Department of the Environment, Transport and the Regions *Quality and Choice for Older People's Housing - A strategic Framework* 31 January 2001 (www.housing.dtlr.gov.uk)

²⁴ G Kitchen and C Welch, *Outside In: Tackling the Social Exclusion of Older Homeless People* (Help the Aged, 1998).

²⁵ See further S Fredman *Women and the Law* (OUP 1997) chapter 8.

an age range of 40 to 50 years. It has been demonstrated that the income and lifestyles of younger pensioners (55-64) are far removed from those of older pensions (over 75 and usually a single female). Many 'younger' pensioners are relatively affluent, with good pensions, and the health and motivation to enjoy their leisure time. This contrasts with the very old and very poor. In fact, although there has been an average increase of 62% in pensioner's incomes over the past two decades, this largely reflects an improvement for the higher income groups. Thus the income of the richest fifth of single pensioners increased by 85% (£87 a week) whilst the poorest fifth saw no more than a 22% (£10 a week) increase in the past 20 years.²⁶

(iv) Social Exclusion

A serious issue which arises for all older people is the extent to which they find themselves on the margins of society. A recent survey found high levels of isolation amongst older people. People over 75, and older women, experience the most severe isolation, aggravated by low income and disability.²⁷ In 1996, 58% of women aged 75 and over lived alone. Isolation is compounded by lack of access to transport and telephones. As Age Concern points out, a telephone is vital both as a lifeline in an emergency and as a daily contact with family and friends. Yet as many as 9 per cent of single pensioner households and 4% of pensioner couple households do not have a fixed telephone, compared to an average of 5 per cent.. Absence of a telephone is closely connected to poverty: high connection and line-rental charges have been found to constitute a major barrier to ownership.

Similarly, many pensioners are dependent on public transport. Yet inaccessible public transport often aggravates the mobility problems associated with ageing. There are several facets to the problem. Physical inaccessibility is compounded by lack of affordability – the high cost of rail fares has been a major deterrent to travel by train, and fuel and car insurance prices have impacted negatively on the travel patterns of older people using cars and taxis. In addition, older people tend to be more fearful, choosing not to travel alone or after dark. This sense of insecurity can be aggravated by badly lit or isolated bus-stops and stations, long distances between home and transport, and feelings of intimidation while on board.²⁸

Departure from the labour force frequently gives the impression that individuals are no longer active contributors to society. This masks the significant amount of continuing caring work done by older people. In fact, older people, particularly older women, are deeply involved in caring activities, such as babysitting, helping family, friends or neighbours, and visiting an elderly or sick person. One in ten women between 45 and 64, who are economically inactive, are spending more than 20 hours a week caring. A quarter of older women who are not in paid work are looking after family or home. Of the 400,000 people between 50 and 65 who are looking after home or family, 85 per cent are women. This contrasts with 6 per cent of men in this group. A particularly important function is that of child-care: grandparents are the most likely people to be looking after children when the parents are absent. The caring function is even more pronounced in the over 60 age group. As many as 2 million of the estimated 5.7 million carers in the UK are over 60, and one fifth of these are aged 75 and over.²⁹ The problem here is of a different kind of social exclusion – invisibility. Approximately 20 per cent of older

²⁶ Help the Aged

²⁷ Help the Aged/Mori Survey *Isolation and Older People*

²⁸ Department of the Environment, Transport and the Regions *Older People: their Transport needs and Requirements* 12 February 2001 (www.mobility-unit-dttr.gov.uk);

²⁹ Help the Aged, *Caring in Later Life: reviewing the Role of Older Carers* (Executive summary)

carers provide care for over 50 hours a week, and many have been intensively involved in caring for periods of up to 14 years, without breaks of two days or more. Older carers are one of the poorest groups in society and have little support from health and social care services. There is also express age discrimination against older carers in that invalid care allowance is only available to carers of 65 or under.

Nevertheless, given that 80 per cent of workless people between 45 and 64 are not involved in caring, it is clear that caring and voluntary work are not replacing paid work to a significant extent. Formal volunteering activities tend to be lower among younger and older people than those in mid-life³⁰. People who are not in employment are less likely to undertake voluntary activities than those who are working; in fact, even those who were involved during their working life seem to withdraw with the rise in economic inactivity.³¹ Although some of this spare time is taken up in leisure activities, it is clear that inactivity can lead to social exclusion through boredom, loneliness and depression.

(v) *Health care*

The vast majority of older people remain fit and healthy enough to run their own lives. The vast majority of older people still live independently in their own homes with 5% estimated to be living in sheltered and very sheltered accommodation and 5% living in registered care homes..³² Nevertheless, whereas age is not necessarily correlated with failing capacity and ill-health, the risks of ill-health and disability rise with age. Indeed, older people form a large part of the constituency of the health service. Adult NHS and social care services are utilised by older people to a greater extent than younger people. In 1998-99, the NHS spent 40 per cent of its budget (£10bn) on people over 56, and in the same year, 50% of the social services budget (£5.2bn) went on over 65 year olds. Two thirds of acute hospital beds were occupied by people over 65, and people over 75 make greater use of hospital, primary care and community health care services than other groups. Older people constitute 40% of all emergency admissions³³. Any discussion of equality must therefore have a dual emphasis. It must reveal and challenge the prejudicial nature of assumptions that old people have failing health and capability. But at the same time, those who do face ill health must be treated fairly and equitably.

To some extent, health services are inevitably responding to the changing population. However, there are two major issues which age discrimination policies need to address. The first is that failing health may be as much a product of the environment in which older people find themselves as their own physiological ageing. This is particularly true of illness and death resulting from hypothermia. Warmth is essential to the wellbeing of older people; but many live in 'fuel poverty', having insufficient income to heat their homes to the appropriate standard for health and comfort. It has been shown that in 1996, 60 per cent of single pension households suffered fuel poverty. The main causes of such poverty are low income and living in an energy inefficient home, both of which, as we have seen affect older people particularly. The result is a high level of excess winter deaths. The figures for such deaths in England are well above those in other countries.

³⁰ Home Office, 'Voluntary and Community Activities: Findings from the 2000 British Crime Survey' p.4

³¹ Winning the Generation Game para 3.3

³² UK DETR, Quality and Choice for Older People's Housing - A Strategic Framework Appendix I Housing Circumstances of older people (<http://www.housing.dtlr.gov.uk/information/hsc/olderpeople/11.htm>). Community Care Statistics 2000: residential personal social services for adults, England table R2

³³ Figures are taken from the *National Service Framework for Older People* March 2001. P.7

The second issue in relation to health concerns inferior or degrading treatment received by older people within the health and social services. A recent review by the King's Fund³⁴ suggests that age discrimination occurs across all the services provided by the NHS, at different levels and in different guises. There is evidence across a range of services that older people may be denied treatment offered to younger patients, and in some hospitals, the standards of hygiene and nutrition given to older people fall below even minimum standards. In addition, there is evidence of indirect discrimination. Older people are often negatively perceived by GPs, because of the increased workload; and there is some evidence that older people are not offered the best available treatment, partly because the effects of the treatment on older people are not properly researched. The King's Fund review concludes that while there are many examples of excellent care in for older people, there is also much unfair age discrimination, some of it being covert and implicitly in decisions not to prioritise older peoples' services.

Of even more concern are the services which operate with upper age limits which are deliberately not publicised. Thus in 1991, 20% of cardiac care units operated upper age limits and 40% had an explicitly age-related policy for thrombolysis. According to the National Service Framework 2001, these practices have all but disappeared. However, there is evidence of age discrimination elsewhere. Older trauma victims in Scotland have been shown to be given less care than younger victims, and there is specific concern as to whether older patients are more likely to be denied cardiopulmonary resuscitation on grounds of their age.³⁵ A recent study coordinated by the RCP's Clinical Effectiveness and Evaluation Unit (CEEu) found that older patients with the same extent and types of lung cancer as younger patients are being less actively treated.³⁶ Quality of care has also been affected by negative staff attitudes in a number of areas and many older people and their carers have found that palliative care is not available to them.

Black and minority ethnic elders especially report negative experiences in the health system and hospitals.³⁷ For older members from ethnic groups, the conditions in the health system are aggravated by a language barriers, insensitivity to their religious and cultural beliefs and habits and implicit or in certain cases, explicit racism. Ethnic elders, with the exception of older Chinese people, also seem to have more chronic diseases in comparison to white British older people of the same age. Explanations for this are poverty, poor housing and lifestyle and other factors but also include a sense of alienation and a failure to make sure of statutory and voluntary services because these services are perceived as being insensitive to their needs.³⁸

The problem here lies deep within the social culture. Prejudice is not simply born from misunderstanding, or even hatred and fear of the Other, as it is in racism or sexism. It is based in a general belief that older people's quality of life is less valuable

³⁴ King's Fund Briefing Note

(www.kingsfund.org.uk/eHealthSocialCare/assets/applets/emilie_ageism_reportPDF.pdf) pp2 - 7

³⁵ NSF para 1.6

³⁶ Royal College of Physicians News 11 May 2000 (<http://www.rcplondon.ac.uk/news/>)

³⁷ Help the Aged, Dignity on the Ward: Acting on the lessons from hospital experiences of black and minority ethnic older people.

³⁸ E Shah, 'Caring for Older People: Ethnic Elders' (1996) 313 BMJ 610-613.

than that of younger people; that older people have had a ‘fair innings’ and therefore are less of deserving of limited health and social care resources³⁹. This is reflected in implicit rationing of health care resources, the setting of age limits for particular types of care, whether explicit or tacitly understood, and even influences major decisions such as whether to resuscitate patients. Moreover, as the King’s Fund Review points out, because health problems in the older population are characterised as ‘normal’ aspects of ageing, expectations of what can be achieved by intervention and other services are generally low. This can be self-fulfilling, reflecting in the quality of service provided. In addition, medical research has traditionally placed less emphasis on older than younger people. This means that knowledge about the impact of treatments on older people is often poor. It also affects the esteem of those who work with older people. Work with older people is not considered to be attractive, and pay levels are often poor. The fact that the NHS is modelled on acute disease pathways means that not enough attention has been given to proper palliative care, and doctors frequently feel uncomfortable with diseases they cannot cure.

(vi) *Children and Adolescents*⁴⁰

. The use of age as an approximation of capacity for children and young people raises different issues from those of older people, since decision-making capacity is developing. A difficult and changing balance needs to be struck between independence and participation on the one hand, and protection of the child’s interests on the other.

