



# MAKING OLDER PEOPLE EQUAL: REFORMING THE LAW ON ACCESS TO SERVICES IN NORTHERN IRELAND

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Report for the Changing Ageing Partnership (Cap)  
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**February 2009**

*older louder stronger*

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## Executive Summary

The research for this report was commissioned by the Changing Ageing Partnership towards the end of 2007. The aim of the research, which was conducted between February 2008 and February 2009, was to examine the laws in a number of other jurisdictions to see how they protect people against discrimination on the grounds of age when they are accessing goods, facilities or services. At the moment the law of Northern Ireland does not grant any such protection, except very indirectly.

We examined the law of four common law countries – i.e. countries whose legal systems operate on the same basic principles as that of Northern Ireland – namely the Republic of Ireland, Canada, the United States of America, and Australia. In the case of the last three countries we looked not only at the national (i.e. federal or Commonwealth) law, but also at the provincial, state or territorial law within each nation. Appendices 1 to 4 in this report provide a summary of how the law operates in the four countries concerned.

In each of these jurisdictions we found that the law protects older people against this form of discrimination very effectively. Naturally there are small differences between the various sets of laws, and in all of the countries there are exceptions to the protection granted, wider in some countries than in others, but we found that across the board there was a willingness to extend to older people significant protection against discrimination in relation to access to goods, facilities and services. It would seem that Northern Ireland (and the rest of the United Kingdom) is one of the few common law jurisdictions where such legal protection does not exist, despite there being extensive protection in Northern Ireland against discrimination based on other grounds.

There are three chapters in the report. Chapter 1 explains the legal, social and political background to the research project, including the steps which are imminently to be taken in this field in England and Wales and at the level of the European Union. If Northern Ireland does not follow (or pre-empt) the lead of England and Wales in this respect, it will soon be out of step with two major jurisdictions in these islands. It will in any event have to comply with the imminent EU Directive covering this topic, probably within three years of the Directive being formally issued in Brussels. The chapter explains that at present there are two kinds of gap in the protection granted by the law of Northern Ireland to people who are discriminated against on the basis of their age when they try to access goods, facilities, or services. The *primary gap* is between the extent of the law on

age discrimination and the extent of the law on other forms of discrimination in Northern Ireland, which does protect people when trying to access goods, facilities, or services. There is also a *secondary gap*, between the applicability to public authorities in Northern Ireland of the law concerning equality of opportunity between people of different ages and the non-applicability of that law to private bodies.

Chapter 2 sets out the findings that emerged from the research, all of which are primarily based on a study of the laws operating in the four countries which were closely examined during the project. It begins by outlining the goals which the authors believe any reform of the law in this area in Northern Ireland needs to meet. It then considers whether there should be a general prohibition against age discrimination before considering the basis upon which any exceptions to this general prohibition should be permitted. The chapter stresses that it is very important to avoid making traditional assumptions about the characteristics of older people. To ensure that this is reflected in the new law, the proposal is made that exceptions permitting service providers to discriminate *against* older people (i.e. negative exceptions) should be very specifically set out in the reforming legislation. In the field of health and social care, therefore, exceptions should be based on clinical and welfare *need*, not age, and, in the field of insurance, exceptions should be based on objectively verifiable actuarial or statistical evidence which is publicly available. On the other hand, the chapter proposes that service providers should be permitted to discriminate *in favour of* older people (i.e. make positive exceptions) if the reason for doing so is to promote one of the conventional goals of anti-discrimination legislation, such as the rectification of historical disadvantage, the promotion of social inclusion, the satisfaction of special interests, or the meeting of special needs. Chapter 2 concludes with sections arguing for effective remedies for victims of age discrimination in Northern Ireland in relation to access to goods, facilities or services, and for other measures to be taken to help prevent age discrimination and promote equality of opportunity between people of different ages.

Chapter 3 provides a brief summary of the recommendations made by the authors based on the findings identified in the previous chapter. In making the recommendations the authors had in mind six goals:

- 1) to reform the law of Northern Ireland in a way that makes it more fair and more respectful of older people's right to be treated with dignity;
- 2) to make the new proposed law easy to understand and 'a good fit' with existing laws;

- 3) to ensure that the new law protects people in a wide variety of contexts;
- 4) to strictly limit the exceptions to the law which will permit discrimination to be practised *against* older people;
- 5) to allow exceptions which will permit discrimination *in favour of* older people whenever these are based on clearly identified goals which will benefit society as whole, e.g. social inclusion and the meeting of special needs;
- 6) to ensure effective remedies for victims.