The picture is particularly complex for young adults or adolescents, as they are classified legally as adults or children depending on the issue at hand. Young teenagers are not allowed to vote and are legally prohibited from drinking. Yet they are deemed adults for the purposes of criminal responsibility.⁴¹ In 1998, legislation abolished the rebuttable presumption that a child aged 10-14 was incapable of committing an offence, unless it was proved that the child knew his or her act was seriously wrong.⁴² The minimum age of criminal responsibility is now 10 years, one of the lowest in Europe.⁴³ The *Bulger* case highlighted many of the tensions in the criminal justice system and public perceptions about the ‘appropriate’ response to children and young people who commit violent crimes and what protection should be available to them through the trial and criminal process.⁴⁴

The complex balance between protection and participation manifests itself particularly in relation to reproductive autonomy. Even though the law recognises the right of under 16s who are ‘Gillick’ competent to get contraception without parental consent, fear of a lack of confidentiality or of being judged or access to services may prevent a number of young people from accessing emergency contraception.⁴⁵ Children can seek to restrict the rights of parents to make decisions about them by bringing an application to the court to seek an order in respect of a particular issue. It is however rare for courts to give leave to do so either out of a belief that such issues are trivial or better dealt with in the family⁴⁶ or because of the difficulty of children accessing courts and legal services.

³⁹ See A Williams ‘Intergenerational Equity: An exploration of the ‘Fair Innings’ Argument’ *Health Economics* Vol 6 pp117 – 132 (1997)

⁴⁰ I am indebted to Meghna Abraham for her contributions to this section.

⁴¹ See E Scott, ‘The Legal Construction of Adolescence’ (2000) 29 *Hofstra Law Review* 547.

⁴² Crime and Disorder Act, 1998, s. 38 . See No more excuses: A new approach to tackling youth crime in England and Wales (<http://www.homeoffice.gov.uk/cpd/jou/nme.htm>)

⁴³ J. Fionda, Crime And Disorder Act 1998: New Labour, Old Hat: Youth Justice and The Crime and Disorder Act 1998, [1999] *Crim.L.Rev.* 36-47.

⁴⁴ See Case of T v. U.K where the ECHR held that the trial and sentencing procedure were violative of Art. 6 of the Convention.

⁴⁵ Young Women and Emergency Contraception, (http://www.hpw.wales.gov.uk/emergency_contraception/young_women.htm).

⁴⁶ See J Herring, ‘Parents and Children’ in J Herring (ed) *Family Law: Issues, Debated, Policy* (Willan 2001) 151-152.

Particularly worrying is the popular perception that society needs protection from children. The fear of youth crime and violence has found expression in the exclusion of children and young people from public spaces through the use of night curfews. These curfews by are intended to protect the local community from the 'alarm and distress' caused by the anti-social behaviour of groups of young people and to protect children from being unaccompanied at night and against the risk of older peers encouraging them into criminal activities.⁴⁷ The government has also recently announced the results of its consultation on the physical punishment of children, carried out between January and April 2000. Stating that "our approach is to avoid heavy-handed intrusion into family life", the Government has ruled out legal reform to stop the corporal punishment of children.⁴⁸ Both of these policies are difficult to reconcile with the rights of children and young people to physical integrity and liberty.

Part II : The legal context

Despite complex legislation on race, gender and disability legislation, there are currently no domestic provisions in Britain relating to age discrimination. Indeed, the express preference of the government has been for voluntary initiatives. Hence a non-statutory Code of Practice on Age Diversity In Employment was launched in June 1999. Outside of the employment field, there have been a range of highly significant policy documents setting out policy and strategies for eliminating age discrimination. Thus the NHS Plan has a whole chapter devoted to older people, and the National Service Framework for Older People sets out more concrete strategies. Similarly, there are strategy documents on housing and transport for older people.⁴⁹ A different approach has been adopted in Northern Ireland, where public authorities already have a duty to promote equality of opportunity on grounds, inter alia, of age.⁵⁰

The impetus to bring in legally binding measures on age discrimination has come from Europe. When the new Treaty on European Union was adopted (the Amsterdam Treaty), the Community was given power for the first time, to implement the equality principle, not just in the field of gender, but also on grounds of race, religion, age, disability and sexual orientation⁵¹. Progress since then has been swift. A directive 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' was adopted in June 2000.⁵² A second directive extending the principle of equal treatment to prevent discrimination on grounds of age, disability, religion and sexual orientation (the 'framework directive') was adopted five months later.⁵³ The Framework Directive must be implemented by December 2003, but the Government has decided to take advantage of the permission to delay implementation until December 2006.⁵⁴

⁴⁷ Juvenile Offenders Unit , Local Child Curfew Guidance (<http://www.homeoffice.gov.uk/yousys/guidcurfew.pdf>)

⁴⁸ <http://www.londonchildrenscommissioner.org.uk/>

⁴⁹ Department of the Environment, Transport and the Regions *Older People: their Transport needs and Requirements* 12 February 2001 (www.mobility-unit-dttr.gov.uk); Department of the Environment, Transport and the Regions *Quality and Choice for Older People's Housing – A strategic Framework* 31 January 2001 (www.housing.dtlr.gov.uk)

⁵⁰ Northern Ireland Act 1998, s. 75(1)(a)

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Article 13 EC

⁵² Council Directive 2000/43/EC of 29 June 2000

⁵³ Council Directive 2000/79/EC of 27 November 2000

⁵⁴ Subject to a requirement of that progress is reported annually.

The directive applies to all persons, both public and private. It follows the traditional pattern of domestic discrimination legislation, defining the 'principle of equal treatment' as meaning that there should be no direct or indirect discrimination on grounds of age. (These terms are defined below). It goes somewhat further in expressly providing that harassment is deemed to be a form of discrimination, as is an instruction to discriminate. According to the directive, member states may set special conditions for young people and older workers 'in order to promote their vocational integration or ensure their protection'⁵⁵ and specific measures may be imposed to prevent or compensate for disadvantages linked to age⁵⁶. But there is no obligation to impose positive duties public bodies or employers. This sets it apart from the newly enacted Race Relations Amendment Act 2000 which imposes a positive duty on employers to promote racial equality and foster good race relations.

Member states are also permitted to provide that differences of treatment on grounds of age do not constitute discrimination, if 'they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'⁵⁷ Ages for admission to or entitlement to retirement or invalidity benefits may be specifically excluded, provided this does not result in discrimination on grounds of sex. The Directive is 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the protection of health and for the protection of the rights and freedoms of others.'⁵⁸ So far as enforcement is concerned, member States must ensure that organisations with a legitimate interest in ensuring that the provisions of the Directive are complied with, may engage in any enforcement procedures on behalf of or in support of the complainant.⁵⁹ But whereas the race directive creates an obligation to establish a commission, there is no similar obligation in the framework directive.

The framework directive is limited to discrimination within employment, vocational training and membership of organisations of workers or employers. Social security is excluded.⁶⁰ The narrow scope of the directive contrasts with the much wider race directive, which extends more broadly than the labour market, to include 'social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.'⁶¹ The directive is also narrower than existing discrimination legislation. Race and gender legislation outlaws discrimination in education, employment and the provision of services, while the Disability Discrimination Act covers employment, the provision of goods, facilities and services, premises, education and transport. Most advanced is the recent Race Relations Amendment Act 2000. Crucially, this is not confined to employment, education and services, but applies to all functions of specified public authorities. Law enforcement, whether by the police, local authorities or tax inspectors, is for the first time be subject to anti-discrimination laws, as are the core functions of the prison and probation service, the implementation of the Government's economic and social policies, certain public appointments, and the activities of immigration and nationality staff when they exceed what is expressly authorised by statute or Ministers.

The limitation of the directive to employment and vocational training means that many areas of age discrimination will be untouched. However, it is argued here that legislation on age discrimination would be defective if it was confined to employment. Even if the aim were solely to address age discrimination in employment, legislation would not be effective unless it extended to other areas, such as health care, lifelong education, and social security and pensions. Absence of relevant training, and disincentives in pensions and social security are just as serious barriers to older people in the workforce as explicit prejudice in the form of age

⁵⁵ Article 6(1) (a)

⁵⁶ Article 7

⁵⁷ Article 6

⁵⁸ Article 2(5)

⁵⁹ Article 9

⁶⁰ Council Directive 2000/79/EC of 27 November 2000 Article 3(3)

⁶¹ Council Directive 2000/43/EC of 29 June 2000, Article 3

limits. In any event, as will be seen, there are many issues in the health service, education and elsewhere which need to be addressed if measures against age discrimination are to make a real impact. The narrow scope of the directive also makes it tempting to deal with the issues by means of an individual litigation model. This model leaves it to individual litigants to provide the impetus for change; while courts and tribunals must formulate the legal response based on the facts of individual disputes, rather than the whole picture. Equally problematically, it puts the main burden of change onto the employer, rather than requiring the State and other bodies to take active measures to deal with the causes of the problem.

Part III: The Concept of Equality

(i) Introduction

Equality in the context of age raises particularly complex issues. Much anti-discrimination legislation has been aimed at redressing prejudice against 'discrete and insular minorities' with little access to political or economic power. This was the impetus behind the race discrimination legislation in the US. Similarly, the pervasive legal and social barriers faced by women through the centuries has provided the impetus for policies and legislation to achieve gender equality. However, age does not define a fixed delineated group. Moreover, not all distinctions are discriminatory. The crucial challenge is to therefore to demarcate valid from invalid distinctions.

What role then can equality play? This requires a clearer and more focused understanding of the meaning of equality itself and of its aims and objectives. Closer examination reveals that equality is not a unitary concept, but can be defined differently depending on what aims and objectives are identified. A familiar aim of equality is to achieve consistency: likes should be treated alike. This is closely related to the 'merit' principle, that is that individuals should be treated according to their merit, and not according to irrelevant characteristics. Merit may be appropriate to the job market. But in the health service, it gives way to a different conception of equality, namely that individuals should be treated according to their need. A less individualistic approach characterises the purpose of equality in terms of distributive justice. It will be argued here that all these approaches are flawed. Instead, the aims of equality should be seen as the facilitation of choice or autonomy, the protection of dignity and the enhancement of participative democracy or social inclusion. A legislative model should be shaped to achieve these objectives.