The report concludes that there is a very strong case for amending the law of Northern Ireland so as to outlaw discrimination on age grounds when people are accessing goods, facilities or services. The law should be designed so that it operates in a similar way to the current laws on discrimination whenever it occurs in this context on other grounds, such as gender or race.

The report recommends that the Northern Ireland Assembly should move to introduce this legal reform as soon as possible. The Executive will very soon know what are the minimum protections it needs to accord to older people in order to comply with the imminent EU Directive on Goods and Services, but it should ensure that the Northern Ireland law goes beyond that Directive where this is appropriate, for example where there is an opportunity to harmonise the law on age discrimination with the law in Northern Ireland on discrimination on other grounds.

The new law should contain provisions authorising specific exceptions from the law, but these should be strictly limited. There should be no general defence to a claim of age discrimination based around the concept of 'reasonableness'. The authors do not have confidence that a general justificatory defence would be consistently interpreted by courts and tribunals in Northern Ireland in a way which steers clear of traditional ageist assumptions and stereotyping. On the other hand, we recommend that the new law should permit measures designed to benefit older people, provided these measures are based on grounds such as economic need, social inclusion, or special interests.

The report does not go so far as to recommend that the current law requiring public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity among people of different ages (section 75 of the Northern Ireland Act 1998) should be extended to private bodies as well, not even to large private bodies. But it does recommend that the guide on public procurement issued in 2008 by the Equality Commission for Northern Ireland and the Department of

Finance and Personnel in the Northern Ireland Executive should be given the force of law in the sense that private sector concerns which employ more than 10 people should have to comply with the parts of that guide dealing with age discrimination if they are to be eligible to supply goods or services to any public authority in Northern Ireland. It makes sense for the parts of the guide dealing with other forms of discrimination to be given the force of law in the same way, but recommending that would go beyond the terms of reference of this research report.

The report further recommends that the remedies available for age discrimination in relation to access to goods, facilities and services should be just as effective as the remedies available in other discrimination contexts. They should be designed to deter such discriminatory practice taking place in the future and to compensate individuals who have been disadvantaged by such discrimination. As regards an alleged failure of a private business employing more than 10 people to promote equality of opportunity between people of different ages, we recommend that this should be enforced through complaints to the Equality Commission for Northern Ireland, which should be given the power to direct the business in question to put in place policies and practices to ensure compliance with the legislative requirements relating to equality of opportunity. But no compensation should be payable for such a failure to promote equality of opportunity.

# Chapter 1

## The Background to the Research

### Introduction

This report is the product of research that was commissioned by the Changing Ageing Partnership, a project based in the Institute of Governance at the School of Law of Queen's University Belfast. The researchers bid for the funding in October 2007 and were notified of the success of the bid in November 2007. They began work on the research in February 2008. The initial deadline for completion of the project was October 2008, but in September 2008 this was extended by the Changing Ageing Partnership to February 2009.

The researchers have considerable experience in teaching and researching the law on discrimination and are accustomed to comparing and contrasting the law of Northern Ireland with the law of other parts of the world. Their proposal for this research was to examine how the law on age discrimination operates in other prominent common law jurisdictions around the world, with a view to assessing whether Northern Ireland's law could be reformed so as to enhance the protection granted to people from being discriminated against on age grounds when they are accessing goods, facilities or services.

The resulting report contains three chapters and four appendices. The three chapters set out, in turn, the legal, social and political background to the research, the principal findings emerging from the research, and a summary of the recommendations made by the researchers based on the findings. Throughout Chapter 2 reference is made to the state of the law in various common law jurisdictions beyond Northern Ireland. In order to aid an understanding of how those laws operate in their own contexts we have included a summary of the laws in the four appendices. Before doing so we reviewed existing literature,<sup>1</sup> and sought to obtain the most up-to-date information, including from governmental and non-governmental agencies operating in the countries in question. The jurisdictions examined in this way are the Republic of Ireland, Canada (both federal and provincial), the United States of America (both federal and state), and Australia (both Commonwealth and state or territorial).