Before elaborating on these points, it is necessary to deal with one sort of argument, which holds that there is in fact no real inequality on the grounds of age. On this view, an individual needs to be considered in terms of her whole life-span, so that, provided we all bear equal burdens at similar stages in our lives, there is no inequality. One defence of mandatory retirement ages is phrased in these terms. Since we all will be subject to mandatory retirement ages at 65, the argument goes, there is no breach of the equality principle.⁶² This argument is, however, fallacious. Two life-spans cannot genuinely be compared, not just because there are too many variables, but also because a change in policy at some point in time might affect those who happen to be of the appropriate age, but would not have affected those older than them. In addition, the same event might affect two people of different generations quite differently, even if it occurs to both at the same age, because of the deep cultural differences between generations. It is therefore argued here that the use of age as a criterion for distinction between

⁶² See the discussion by D McKerlie 'Equality between Age-Groups' 21 *Philosophy and Public Affairs* 275 – 296 (1992)

two individuals at any one point in their lives can be a manifestation of age discrimination, regardless of how the same individuals might be treated in the future or in the past.

(i) *Equality as Consistency: treat likes alike*

The most basic concept of equality is the Aristotelean notion that likes should be treated alike. This is an intuitively powerful concept. However, it immediately comes up against the question: are two people of different ages 'alike' in the relevant sense? And if they are, should they always be treated alike? Uniform treatment of different age groups may in some contexts be appropriate, but there are also clearly situations in which uniform treatment exacerbates disadvantage. The principle of equality as consistency does not assist us in distinguishing invidious discrimination from appropriate differentiation. Moreover, it is a blunt tool. Only 'likes' qualify for equal treatment; there is no requirement that people be treated appropriately according to their difference

Equality as consistency is also limited by the fact that it is merely a relative principle. It requires only that two similarly situated individuals be treated alike. There is no substantive underpinning. This means that there is no difference in principle between treating two such people equally badly, and treating them equally well.. For example, flexible retirement could be make a useful contribution to extending the working life of older people. However, if the employer refuses to allow workers of any age group to work in this way , an older person could not claim that a refusal to permit flexible working is breaches the principle that likes should be treated alike. The principle of equality as consistency does not give a right to flexible working; it only requires an employer to treat employees consistently regardless of their age.

Even more problematically, the absence of substantive underpinning means that a claim of equal treatment can just as easily be met by removing a benefit from the relatively privileged group, and equalising the two parties at the lower point (levelling down), as by extending the benefit to the relatively underprivileged individual , and equalising the parties at a high point (levelling up). This would mean, in the health service for example, that inequality in allocating particular resources could be dealt with by withdrawing that resource from everyone.⁶³ All would then be treated equally, but equally badly. Similarly, when older men complained they were being treated less favourably than older women because the State pension age was 65 for men and 60 for women, the response was simply to raise women's pension age to 65. This achieved equality but only by removing a benefit from older women without improving the position of older men.

(ii) *Individual Merit*

The flaws in the bare notion of equality as consistency point us towards the merit principle. The hallmark of prejudice and inequality has always been detrimental treatment based on a person's race, gender or other irrelevant characteristic. It is therefore a fundamental aim of equality to ensure that an individual is treated according to her merit, free of stereotypical assumptions. The merit principle has been a central plank of business and government promotion of age equality. Employers who exclude workers on the basis of stereotypical views about their capacity, it is argued, are thereby precluding themselves from benefiting from a pool of potentially talented workers⁶⁴.

Central to this discussion is the complex relationship between age and capability. So far as older people are concerned, there is convincing evidence that age is not a good proxy for capability. For young people, the relationship between age and capacity is more complicated. On the one hand, it is recognised that children and young people are not always in a position to look after themselves or to make the best decision in their own interests. On the other hand, age should not be mechanically

⁶³ J Harris 'The rationing debate' 1997 *British Medical Journal* 314:669

⁶⁴ See Code of Practice on Age Diversity in Employment

related to decision-making capacity or maturity, thereby denying equal rights to make decisions to those who are in fact able to do so. A vital aim of equality legislation is therefore to prevent stereotypical assumptions about an individual's capability based on her age. The argument that individualised assessment is too costly does not prevent an equality claim from arising. It may of course be raised as a potential limit on equality; but then its legitimacy must be judged according to the strength of its claim to displace equality.

However, sole reliance on merit yields a principle of equality which is too limited. Most importantly, neither capability nor merit are scientific, objective criteria. Instead, they are measured against a particular norm, that of the able bodied, prime age adult. Uniform treatment of all age groups, based on this norm, will in practice disadvantage those who do not conform, amongst whom there will be a disproportionate number of older and younger people. For example, mobility is relative to the accessibility of means of transport. Because transport is structured and run in such a way as to cater for the needs of the healthy able-bodied adult, those who do not conform to this norm are relatively immobile. Similarly, because training is structured according to the cultural expectations of the current generation of 'prime age' workers, older people seem to be less 'capable' of being trained. Nor is 'merit' a fixed quantity. Instead, it is largely a result of social input, which can itself be distorted by prejudice. For example, older workers are often rejected because they are not qualified for a job. Yet the absence of qualification is partly due to the fact that employers are reluctant to invest money in training older workers. Moreover, a focus on 'merit' assumes that the individual should fit the job, rather than that the job should be adjusted to fit the worker. Yet it may well be possible to accommodate the needs of an older worker without undermining the requirements of the enterprise. This can already be seen in moves towards flexible retirement ages. The EU Part-Time Workers Directive, for example, advocates part-time work in part to encourage employers to facilitate gradual retirement of older workers.

Finally, while the merit principle benefits those whose capacity is unaffected by age, is of course of little use to those who find that they have age-related limitations. Within the employment context, if the aim is to find more workers with the relevant talents, workers without these 'merits' will continue to be excluded. The merit principle is particularly invidious in respect of health care or other social services. In this context, it could easily translate into a principle that the criteria for allocating health care resources are calculated according to whether an individual 'merits' the resources, that is whether she will continue to have a full or productive life.

(iii) *To each according to her need*

A better analysis is to declare openly that the health service responds to need rather than merit, stressing that age is irrelevant to need. This is encapsulated in the policy statement of the National Service Framework for Older People⁶⁵, where it states: '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.' A similar formulation is appropriate for all aspects of public services, including social services, housing and transport.

The use of need as a criterion is intuitively appropriate. However, care must be taken to ensure that the definition of need does not in itself incorporate age based presumptions. It is notable that the formula above includes both health needs and ability to benefit. 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.' Instead, he argues, the principal of the NHS should be to offer beneficial

⁶⁵ Para 1.7

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.'⁶⁶

(iv) *Fair Distribution*

A less individualist objective of equality is to correct inequities in the distribution of social benefits, monetary or otherwise. More particularly, as the Canadian Supreme Court has articulated it, the aim of equality is to prevent the imposition of particular burdens on grounds of group membership. This approach is specifically asymmetric, in that it only challenges classifications which burden group members; leaving the legitimacy of beneficial classifications unquestioned.

The distributive aim recognises that equality of treatment can perpetuate disadvantage. For example, equality of treatment of all in the health service would substantially disadvantage the elderly. Unequal treatment, in this sense, aims to achieve greater equality of results. A rich concept of equality therefore requires more than just uniform treatment. It is also asymmetric. This means that discrimination is prohibited if it imposes burdens on group members. Actions which lead to fairer distribution will be permissible, even if they involve some differentiation on the prohibited ground.

The distributive aim is, however, a difficult one to apply in practice. Why should we insist that social goods such as jobs, representation in Parliament, and other positions of power should be distributed proportionally among different age groups? . One explanation is that given by proponents of 'age diversity', which has been central both to the government's promotional campaign in support of the voluntary code of practice, and to employers' organisations. Age diversity has been promoted on the grounds that a range of ages within employment is good for business because it combines the benefits of the experience of older workers with the flexibility and enthusiasm of younger ones. Older workers can maintain the 'corporate memory' and older customers might prefer to deal with older salespeople or financial advisors. Formulated in this way, it is obvious that this approach runs counter to the merit principle, in that it is based on an assumption that people of different ages bring different characteristics to the job simply due to their age. It is true that this draws on positive stereotypes associated with different age groups, rather than negative ones. However, it still falls into the trap, which has been recognised in feminist literature, of 'essentialising' age. In addition, a strategy based on age diversity alone can legitimate the exclusion of some people because of their age. If there are already sufficient representatives of a particular age, the age diversity argument requires that any new recruits of that age be excluded. Moreover, on closer inspection it can be seen to be grounded, not so much in genuine redistribution, but in business strategy.

Within the health service and other social services, the distributive aim is even more complex. Equality of representation in the health service is not appropriate: we have already seen that older people take up more of the resources of the health service than other groups. A different version of the distributive aim concentrates on inter-generational equity, and constitutes a variant of the 'fair innings' argument. On this view, the aim is to equalise the lifetime experience of health of all people in society. Alternatively, it is argued that the objective should be to improve the health of the nation as a whole as much as possible. This means that priority should be given to those who will benefit most from the resources available⁶⁷. Both of these explicitly outcomes-based views, however, have the effect of

⁶⁶ J Harris 'The rationing debate' *British Medical Journal* 1997 314:669

⁶⁷ A. Williams 'The rationing debate: Rationing health care by age: The case for' *British Medical Journal* 1997 3114:20 (15 March)

legitimizing a lower allocation of health care resources to older people. The first version leads to the conclusion that those who have had a ‘fair innings’ should not expect to have as much spent on health improvement as would be spent on someone who has not yet attained or may never attain that level of health⁶⁸. The approach based on improving the aggregate health of the nation as a whole, has the effect that, for treatments which yield benefits which last for the rest of a person’s life, resources should be allocated to younger rather than older people. Williams expressly recognises, and indeed endorses the conclusion that improving the health of the nation as a whole is likely in some circumstances to lead to indirect discrimination against older people⁶⁹. Similarly, he concludes, ‘the notion of intergenerational equity requires greater discrimination against the elderly than would be dictated simply by efficiency objectives’⁷⁰.

This discussion shows that a notion of fair distribution based primarily on results can be problematic; indeed, it may even legitimate a lesser allocation to older people. It is argued here that an emphasis on results is important in highlighting the limitations of an approach based on identical treatment. However, the distributive aim must be allied to a strong notion of individual rights to avoid collapsing into utilitarianism. Thus the emphasis on results should imply a right to an equivalent quality of life so far as possible; without having to trade off one individual’s rights against those of another. I therefore turn to more individual rights-based arguments.

(vi) *Choice or Autonomy*

An aim of equality is to give all people, regardless of their sex, race, or age, an equal set of alternatives from which to choose and thereby to pursue their own version of a good life. Equal treatment is not sufficient if obstacles exist on the basis of a prohibited characteristic to the genuine exercise of choice. However, provided the choices exist, there is no reason to expect that everyone will make the same decision. Thus while this formulation of the aims of equality requires more than equality of treatment, it does not go so far as to require equality of outcome. Difference in outcome, on this view, is not attributable to discrimination but to difference in the exercise of individual choice.

This objective (often allied with the principle of equality of opportunities) holds much promise in the field of age discrimination. One of its most important implications is the removal of age barriers in a variety of contexts, whether in employment, health care, social services or training. The removal of a series of age – related criteria opens up a range of choices for individuals. However, it has long been recognised that the formal existence of choice does not necessarily mean that people are genuinely in a position to make use of the opportunities thereby presented. We have already seen that although many people retired early under what were nominally ‘voluntary’ early retirement schemes, in fact, given a real choice, two thirds would have remained in employment. Similarly, women over 70 are not offered breast cancer screening automatically, but may choose to have it. In fact, there is a widespread lack of awareness among older women of the availability of screening, and the overall rate of self referrals is very low. Indeed, as the King’s Fund research concludes, the very existence of an age limit may give a discriminatory message, indicating that older people are considered to be less valuable, or that risks of contracting breast cancer are lower.⁷¹

If equality of opportunities is limited to the provision of nominal choices such as these, it is unlikely to make a significant impact. However, a more substantive sense of equality of opportunity would require measures to be taken to ensure that people of all ages have real choices, and are genuinely able to pursue those choices. This is a potentially radical approach, which requires active measures such as the provision of training, the adjustment of pension schemes, the introduction of flexible working and the appropriate allocation of health care resources and information. It could go even further and require a greater adaptation of the built environment to accommodate the needs of older people. For

⁶⁸ A Williams ‘Intergenerational Equity: An explorations of the ‘Fair Innings’ Argument’ Health Economics Vol 6 pp117 – 132 (1997)

⁶⁹ Williams BMJ

⁷⁰ Williams Health Economics at p.117

⁷¹ King’s Fund Briefing Note Age discrimination in health and social care.

example, better public transport would increase the range of options provided, particularly for those who have failing eyesight and can no longer drive. For older people, the choice to continue to live at home may only be a genuine one if there is assistance in modernising or adapting housing. As has been shown above, many older people live in houses which are poorly insulated and dilapidated. The debilitation caused by cold, hunger and financial anxieties in themselves significantly limit older people's ability to make meaningful choices. Age Concern goes on to argue that older people's choices of housing should be widened to include appropriate, accessible two-bedroom accommodation, with part-ownership options for older people who do not have sufficient capital to make a full purchase. Real choice also entails giving the older people the right to choose to relax and enjoy leisure activities. It can be seen from this that employers can only be expected to deliver a small aspect of equality of opportunity; many of the more far-reaching measures need to be taken by the State.

(vii) *Dignity*:

Also a potential aim of equality is to ensure that everyone is treated with equal dignity and concern. 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.'⁷² Dignity is also central to the new South African constitution and the German Basic Law. Most importantly, the newly proclaimed EU Charter of Fundamental Human Rights specifically grounds the equality rights of the elderly in the dignity principle. Thus Article 25 proclaims the right of the elderly 'to lead a life of dignity and independence'. Dignity as a value has also been recognised in the domestic context. The National Health Service Plan commits the government to providing for the 'dignity, security and independence in old age.'⁷³ Finally, the Framework Directive itself bases the right to protection against age-related harassment on the dignity of the person.

Dignity is an irreducible minimum. It has the important effect of underpinning equality, making it impossible to argue that a 'levelling down' solution is as good as one that 'levels up'. Equality based on dignity must enhance rather than diminish the status of individuals. It also means that equality need not be based on a demonstration of equal merit or capability. A person must be treated with respect regardless of his or her merits or capabilities. Dignity is also given an important substantive boost by allying it with a right to independence. The right of the elderly to lead a life of independence requires a positive response, action on the part of both public and private actors to facilitate the right. This has been expressly recognised in the NHS Plan.

It should be noted that dignity is a malleable concept, and can be used for varying purposes. For example, many have argued that the elimination of mandatory retirement ages undermines the dignity of individuals, since senior workers will be subjected to degrading personal appraisal instead of the less intrusive mechanism of automatic retirement. It is important therefore that the dignity argument be placed firmly on the foundation of individual rights, and not be interpreted from the business perspective.

(viii) *Participative democracy*:

The final substantive value underlying equality is that of participative democracy. Thus Young argues that social equality, while referring in part to the distribution of social goods, primarily refers to the full participation and inclusion of everyone in major social institutions.⁷⁴ A rich idea of equality sees equality as participation and inclusion of all groups.⁷⁵ This goes beyond participation in elections. It extends to participation in all aspects of social life. 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 the more general principle of combating social exclusion. Notably, Article 25 of the EU Charter of Fundamental Rights includes not just the right of the elderly to lead a life of dignity and independence but also to 'participate in social and cultural life'.

⁷² *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5.

⁷³ HMSO The NHS Plan July 2000

⁷⁴ Young, I. Young, *The Politics of Difference* (Princeton University Press, 1990), p.173.

⁷⁵ Young, above note⁶⁵ p 158.

Participative democracy also entails full involvement in decision-making which affects older or younger people. This is recognised in the National Service Plan for Older People, which stresses that the need for representation of older people across every organisation, both in decision-making and in setting and monitoring standards. However, the representative aspect of participative democracy is not uncomplicated. There is an assumption that an older person, simply by being in the appropriate age range, will ‘represent’ older people’s interests. No attempt is therefore made to specify how such representatives will be chosen and how their representativity and accountability will be maintained. However, as we have seen, older people do not constitute a homogeneous group. More attention clearly needs to be paid to who such representatives will be if participation in decision-making of older people is to be meaningful.

It is argued here that the central aim of equality should be to facilitate equal participation of all in society, based on equal concern and respect for the dignity of each individual. This draws directly on the newly adopted EU Charter of Fundamental Rights which proclaims the right of the elderly ‘to lead a life of dignity and independence and to participate in social and cultural life’⁷⁶. This aim requires a complex amalgam of strategies, some of which might involve treating different age groups differently. It also requires positive measures to facilitate participation.

This formulation of equality suggests that the aims of equality might be different for younger people and children. It is noteworthy that the rights of children are formulated quite differently in the EU Charter. This stresses the rights of children, on the one hand to ‘such protection and care as is necessary for their well-being’ and, on the other, to express their views freely, and to have ‘their views taken into account on such matters that concern them in accordance with their age and maturity’.⁷⁷ This combination of parentalism and respect for their views provides a useful benchmark against which to assess the meaning of equality in relation to children.

PART IV. LIMITS ON EQUALITY

As with many social rights, the right to age equality is not unlimited. Whatever decision is taken as to the aims and objectives of age equality, it is still necessary to consider whether and in what circumstances, other, non equality based values should trump equality concerns. There are two aspects to the question. First, which interests are permitted to displace equality? Second, what weight should be given to those interests? Is it enough for the conflicting aim to be convenient or strategic, or must it be demonstrably necessary to achieve the stated objective?

There are several ways in which the limits to equality have been framed. The first is the ‘fair innings’ argument. We have seen that discrimination against older people in the health service has been defended on the grounds that older people have had a ‘fair innings’ and therefore are less deserving of limited health and social care resources. Similarly, employers have argued that older workers have had a fair innings and should give way to younger workers. This was the argument which was used to justify the policy of early retirement in the recessionary period at the end of the twentieth century. It is still used to justify policies of mandatory retirement. Underlying these arguments is the view that it is wrong to consider a particular stage of life in isolation. The opportunities available to an individual throughout his or her life-span should be considered cumulatively, and once a person has had those opportunities, she or he should not expect any more. Indeed, it has distributive overtones: because older people have once arguably been treated to all the benefits of society, they should now let others have their share.

This argument, is, however, fundamentally unsound. In particular, the notion that older workers should give way to younger ones is based on flawed assumptions. It assumes that there is a fixed number of jobs which can simply 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

⁷⁶ Article 25

⁷⁷ Article 24

people in work does not 'use up' jobs which could be reallocated to younger people. Known as the 'lump of labour' fallacy, this approach ignores the fact that jobs can create further jobs, so that the size of the labour market is determined by the scale of demand for jobs, not the supply of jobs. In fact, it has been demonstrated that 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. Population growth does not itself lead to higher unemployment, particularly if the economy is buoyant.⁷⁸

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 inevitably 'uses up' resources that could otherwise be spent on younger people. However, as in the case of jobs, 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. As Sir John Grimley Evans demonstrates, the resources spent on interventions such as hip replacements for older people improve their quality of life dramatically, as well as decreasing the need for other resource input. In addition, 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 only reappear in the social services budget, or be financed from private family income (unless, that is, we are prepared, as society to countenance older people living in degradation and pain). Others go so far as to argue that the apparent limitation on health care resources is not an absolute fact, but is an outcome of socially determined forces, which can themselves be manipulated.⁷⁹ The duty to promote equality should provide an impetus to manipulate those forces in the direction of age equality, rather than permitting the mere assertion of a limitation on resources to justify inequality.

A second argument which is frequently put forward to limit or even trump the equality claim is that discrimination or differentiation on grounds of age is necessary for business. Why then should business needs trump equality? One justification is that employers should not have to bear the costs of remedying a social problem, which is not of their creation. Ageing and the ageing process are not the fault of the employer, and therefore, on this argument, the employer cannot be expected to incur any costs in accommodating older people beyond what is efficient for the business.. This approach, however, makes the assumption that 'costs' need only be assessed from the point of view of the employer. It assumes that if the employer refuses to bear the cost, the cost simply disappears. In fact, it is born by the individual employee, who is made redundant, or excluded from training, promotion or the job itself. Thus the real question is how costs should be distributed. It is be argued here that the cost of remedying a social problem should lie on those social actors who have the resources and power to do so.