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<sup>1</sup> Amongst the most useful existing studies is *Addressing Age Barriers* (2004), a study commissioned by Age Concern and Danish, Dutch and German organisations. It is available at [http://www.ageconcern.org.uk/AgeConcern/Documents/Addressing\\_Age\\_Barriers\\_final.pdf](http://www.ageconcern.org.uk/AgeConcern/Documents/Addressing_Age_Barriers_final.pdf).

We have tried at every point in the report to be as clear and as practical as possible in our exposition. We have included references to some examples to illustrate our points and we have tried to face head-on the key difficulties arising in this field. Chief amongst these is how to outlaw discrimination on the grounds of age in goods and service provision while at the same time permitting older people to benefit from steps taken by goods and service providers to give them preferential treatment over other people in society. As most of the problems arise in two particular contexts – health and social care, and insurance – we have paid particular attention to the issues at play in those fields. Chapter 2 includes separate sections outlining our findings in those spheres.

The recommendations summarised in Chapter 3 are based entirely upon the findings set out in Chapter 2. We have not attempted to consider local political difficulties that might arise in the implementation of the recommendations since we deemed that to be beyond the scope of the commissioned work.

### **The legal background**

There is a primary gap in the protection which the law currently gives to people in Northern Ireland who claim to have been discriminated against on the basis of their age. Under the Employment Equality (Age) Regulations (NI) 2006 they can usually claim protection from a tribunal or court if the alleged discrimination occurs in an employment context (e.g. if they have been denied a job because they are deemed to be too old). But there are no regulations which allow them to go to a tribunal or court if the discrimination they experience occurs when they are seeking access to goods (e.g. in shops), facilities (e.g. in leisure centres) or services (e.g. in dealings with a professional adviser). The Employment Equality (Age) Regulations (NI) 2006 cover occupational pension schemes, as these are deemed to be an aspect of employment. But non-occupational pension schemes are not covered by those Regulations, so the primary gap in the law exists there too.

Curiously, the primary gap does not exist in the law of Northern Ireland relating to discrimination based on other grounds, such as gender, disability, race or religion. Under the Sex Discrimination (NI) Order 1976, the Disability Discrimination Act 1995, the Race Relations (NI) Order 1997 and the Fair Employment and Treatment (NI) Order 1998, a person who, say, is denied access to facilities at a leisure centre because of his or her gender, marital status, disability, racial origin, religious belief or political opinion can seek a remedy in a court. Of course there are some exceptions to this right (especially as regards private clubs), but in general the right

exists. Moreover it exists whether the owner of the leisure centre in question is a public body, such as a local council, or a private company, such as Fitness First.

On the other hand, the law of Northern Ireland seeks to protect people against discrimination not just by allowing them to go to a tribunal or court to seek a remedy but also by requiring employers and suppliers of goods, facilities and services to take steps to avoid discriminatory actions by putting in place policies and practices that reduce the likelihood of such actions occurring in the first place. It is a preventative rather than a retrospective approach to protecting people against ageism. But so far the law of Northern Ireland imposes this requirement only on public authorities, not private bodies, though it does so in relation to the full range of grounds upon which people are often treated unequally, including age. The law is set out in section 75(1) of the Northern Ireland Act 1998, which imposes a duty on public authorities to have due regard to the need to promote equality of opportunity between persons of different ages.<sup>2</sup> In this respect the law of Northern Ireland goes further than the law of England and Wales, Scotland, or the Republic of Ireland, although increasingly those jurisdictions are imposing such equality of opportunity requirements in relation to other grounds, such as gender, disability and race. The gap in the law of Northern Ireland in this respect is one which also exists in those other legal systems, namely that only public authorities, not private bodies, are obliged to fulfil these equality of opportunity requirements. While this report concentrates on plugging the primary gap identified in the law of Northern Ireland, it also briefly considers how best to plug this secondary gap.

### **The social and political background**

There appears to be no satisfactory justification for continuing to tolerate the primary gap which currently exists in the law on age discrimination in Northern Ireland. It seems to be there for three reasons, but none of them is a good reason.

First, it is there because awareness of, and concern about, age discrimination have generally developed much later in developed societies than awareness of, and concern about, other grounds of discrimination. Even today people are likely to harbour a wider range of stereotypical thoughts and prejudices about older people than they harbour about people of different genders, abilities, religions or races.

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<sup>2</sup> There is also a duty, imposed on government departments, local councils and other designated bodies, by s 25 of the Northern Ireland (Miscellaneous Provisions) Act 2006, to act in a way that those bodies consider to be best calculated to contribute to the achievement of sustainable development in Northern Ireland, unless doing so would not be reasonably practicable given all the circumstances.