An even more telling rebuttal of the cost argument is to demonstrate that, in practice, the employer is not bearing the costs. Instead, the employer is simply repaying the worker in the later, less productive years of his or her life for the 'super-productive' mid-life period. American commentators have argued that one of the justifications for age discrimination legislation is based on the 'life-cycle model'. On this model, the employer benefits from the employee's prime productivity during the middle stages of his or her career, paying less than marginal productivity. This is compensated for by paying a wage premium during the training stages of employment and again at the end stages of the employee's career. However, the employer is tempted to take advantage of the intermediate period of super-productivity and then to discharge the employee without honouring the implied obligation to pay more than his or her productivity in the end stages of his or her career.⁸⁰ Legislation, on this view, is necessary to prevent this from occurring.⁸¹

⁷⁸ Winning the Generation Game and see N Campbell 'The Decline of Employment among Older People in Britain (CASE paper 19, Jan 1999); Samuelson Textbook on Economics 11th ed (1979) pp...

⁷⁹ G D Smith, S Franke, and S Ebrahim 'Rationing for Health Equity: Is it necessary?' *Health Economics* 9: 575 – 579 (2000)

⁸⁰ D Neumark 'Age discrimination Legislation in the US' in Z Hornstein (ed) *Outlawing age discrimination* Policy Press 2001, p55 and see Lazear EP 'Why is there mandatory retirement?' vol 87 no 6 1979, pp1261 –84.

⁸¹ The life-cycle model is limited by the fact that it is based on the paradigm of a worker who remains in the same employment all his or her life.

A broader defence of the legitimacy of business interests as a limit on equality is the argument that the good of the individual business will further the good of all, even if it subordinates particular equality rights. Thus if a business is required to retain unproductive workers, or to bear to great a portion of social costs, the business might no longer be viable, causing unemployment and dislocation. This is a worse result than the overriding of equality. This argument is a familiar one in the area of labour law. It was used, for example, to oppose the introduction of the national minimum wage; and to justify excluding part-time workers from unfair dismissal rights for the first five years of a job. There are two responses to this argument. The first is that its empirical basis is often unsteady. The Low Pay Commission in its second report found that by setting the minimum wage at a modest level, there had been no significant adverse impact on employment. The courts have themselves refused to accept that the discriminatory impact of a five year qualification period was justified by a theory that such a qualification was necessary to facilitate employment of part-time workers.⁸² Certainly employment of part-time workers has continued to climb despite the abolition of the five year period. Therefore this argument should only be countenanced if in an individual case there is proof that the promotion of equality will have significant adverse effects. Secondly, and equally importantly, there is no reason why the whole cost of promoting equality should be born by employers. It should be seen as a social cost, shared between employers and the State, in the same way as sick pay, maternity pay and other similar protections are.

A third potential limitation on equality is the 'public interest' as expressed through State policy. This is the most complex issue. The public interest is itself a contested notion, and is therefore arguably best determined by the government and legislature. It clearly has resource implications, and, inevitably, comes up against the need for a fair allocation of resources. This problem particularly acute in respect of age because of the real risk that allocating resources to one age group might drain resources from another. Democratic principles require deference to legislative decisions, and governments are in a better position to make decisions balancing the interests of different sections of the population or requiring resource allocation than courts. On the other hand, there are legitimate human rights constraints on government policy. Indeed, it is arguably a prime function of rights to act as a brake on utilitarian decisions, such as a decision to allocate resources away from older people in favour of younger people. The question then is not so much what the fair distribution should be, but who should be trusted to make the allocation.

The resolution of these issues entails a recognition that courts should not be left to make the ultimate decisions. Equality legislation should not simply move these decisions away from elected and expert policy-makers to courts. At the same time, the role of legal principle is to structure decision-making in such a way as to ensure that the relevant interests are properly considered. This entails transparent decision-making and a duty to give due consideration to the effects on age of particular decisions. The key issue is then whether it is enough for the State or employer to demonstrate a reasoned basis for the decision to override the discriminatory treatment or effects (a rationality test); or must it be shown that there is no non-discriminatory alternative to achieve the same end (a necessity test)? A necessity test has been preferred in the gender discrimination field in the UK and the EU⁸³ and in the race discrimination field in the US⁸⁴. But the age discrimination cases in Canada have accepted the rationality test. For example, in a recent Canadian case, it was held that a rule was discriminatory on grounds of age, but this was justifiable because it involved the distribution of limited resources among competing groups, and the legislature was entitled to decide to allocate the benefit on efficiency grounds.⁸⁵ Similarly, several cases have upheld mandatory retirement ages, on the ground that a rational relationship can be established between this and the ends sought.

I argue that the rational relationship test is not stringent enough. Instead, a strict justification test is warranted, requiring proof that there is no viable non-discriminatory alternative. For example, it has been argued that age limits in screening programmes can be justified if there are no overall benefits to women in older age groups. The application of such an approach can be seen by considering two examples

⁸² *R v Secretary of State ex p EOC*

⁸³ *Bilka Kaufhaus*

⁸⁴ *Griggs v Duke Power*

⁸⁵ *Sutherland v Canada* 208 NR 1; 123 FTR 80 (1997) Federal Court of Canada, Appeal Division per Isaac CJ

from the NHS: cervical cancer screening, and breast cancer screening. Women are not routinely screened for cervical cancer over the age of 64; whereas women between 20 and 64 are called up for screening every five years. Age limits for cervical cancer screening are justified by the very low risk of women over 65 developing cervical cancer if they have had a negative smear history before exiting the programme. However, a different picture emerges in respect of breast cancer screening. Women are only called up for breast screening between 50 and 64, although women over this age may self refer and an extension to age 70 is planned by 2004. However, it is difficult to justify even the age limit of 70 in view of evidence that 1500 lives could be saved annually if the programme were extended to all women over 70.⁸⁶

IV LEGISLATING FOR EQUALITY

Having set out the principles behind any legislation, I now attempt to translate these into legislative form. As we have seen, the Framework Directive follows well established contours, applying only to discrimination within employment and vocational training and relying on the traditional definition of direct and indirect discrimination. Enforcement is conceived of as an individual right to apply to a court. Although positive action is permitted, it is not required; and the Directive does not require the establishment of a Commission. It is evident from the above discussion that this approach is too limited. It will be argued below that the legislation should extend beyond employment to cover all public functions and the provision of goods and services. It should also extend the frontiers beyond the negative prohibition on direct and indirect discrimination and set out a series of positive duties to promote equality.

In addition, sole reliance on individual litigation is too limited. Such an individualistic model, which has been mainstay of US age discrimination in employment legislation, leads to an adversarial and defensive attitude among respondents. It also favours individual complainants who can afford to bring proceedings and for whom the major incentive is compensation rather than structural change. Instead, I argue for a 'mainstreaming' approach, a positive duty to take steps to promote equality, such as is found in more recent equality legislation in the UK. Nor are these ideas wholly radical. Important steps have been taken in this direction already. The Race Relations Amendment Act 2000 already places a positive duty to promote equality on all public bodies when carrying out their functions. The National Service Framework on Health in Older People, and the policy documents on housing and transport already constitute positive measures to promote equality, as does the Code of Practice on Age Diversity in Employment. Similarly, the European Commission Report *The Social Situation in the EU 2001* emphasises that the responsibility lies on government to develop policies to enable workers to remain in the labour force for as long as possible.

Formulating the questions in these terms also makes it clear that it is not appropriate to use secondary legislation under the European Communities Act 1972 to bring in new measures. It is argued strongly that there should be primary legislation, giving a proper opportunity for full debate. Regulations are inevitably limited to the requirements of the directive and no more.

These ideas are developed below. I examine the scope and coverage of legislation, the definitions of discrimination and the nature of positive duties, before turning to questions of enforcement.

(i) Scope and Coverage

As suggested earlier, legislation should aim to achieve a concept of equality which enhances individual choice and autonomy, protects individual dignity and facilitates social inclusion. This requires more than a prohibition on discrimination in employment and vocational training. As we have seen, the problem of age discrimination extends beyond employment, to include a wide range of public services. Even if the aim were only to achieve equality in employment, this could not be achieved without legislating in a far wider range. This is because many aspects of age discrimination interact and

⁸⁶ Age concern England *Older women unaware of breast cancer risk* ACE 11 October 2000

reinforce one another. Better health-care enhances employability, and employment enhances 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. Rigid tax rules prevent flexible retirement, incentives within the pension system encourage early retirement and a dearth of training inhibits re-employment of older workers. Legislation focussing on employment will be ineffective unless it addresses these wider issues.

To restrict legislation to employment also puts a burden on employers which they cannot necessarily discharge. The ability of employers to bring about change by removing stereotypical assumptions is necessarily limited. In order to be properly effective, and to avoid distortions, Government and other public bodies need to be actively harnessed to the cause. For example, tax and pension rules need to be changed before employers can be expected to introduce flexible retirement ages. Training of older workers needs to be a State responsibility, and not left to employers. Also essential to effecting real change are promotional and educational measures to help dispel the image of older people as dependent or inferior. Thus age discrimination legislation should follow the example of the Race Relations Amendment Act 2000, which broke new ground by applying to all public services.

It is also important to determine who should fall within the scope of legislation. Different jurisdictions have taken different views. The US legislation covers everyone above 40; and the Irish legislation spans the age range of 18 to 65 for employment and 15 to 65 for training. The EU Charter of Fundamental Rights has an article devoted to the rights of the elderly, while the EU Directive applies to all age groups, and there is no suggestion that discrimination against young workers can be excluded. Similarly, broad constitutional guarantees, such as the Canadian Charter, refer simply to 'age' as a protected ground of discrimination. There is no doubt that different problems confront younger and older workers, and these interests might even conflict. However, age discrimination policies and legislation which deal only with older people run the risk of ignoring questions of inter-generational equity. Indeed, one of the major criticisms of the US legislation has been that it has permitted older people to capture a disproportionate share of social benefits⁸⁷. Arguably, this is because of the focus in the US legislation on older people to the exclusion of younger people. Thus legislation should apply to all ages, while permitting or requiring provisions aimed particularly at benefiting a particular age group, where this is necessary for the promotion of their interest. This reflects the approach in the directive, which permits exceptions for special treatment to promote a group which has previously been disadvantaged. Finally, the interaction between different sorts of discrimination should not be forgotten. For example the combination of sexism, ageism and racism might put elderly women of Asian or African origin at a particular risk of discrimination.