Such thinking is outmoded and inappropriate. Every person, whatever their age, deserves to be treated equally in society unless there are very clear and objectively justifiable reasons for differential treatment.

Second, the gap is there because in most areas of discrimination law (with the exception of discrimination on grounds of religious belief or political opinion) the people responsible for developing the law of Northern Ireland have tended to follow the lead of law-makers in England and Wales. Consequently, as the latter have been slow to enact laws protecting people there against age discrimination in relation to access to goods, facilities and services, there has been a corresponding lack of pressure to make such laws for Northern Ireland. Since the restoration of devolved powers to the Northern Ireland Assembly and Executive in 1999, and particularly since what appears to be a more stable form of devolution was put in place in May 2007, there is no longer any excuse for the law-makers of Northern Ireland to feel inhibited in what they can do in this sphere just because their colleagues in England and Wales have not yet got round to putting in place the appropriate laws.

Third, the gap is there because, in the field of discrimination, law-makers have traditionally paid more attention to discrimination in the sphere of employment than to discrimination in other aspects of life. In Northern Ireland this was particularly apparent as regards discrimination on the grounds of religious belief or political opinion: such discrimination was outlawed in the sphere of employment as far back as 1976, by the Fair Employment (NI) Act of that year, but it was not until the Fair Employment and Treatment (NI) Order 1998 was passed that such discrimination in relation to access to goods, facilities and services was outlawed. Employment is obviously a very important part of many people's lives, and is the lifeblood of society, but people interact almost as much, if not more so, when accessing goods, facilities and services as they do when working in a job, so it is every bit as appropriate that discrimination should be outlawed in that context as well. To give the impression that discrimination cannot be tolerated in one dimension of society but can be in others is counter-intuitive and counter-productive.

As regards the secondary gap in Northern Ireland's law – whereby the legal duty to have due regard to the need to promote equality of opportunity between people of different ages is imposed only on public authorities and not on private bodies – the justification is supposedly found in the belief that public authorities should be leading the way in promoting equality of opportunity and that they tend to have a broader remit than private bodies, many of which are developed in order to meet

the needs of a niche market that attracts just one or more small sections of society whereas public authorities, by definition, have to interact with all sections of the public. But we know of no research that has estimated the costs and other consequences for private bodies, whether large or small, if they were to be subjected to a duty to promote equality of opportunity. It is by no means obvious that such a duty is inconsistent with a market-driven economy. Private bodies are already required to comply with the legal duty not to discriminate on age and other grounds, so it is not clear why they could not also live with a legal duty to consider how best to promote equality of opportunity on all those grounds.