(ii) **The definition of discrimination**

The Directive defines discrimination according to the traditional distinction between direct and indirect discrimination. While these principles make a valuable contribution, it is important also to examine other, complimentary legislative principles. Most important of these are the principle of proportionality, and the positive duty to promote equality, including the duty to make reasonable adjustments. It is not suggested that these models are mutually exclusive; indeed they could be regarded as a set of building blocks from which to select the appropriate elements to formulate a new approach. Each is dealt with in turn below.

(a) *Direct discrimination:*

Direct discrimination is defined in the Framework Directive as occurring 'where one person is treated less favourably than another is has been or would be treated in a comparable situation on [grounds of age].'⁸⁸ Direct discrimination clearly has an important role to play in respect of age. As we have seen, many of the problems arise from explicit or blatant prejudice, including age limits.

Direct discrimination is grounded in the principle, discussed above, that likes should be treated alike, or that basic fairness requires consistent treatment. Consequently, it shares the weaknesses of the consistency principle (see above). First, it is merely a relative principle. There is no substantive

⁸⁷ S Issacharoff and E Worth Harris 'Is Age discrimination Really Age discrimination?' [1997] 72 *New York University Law Review* 780 – 840

⁸⁸ Article 2(2)

standard: as long as the complainant is treated the same as a similarly situated comparator, there is no direct discrimination regardless of whether they are treated equally badly or equally well. Secondly, a comparator must be found. Inconsistent treatment can only be demonstrated by finding a similarly situated person who has been treated more favourably than the complainant. In the area of age discrimination, this is particularly problematic since age is a process rather than a fixed quality. How much of an age difference is necessary? Must it be a person much younger or older, or will any age difference suffice?⁸⁹ Thirdly, direct discrimination is an all-or-nothing concept. If two people are considered different, then the equality principle is simply not triggered. Detrimental treatment is permitted even if it is disproportionate to the degree of difference. Similarly, if two people are considered alike, the principle is fully satisfied by equal treatment. This means, first, that differential impact goes unremedied, and second, that differential treatment will always be illegitimate, even if the treatment aims to promote a previously disadvantaged group. This symmetry of direct discrimination rules out positive action *ab initio*.

These problems are not, however, insurmountable. They can be dealt with by moving away from a comparative approach. Instead, legislation should provide simply that it is discriminatory to subject a person to a detriment because of her or his age. This approach makes it unnecessary to identify a specific comparator who has been more favourably treated, following the trend set in relation to pregnancy⁹⁰ and disability⁹¹ discrimination. It also makes it impossible to argue that equality can be achieved by subjecting others to the same detriment. In this way, direct discrimination is interpreted consistently with the dignity aim identified above. Finally, the definition is expressly asymmetrical, identifying detrimental treatment as the mischief to be addressed by the law and therefore by implication permitting positive treatment. It is therefore suggested that instead of using the direct discrimination definition in the directive, legislation should simply make it unlawful to subject a person to a detriment on the grounds of her age.

Less easily resolved is the question of what limits should be placed on the prohibition against direct discrimination. As we have seen, there may be good reason to subject a person to a detriment on grounds of age. A minimum voting age is a good example. There are two possible legislative techniques to create such limits. The first is to permit any justification on a ground unrelated to age, leaving it to the court to decide if the proposed justification is sufficient. The second is to set out specific exceptions, for example, for positive action, or where age is a 'genuine occupational qualification.' Both techniques depend heavily on the standard of justification demanded by the court. If employers are permitted simply to assert that the age criterion is a business requirement, or the State could simply assert a public policy reason, the basic value of equal treatment could be undermined. On the other hand, if the court requires a high standard of proof, including a demonstration that there is no non-discriminatory alternative, this approach could form a useful means of distinguishing legitimate from illegitimate discrimination.

The importance of the Court's role in preventing such a risk from materialising can be seen from the experience of the US legislation, which permits age discrimination "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." In a recent case, the US Supreme Court rejected an employer's argument that compulsory retirement at age 60 of flight engineers was "reasonably necessary" to the safe operation of the airline. The airline company argued that the requirement was a bona fide occupational qualification, "reasonably necessary" to the safe operation of the airline on the grounds that 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 parties. The Supreme Court emphasised that the standard of justification was a high one. Justice Stevens held that to establish a bona fide occupational qualification defence, an employer

⁸⁹ 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..

⁹⁰ 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.

⁹¹ *Clark v Novacold* [1999] 2 All ER 977 (CA).

must establish that age is a legitimate proxy for safety-related job qualifications in that it is impossible or highly impractical to deal with older employees on an individualised basis. He reiterated that the standard was one of reasonable necessity, not reasonableness; and therefore the employer must establish more than a rational basis in fact for believing that identification of unqualified persons cannot occur in an individualised basis. Even in cases involving public safety, the Act did not permit the court to give complete deference to the employer's decision.⁹²

Existing race and sex discrimination legislation does not provide for any justification for direct discrimination, whereas the equal pay and disability legislation permits such a defence. Limited exceptions are, however, provided in the form of a genuine occupational qualification. In the Directive, it is specifically stated that differences of treatment on grounds of age can be justified (Article 6). The standard of justification is set reasonably high: a derogation is only permitted if it is objectively and reasonably justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary⁹³. The directive gives three examples of justifiable differences of treatment. The first caters for the need for affirmative action. Second, it may be justifiable to require workers to be over a given age, experience or seniority before they are given access to employment or advantages linked to employment. Third, a maximum age for recruitment may be set if it is based on the training requirements of the employer, or the need for a reasonable period of employment before retirement. This last exception is particularly worrying, since both training and retirement age are in the hands of the employer.

Even more contentious issue is whether there should be an exception to permit mandatory retirement ages. This question dealt with in detail in a subsequent paper in this series. However, it is worth noting the experience of other jurisdictions. In the US, mandatory retirement ages were made unlawful in 1986 by an amendment to ADEA⁹⁴, and there are many who criticise its implications. First, it is argued that it redirects firm 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.⁹⁵ The inclusion of younger workers in the legislative scheme helps ameliorate this problem. Secondly, it is argued that the abolition in practice is counterproductive and undermines job security for older workers. Employers could well respond, as the University of Texas did, by a reluctance to grant formal permanence to employees, instead hiring workers on long fixed term contracts.⁹⁶ To avoid age discrimination, however, an employer would have to employ all workers, regardless of age, on similar fixed term contracts. This problem may also be partly resolved by the Fixed Term Workers Directive, which requires that fixed term workers be treated no less favourably than comparable permanent workers. Third, some argue that absence of a mandatory retirement age means that senior workers are subjected to degrading merit appraisals. This is in turn ameliorated by incorporating the right to dignity into the prohibition on direct discrimination.

(b) *Indirect discrimination*

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, who, as we have seen, 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 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 figures can vary substantially depending on which groups are chosen. 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

⁹² *Western Airlines v Criswell* No 83- 1545

⁹³ Framework Directive Article 6(1)

⁹⁴ 29 U.S.C. s631 (1988)

⁹⁵ Issacharoff and Worth Harris correct reference *Generic Law Journal* p 52.

⁹⁶ *Ibid.*

the job? Once this has been settled, it is still necessary to decide whether a small difference in impact is sufficient, or whether the difference must be considerable.⁹⁷

Some attempt has been made to resolve these issues in the Framework 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'.⁹⁸ It is notable that the directive simply refers to the need to compare persons of 'a particular age' with 'other persons'. 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 would avoid much unnecessary litigation on the threshold question. The respondent then has the opportunity in the justification defence to show that the differential treatment was justifiable. However, the standard of justification is high. It is not enough for it to be convenient, appropriate or desirable. As the Directive provides, disparate impact is discriminatory unless it 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 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 might have the positive effect of requiring employers to revisit their criteria for selection or promotion to be sure that they in fact produce the best person for the job. A requirement of formal qualifications might exclude those with relevant experience and thereby preclude the employer of finding the best person for the job. For example, a degree in media studies might not be a necessary requirement for a job as a journalist.

Thus indirect discrimination should be defined simply so that a prima facie case is established if an apparently neutral practice has a particularly detrimental effect on an individual. The case can be rebutted by clear evidence of job related – ness.

(c) *Proportionality*

An alternative approach is to use a proportionality analysis. This approach acknowledges that not all distinctions are discriminatory, even if based on a prohibited ground. Instead, the aim is to provide a mechanism to distinguish between invidious discrimination and appropriate differentiation. This is done by a means - end test. The respondent must first show that it has instituted differential treatment for a legitimate purpose, and second, that the differentiation is appropriate to achieve that purpose. This approach is well developed in the case law of both the US and Canada. Thus the Canadian Supreme Court uses a three-stage analysis. First, has a distinction been drawn which prima facie denies an individual the right to equal treatment? Secondly, is the distinction discriminatory in that it imposes a burden on a particular group, defined according to an irrelevant personal characteristic, which is greater than that imposed on others? Finally is the distinction nevertheless justifiable according to a necessity or rationality standard?

Proportionality has some important strengths, as compared to direct and indirect discrimination. Instead of being an 'all-or –nothing' approach, proportionality permits treatment to differ according to the degree of difference in the subjects. Thus while it may be appropriate to treat two people differently according to their age, the differential treatment must not create a burden which is disproportionately large. In addition, it is asymmetric. To treat a group in a disadvantageous way could be disproportionate, while to while to give them extra benefits might be appropriate in order to redress past discrimination or to achieve legitimate government objectives.

⁹⁷ *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).

⁹⁸ Article 2(b)

Proportionality is particularly appropriate in respect of age, where distinctions are not necessarily invidious. As Mr Justice La Forest of the Canadian Supreme Court put it: 'The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged, based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits.'⁹⁹ For example, in a recent case¹⁰⁰, the Canadian Federal Court of Appeal rejected a claim of age discrimination arising from a rule limiting eligibility for credit from a 'goods and service' tax (equivalent to VAT) to those aged 19 and over. The adoption of the age of 19 as a proxy for dependency had a sufficiently rational relationship with the legitimate state aim, that of protecting those on lower income against regressive taxation. In short, held the court, this legislative provision created a distinction which was not discriminatory..¹⁰¹

However, in complex cases, La Forest J's statement reflects the dilemma rather than resolves it. Where complex policy decisions are concerned, particularly involving allocation of resources, the court's role is not to dictate the correct answer, but rather to provide a set of constraints on decision-making. If a distinction is drawn on grounds of age, the policy-maker must give a good reason for it. But the proportionality model does not in itself tell us when a reason is good enough; this depends on the standard which is applied. There is an important difference between a standard based on rationality, which simply requires a rational explanation of the distinction, and one based on necessity, which requires a demonstration that there is no acceptable alternative. In the field of age discrimination, the courts have in practice been more deferent to policy-makers than in other areas, such as race discrimination. The danger then is that courts will be too ready to accept a proffered justification.

The ease with which the constraints of equality can be diluted is demonstrated by contrasting the reasoning of the majority and the minority of the Canadian Supreme Court in the important case *McKinney v University of Guelph*¹⁰². In this case, the applicants challenged, first, the mandatory retirement age set by the university and, second, the provision in the Human Rights Code excluding people over 65 from protection against age discrimination in employment. The majority held that both these measures were *prima facie* discriminatory because they distinguished between people on grounds of their age. Nevertheless, they constituted a reasonable limit to the right to equality. The legislature was faced with competing socio-economic theories and was entitled to choose between them and to proceed cautiously in effecting change. According to the majority, the courts should not lightly use the Charter to second-guess legislative judgement as to just how quickly it should proceed in moving forward towards the ideal of equality. Consideration must be given not only to the reconciliation of claims of competing individuals or groups but also to the proper distribution of scarce resources. So far as the universities were concerned they had a reasonable basis for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives. Staff renewal was a vital means to achieve academic excellence, ensuring as it did an infusion of new people and new ideas and a better mix of young and old.

This can be contrasted with the dissent. Ginsburg J expressly considered whether an element of human dignity was at issue. Were academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? The answer was clearly yes. The measures were therefore discriminatory. Nor did they constitute a justifiable limit on equality. For Ginsburg J, there were many risks in simply allowing limited resources to trump an equality claim. In a period of economic restraint, competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, she stressed, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. To treat such price as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms. Although she acknowledged that in some circumstances, the court should defer to legislative distribution of resources, this was not one. Young academics were not the kind of "vulnerable" group contemplated in those cases applying a relaxed standard of minimal impairment. By denying protection

⁹⁹ *McKinney v University of Guelph* [1990] 3 S.C.R. 229 at p.297

¹⁰⁰ *Lister v Her Majesty the Queen* [1995] 1 FC 130

¹⁰¹ Contrast *R v M* (1995) 30 CRR (2d) 112 an age of consent of 18 for anal intercourse conducted between two consenting persons in private was discriminatory on ground of age when the age of consent of other sexual activity in Canada was 14 years.

¹⁰² [1990] 3 S.C.R.229

to older workers, she concluded, the Code has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.

Given the resource implications and the need for judicial deference to State policy, the proportionality analysis may well be appropriate for challenging State policy outside of employment. However, the justification should be based on a necessity test rather than one of mere rationality. This is not to argue that decisions on resource allocation should be shifted from governments to courts. Instead, governments should be required to take into account the rights of people of all ages in coming to decisions on resource allocation. Any decision which unduly burdens a particular age group needs to be justified to a high standard. That is, the burden is only justifiable if it serves a legitimate government interest and there are no alternatives with a lower burden.

(d) Positive Duties

An alternative model is to impose a positive duty 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 and aims at restructuring institutions. Correspondingly, the duty-bearer is not the person 'at fault' or responsible for creating the problem. Instead, the duty-bearer is identified as the body in the best position to perform this duty. Nor is it left to the victim to initiate action. Instead, duty bearers are responsible both for identifying the problem (e.g. by monitoring) and for participating in its eradication. Public bodies are often in the best position to carry this responsibility, but suitably framed, it is possible too to impose positive duties on private employers. This approach means too that a wider definition of inequality can be used than that in the traditional direct-indirect discrimination formula. Positive duties need not be triggered only by proof of acts of individual prejudice, nor of unjustifiable disparate impact as a result of a practice or condition. Instead, they arise from evidence of structural discrimination, such as chronic under-representation of people in a particular age group in particular types of work or positions of power. Social exclusion of older people, for example, might trigger a duty on the State to implement policies to remedy it.

A particularly important dimension of positive duties is their potential to encourage participation by affected groups in the decision-making process itself. Because the duty is prospective, and can be fashioned to fit the problem at hand, it is not a static duty, but requires a continuing process of diagnosing the problem, working out possible responses, monitoring the effectiveness of strategies, and modifying those strategies as required. If participation is built in as a central aspect of such duties, not only is it likely that strategies will be more successful, but the very process of achieving equality becomes a democratic one. Thus positive duties further the aim of participatory democracy identified above.

Positive duties to promote equality are being actively developed in several jurisdictions. At EU level, this has taken the form of 'mainstreaming' of gender equality, so that gender is one of the factors taken into account in every policy and executive decision¹⁰³. In Northern Ireland, legislation introduced in 1989 imposed a positive duty on employers to take measures to achieve fair participation of Protestant and Roman Catholic employees in their workforces.¹⁰⁴ The Northern Ireland Act mainstreams equality by providing that public authorities must have 'due regard to the need to promote equality of opportunity' in carrying out all their functions.¹⁰⁵ Most recently, the Race Relations Amendment Act

¹⁰³ *Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities* Commission Communication COM(96) final; see generally T. Rees, *Mainstreaming Equality in the European Union : Education, Training and Labour Market Policies* (Routledge, 1998).

¹⁰⁴ Fair Employment Act 1989, now contained in Fair Employment and Treatment (Northern Ireland) Order (FETO) 1998, Part VII; C. McCrudden 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) 22:4 *Fordham International Law Journal* 1696.

¹⁰⁵ Northern Ireland Act 1998, s. 75; and see C. McCrudden '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) pp. 11-23.

2000, which came into force in April 2001 imposes a general statutory duty on a wide range of public authorities not just to eliminate unlawful racial discrimination, but also to 'promote equality of opportunity and good relations between persons of different racial groups'.¹⁰⁶ As well as the general duty, the Home Secretary is given the power to impose specific duties on listed public authorities 'for the purpose of ensuring the better performance of the general duty'.¹⁰⁷ These specific duties can be tailor-made to meet the requirements of the particular public authority..

It is submitted that positive duties are the most appropriate way for public authorities to advance age equality. We have seen that there are many interrelated institutional factors which entrench age discrimination, including such wide-ranging factors as the structure of incentives in benefit and pensions systems, the image of older people portrayed in the media and in advertising, the absence of formal qualifications and the lack of appropriate lifelong education, and the strategic priorities of the NHS. If the aims of enhancing individual choice, protecting dignity and facilitating social inclusion are to be met, public bodies must play a role in actively promoting equality.

Positive duties are particularly well suited to the promotion of social inclusion, as part of the overall goal of achieving the equal right of all, regardless of age, to participate as full and valued members of society. Barriers to social inclusion include inadequate transport facilities and lack of access to telephones. Positive duties need to pinpoint such barriers and work towards dismantling them. More accessible, cheaper and more flexible modes of public transport, for example, would go far towards relieving social exclusion. Proactive measures on health are also vital to achieving this aim. Winter deaths of older people as a result of fuel poverty is a paradigm example of an aspect of ill health which could easily be avoided. Positive duties could also facilitate the care already generously given by the family and friends of older people. Many older people are looked after by their adult children, usually their daughters who have family and work commitments of their own. The introduction of family leave for carers of older people would greatly assist their efforts, as would the financial assistance provided by the recent introduction of vouchers with which the older person can purchase assistance, giving the carer a break.

It is therefore proposed that any legislation on age discrimination should include a positive duty on public bodies to promote equality. In order to avoid a proliferation of definitions of a 'public body', the definition in the Race Relations Amendment Act (RRAA 2000), which lays down a list of public bodies, which can be expanded by the Home Secretary, should be followed. In particular, the public body should remain responsible for complying with the general duty even if it has contracted out some of its functions to private or voluntary organisations. Crucial too is that the positive duty should place the onus of identifying the discrimination or inequality on the public body itself. This requires an authority to consider the impact of policies on people of different age groups, and actively devise programmes, such as education, public promotions, primary health care and retirement policies, which promote the interests, particularly of older people. As in the RRAA 2000, this duty should include the duty to prepare an Equality Scheme setting out these aims and objectives. The inclusion of affected people in decision-making is also of major importance.

In the private sector, there are equally good arguments for instituting proactive duties. Instead of waiting for individual litigation, employers are better served by taking proactive action. The removal of age limits and other express criteria on age would not only forestall damaging and expensive litigation, but would open up the whole range of talents to employers. Pre-emptive action is even more important in respect of indirect discrimination. As we have seen, indirect discrimination only prohibits criteria which are not strictly job related. Employers who have screened their job descriptions and promotion and training policy to ensure that they are age related would then be relatively insulated from litigation. More substantively, they will again ensure that not excluding talented workers from jobs or training by criteria are practices or practices which are not necessary for the job. The positive duty could also go further than simply pre-empting challenges based on direct or indirect discrimination. It could require employers to positively accommodate older or younger people, for example by instituting flexible retirement ages. This is similar to the duty to make reasonable accommodation, already found in the Disability Discrimination Act. For all these positive duties, detailed guidance, both in the form of a Code of Practice, and active promotion by the relevant government department, is essential to institute the deep-seated change in culture required.

¹⁰⁶ Race Relations Act 1976, s.71(1) (as amended).

¹⁰⁷ Race Relations Amendment Act 2000, s.71(2)-(3)

Positive duties in the private sector are not limited to employers. They should apply equally to private contractors providing public services. For example, extensive privatisation of transport services has meant that the only means of promoting change within the transport sector is to ensure that private providers are under a duty to promote age equality. The Department of the Environment, Transport and the Regions has recognised this in its report on older people's transport needs, which recommends the incorporation of transport operators into the total transport strategy. This would include the provision of more accessible buses (already required under the Disability Discrimination Act 1995) and staff training. Nor are these simply recommendations for good practice. The report suggests that local authorities should monitor customer service performance on contracted services and implement penalties on operators that fail to meet the agreed minimum standard.¹⁰⁸

Nor are these proposals as radical as they might at first seem. Most of these points are already made in the Code of Practice on Age Discrimination in Employment. In the introduction to the Code it is stressed that employment decisions based on age 'are both short-sighted and unfair. Unfair because they can prevent talented individuals from being full players in the labour market. Short-sighted because they can restrict a company's growth and potential.'¹⁰⁹ In many respects, it is an excellent example of 'mainstreaming', 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. Age should not be a barrier to training; and different learning styles and needs are addressed. In redundancy, it is stressed that age should not be the sole criterion for redundancy, and flexible options such as part-time working should be considered. Similarly, retirement schemes should be based on business needs and phased retirement should be used, where possible to allow employees to alter the balance of their working and personal lives and prepare for full retirement.