### **Support for reforming the law in Northern Ireland**

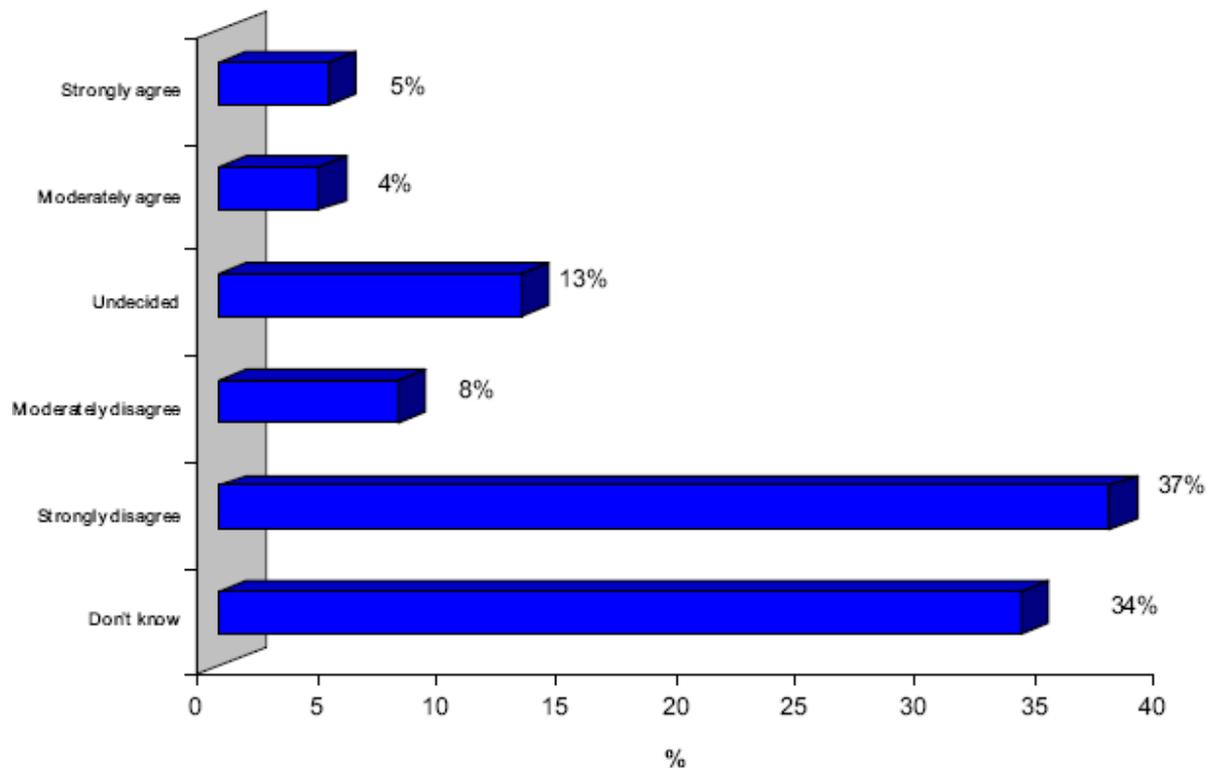
There is widespread support throughout Northern Ireland for the primary gap identified above to be plugged by a new law. A Research Update published by the Equality Commission for Northern Ireland in March 2008 revealed that, out of 53% of the 999 people who had a definite opinion on the matter, 45% either moderately or strongly disagreed with the current legal position – five times the percentage who agreed with it (see Figure 1 below). This is evidence that there is significant support among the general public for the law to be reformed.

The evidence is further supported by the results of research commissioned by the Changing Ageing Partnership from Millward Brown Ulster (a market and social research agency). An omnibus survey was carried out in August 2008, involving 1000 interviews with a representative sample of the adult population. Again, a very high percentage of interviewees (93%) agreed that it should be unlawful to discriminate on the basis of age in the provision of goods and services. When they were asked to choose the top three most important actions or changes that could be made to promote the rights of older people in society, the top overall answer given (70%) was ‘Put stronger age discrimination legislation in place’. An even greater proportion (84%) felt that the Northern Ireland Assembly and Executive needed to do more to ensure the rights of older people are protected and promoted.<sup>3</sup>

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<sup>3</sup> See <http://www.changingageing.org/AgeAwarenessWeek/AgeAwarenessWeek2008>.

**Figure 1: Currently age discrimination legislation does not cover the provision of goods, facilities or services. Do you agree or disagree with this? (n=999)**



### **The position in England and Wales**

Northern Ireland has a ‘common law’ legal system, which means (amongst other things) that its laws derive partly from the legislation which is passed in Parliament at Westminster and in the Assembly in Belfast and partly from the rulings given by judges when cases are decided in court – those rulings serve as binding precedents on lower courts in future cases. Other countries having a ‘common law’ legal system include England and Wales, the Republic of Ireland, most of Canada (not Quebec), most of the United States of America (not Louisiana), Australia, New Zealand, South Africa (largely) and India (largely). Scotland’s legal system is only partly based on common law principles. The main purpose of this report is to show that in most of these other countries the law does already protect people against age discrimination in the context of access to goods, facilities and services and that therefore there can be little objection from a legal point of view to changing the law of Northern Ireland so that it too protects people in that context. In each of these other countries there has of course been some controversy over precisely how

extensive the protection should be (there nearly always need to be some exceptions from every law). In the four appendices to this report we summarise how the relevant laws operate in four of the countries listed above. For the moment we confine our attention to another of those countries – England and Wales, a jurisdiction where the current law is very similar to that in Northern Ireland but where important changes are afoot. Even if these changes were not about to occur, there would be good reasons for the law of Northern Ireland to be reformed in the ways recommended in this report, but the fact that England and Wales is committed to going down virtually the same path of change is an added justification for bringing the law of Northern Ireland up to the same standard.