Other examples of positive duties are also in place. The 2001 EU Employment report stresses that every young person should be offered a new start within six months of unemployment and every older person within a year. Within the UK, this has been put into practice through the establishment of various 'New Deal' schemes, offering targeted training, personal advice and help with job-seeking, as well as a small cash grant to make up for loss of benefits, and in-working training grants.. Notably such schemes specifically differentiate between age categories, offering different packages to workers over 50, from those available to workers between 18 and 24, and again those over 25. Thus there is a New Deal 50 Plus, a New Deal for Young Workers, a New Deal 25 plus, and a New Deal for Disabled People. This is a good example of a case in which express differentiation is an appropriate way of achieving substantive equality of opportunity.

An even stronger example of a positive strategy to promote equality is the NHS plan, published in July 2000 and the corresponding National Service Framework for Older People, published in March 2001. The NHS plan has a chapter devoted specifically to older people. As well as making available additional funding for older people, the plan specifically commits the government to take positive steps to eliminate ageism and promote the autonomy, dignity, security and independence of older people. These objectives are taken forward in detail in the National Service Framework (NSF). The NSF contains some of the crucial components of a successful positive action strategy. First, it encourages participation. Thus it requires every NHS council and council with social services responsibilities to ensure that older people are properly represented in decision-making.¹¹⁰ Its aims expressly include ensuring that old people are never unfairly discriminated against in accessing NHS or social care services due to their age. The plan explicitly aims to remove 'arbitrary policies based on age alone', particularly in respect of resuscitation policies.. For example, it requires transparency of decision-making through the implementation of local resuscitation policies. The plan also goes beyond the removal of discrimination to the positive promotion of equality. This includes extending access to services, notably by involving older people in agreeing their own personal care plan. It also provides extra resources to promote independence through intermediate care, noting that this could save other resources by freeing up beds in acute wards.

¹⁰⁸ DETR *Older People: Their Transport Needs and Requirements* supra

¹⁰⁹ code of Practice on Age Diversity in Employment paragraph 6

¹¹⁰ NSF p.15

The substance of these plans is of course potentially controversial. For example, in the commitment to remove arbitrary policies based on age alone, there is no express definition of what is arbitrary. This raises the question of the distinction between rational and arbitrary policies, demonstrating the importance of explicating the aims and meaning of equality, discussed above. In addition, the question of whether the policies proposed will in fact improve older people's position remains controversial. The answers to these are beyond the scope of this paper. What is important is that the commitment to positive duties already exists. However, what remains unresolved is the question of compliance. It is to compliance therefore that the final part of this paper is devoted.

V ENFORCEMENT

There has been a general reluctance to translate the commitment to removing age discrimination into legally enforceable duties. It is for this reason that the Labour government in its early years opposed a legislative solution and opted instead for the non-enforceable Code of Practice on Age Diversity in Employment. The NHS plan and the National Service Framework for Older People give little attention to compliance, relying primarily on transparency measures and monitoring.¹¹¹ Opponents to enforceability argue that much time and money will be wasted, by individuals bringing unmeritorious claims and forcing a defensive attitude in respondents. What is needed is a cultural change, rather than a set of individual remedies, and this, it is argued, is better achieved through a promotional approach, based on information and encouragement. So far as health, education and social services are concerned, opposition has been based on the reluctance to allow courts to second guess policy-makers' decisions on the allocation of resources.

However, the promotional approach has not proved effective. A recent survey of 800 companies indicated that only 1% had introduced change as a direct result of the Code of Practice on Age Diversity in Employment, and only 4% thought that future change was likely. The main reason given was the belief that company policy or practice already met government guidelines. By contrast, a study of British residents over 50 found that a large majority believed that employers discriminated against older workers.¹¹² This contrasts strikingly with research showing that almost nine out of ten firms have developed or revised their employment policies as a direct result of the Disability Discrimination Act 1995.¹¹³ This debate has now been overtaken, in the employment sphere, by the directive, which requires enforceable legislation by 2006¹¹⁴. There is also a strong case for enforceability outside of the employment field: it has been clearly demonstrated that, while it is important to harness the positive goodwill and energy of major actors, some enforcement mechanism must be available to keep all actors in line.¹¹⁵

What sort of enforcement, is therefore, appropriate? It is argued here that compliance measures need to draw on the strengths of the promotional approach, aiming to facilitate cultural change through co-operation, participation of all affected parties, and proactive measures. However, these requirements must not be a matter of goodwill alone, but be backed up by appropriate sanctions. This suggests that sole reliance on individual litigation is inappropriate. Not only does this create a heavy burden on the individual litigant. It also prompts a defensive attitude in respondents, and leaves the courts to elaborate principles in a fragmentary and ad hoc manner. The problems of sole reliance on individual litigation can be seen in the experience of the US. Much of the criticism of the operation of the ADEA has focussed on the fact that litigation has largely benefited well-off white men. This, it is argued, undermines the rationale of anti-discrimination legislation, which is to redress disadvantage in

¹¹¹ For example, the NHS plan requires NHS organisations to include in their clinical audit programme compliance with resuscitation policies, while progress should be assessed by the Commission for Health Improvement.

¹¹² (2000) 93 EOR 8.

¹¹³ *ibid.*

¹¹⁴ Legislation should be in place by 2003, but Government may apply to extend the deadline to December 2006 subject to a reporting requirement.

¹¹⁵ Hepple, Coussey and Choudhury, B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework* Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Hart, 2000) para 3.3; Rees, above n.103, p. 36.

society¹¹⁶. However, on closer inspection, it can be seen that this is largely due to individual model of enforcement. ADEA 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 the claim in the first place. The individual litigation model is also unsuitable as a sole compliance mechanism in other areas such as the delivery of public services, particularly because it involves courts in complex distributive questions which they are not necessarily equipped to resolve. This is particularly true for positive duties, because of their proactive and policy-oriented nature.

The aim then is to secure compliance through co-operation, by building mainstreaming into existing decision-making procedures. Proper monitoring and progress reports function both as a discipline on decision-making and a means to ensure transparency. However, voluntary co-operation is not sufficient. A specific responsibility for auditing progress on age equality needs to be established, initially in existing audit mechanisms, such as the Commission for Health Improvement, or the DTI, and ultimately, in an independent Commission.¹¹⁷ As a very last resort power, the Commission should be able to issue an enforcement notice, and if necessary apply to a tribunal for an order requiring compliance.¹¹⁸ Compliance mechanisms provided to enforce the new duty on public authorities introduced by the Race Relations (Amendment) Act 2000 reflect this approach. The CRE is empowered to issue a compliance notice to any public authority that fails to fulfil a specific duty imposed by order to promote race equality. The notice may require the authority to comply with the duty and provide information to the CRE of steps taken to do so. If the Commission considers that a person has not complied with any requirement of the notice within three months to a designated county for an order requiring the person to comply with the requirement of the notice. Audit bodies such as the Audit Commission would also be subject to the duty to promote race equality.

It can be seen from this that a proactive duty cannot be operated without a commission. The framework directive does not require member states to establish a commission, by contrast with the race directive, which does. The DTI has taken active steps to promote age diversity, and has undertaken various monitoring exercises. It is possible to argue that this function should be retained within government. However, it is clear on closer inspection that an independent body, with clear powers, would be more effective.

It is proposed that a Commission be established with a series of powers similar to those of existing commissions. It should have the power to support individual in litigation where appropriate. However, the commission should not be given pre-emptive powers, such as those of the US EEOC, which must first investigate and reach a decision on a case before it is permitted to proceed to adjudication. This has led to inordinate delays with few concrete results. Secondly, it should be responsible for promoting equality by bringing about a change in culture through education and promotion. This is allied to the third function, which is to assist public bodies and employers to promote equality within their institutions or establishments. The Commission should have a duty to produce relevant codes of practice, based on close consultation with responsible bodies. Compliance mechanisms should, at the first stage, consist of non-adversarial advice and assistance from the Commission with a corresponding duty on the respondent to co-operate. The Commission should be able to intervene of its own initiative, thus inviting a strategic approach instead of an ad hoc series of actions. Particularly important is the fact that power is specifically directed at a practice of discrimination rather than a particular discriminatory act against an individual. The intervention should be an interactive process, during which the Commission aims to secure a change in discriminatory practices through discussion, negotiation and conciliation. The aim is to secure change through co-operation. For example, age discrimination in the NHS might prompt intervention by the Commission, rather than an individual challenge. This would mean that the Commission could enter into detailed discussion with all the relevant actors, to gain a fully rounded picture in a non-adversarial setting, and attempt to work through alternative strategies rather than the 'win-or-lose' response in individual litigation. As a last resort, and after a set period of time, the Commission should be able to issue a compliance notice and eventually apply to court for an order, in a parallel set of procedures to that under the RRAA.

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¹¹⁷ Hepple, Coussey and Choudhury, above n. 115, para 3.4.

¹¹⁸ Hepple, Coussey and Choudhury, above n. 115, paras 3.21-3.22.

This raises the question, finally, of whether there should be one Commission or many. Clearly, the issues raised by age discrimination are different in many ways from other types of discrimination, but this does not mean that there should be a different institutional structure for each type of discrimination. A proliferation of Commissions with different jurisdictions will create confusion and administrative inefficiency; and make it difficult to deal with cumulative discrimination based on different grounds. Thus it is suggested that there be a single Commission operating a harmonised equality statute. However, the internal structure of the Commission needs very careful attention to ensure that each interest is given appropriate weight.

CONCLUSION

I have argued that the function of equality is to enhance the dignity, autonomy and participation of all age groups. The impetus from Europe offers a unique opportunity to produce 'state of the art' legislation, drawing on the experience of existing discrimination law and extending its frontiers. It is to be hoped that legislators and policy-makers will have the vision and the political courage to use the opportunity. The third age could indeed be a golden age.

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