In the law of England and Wales on age discrimination there is the same primary gap as exists in the law of Northern Ireland. The secondary gap, however, is even wider, because, as already mentioned, there is no exact equivalent in England and Wales to section 75(1) of the Northern Ireland Act 1998 and so there is no duty on either private bodies or public authorities to have due regard to the need to promote equality of opportunity between people of different ages. But in June 2008 the Minister for Women and Equality in England and Wales, Harriet Harman, announced that the government was going to change the law so as to eliminate the primary gap altogether and to close the secondary gap to some extent. Speaking in the House of Commons on 26 June, she summarised the proposals the government was making for a new Equality Bill in a document published that day called *Framework for a Fairer Future*. She said:

*We will include in the Equality Bill duties on the public sector to eliminate age discrimination and promote equality for older people. We will take powers to outlaw discrimination in the provision of goods and services. We will need to allow for a transitional period for changes to be made to comply with the law before it comes into effect, but work is already under way, and we will consult on making provisions to bring the new law into force more quickly in those sectors that are ready to comply with the law.*<sup>4</sup>

The proposed Equality Bill will also bring into one location the various laws which govern the field of discrimination and be written as far as possible in plain English. Colloquially this new Bill is sometimes referred to as the ‘Single Equality Bill’ because it will seek to bring into one single piece of legislation a mass of rules which are currently set out in a wide range of pieces of legislation. In the government’s latest Queen’s Speech, delivered on 3 December 2008, the Equality

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<sup>4</sup> HC Debs, 28 June 2008, col 500.

Bill was promised for the next Parliamentary session. Unfortunately, at the time of writing (the last week of February 2009), the government has not yet published a draft of the Bill, so we are unable to comment further on its detailed proposals in this report.

In July 2008, however, the UK government did publish another document giving further details of what it proposes to do in this field and in November 2008 it made an announcement, through Mr Phil Hope, a Minister of State in the Department of Health, about its 'defined programme of action to tackle age discrimination in the health and social care sectors and to help service providers prepare for legislation'. Amongst other things, the government plans to establish an advisory group to advise it on what action the Department of Health and others may need to take to remove unjustifiable age discrimination in the provision of health and social care, what possible exceptions there should be to a ban on unjustifiable discrimination, and what would be the costs, risks and benefits of differentiation of services for different age groups. The Department has promised to publish on its website a summary of the group's discussions and any advice it produces. The work of the advisory group is expected to take until June 2010 to complete, but evidence emerging from its work will be used as it becomes available to inform the ongoing development of policy and priorities concerning the provision of health and social care in England. When the advisory group has finished its work the government will undertake consultation on possible exceptions to the ban on unlawful age discrimination in health and social care.

The Department of Health's website already provides links to various reports it has commissioned in this field.<sup>5</sup> In December 2007 the Centre for the Policy on Ageing (an independent UK-based research organisation) published a literature review, commissioned by the Department, of the likely costs and benefits of legislation to prohibit age discrimination in health, social care and mental health services.<sup>6</sup> In April 2008 the Personal Social Services Research Unit (which is co-located at several universities in England, including the London School of Economics) published a report commissioned by the Department of Health on the costs of addressing age discrimination in social care.<sup>7</sup> After analysing two datasets the author concluded that service users aged 65 or over would require up to a 25% increase in support before the differences between their provision and the

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<sup>5</sup> See [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085763](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085763).

<sup>6</sup> See [http://www.cpa.org.uk/information/reviews/age\\_discrimination.html](http://www.cpa.org.uk/information/reviews/age_discrimination.html).

<sup>7</sup> See <http://www.pssru.ac.uk/pdf/dp2538.pdf>.

provisions for those aged 18 to 64 would be removed. Finally, in May 2008 the PSSRU published a further report commissioned by the Department of Health on the extent of age discrimination in mental health services.<sup>8</sup> This concluded that use of mental health services is lower amongst older people, after adjusting for other variables such as need. Generally it is people over 65 who are receiving lower cost support packages compared to younger adults; there is little or no age-cost association amongst people aged under 65. The PSSRU calculated that eliminating age discrimination in mental health services would require extra expenditure of around £2 billion.

A Financial Services Experts' Working Group – on which age equality organisations were represented – was also set up by the government in April 2008 and on 2 October 2008 it published its final 173-page report on the likely impact on customers and service providers of a number of legislative options.<sup>9</sup> The three chief options it considers are (a) doing nothing, (b) introducing a system to signpost customers to firms who can meet their needs, and (c) making unjustified age discrimination unlawful, given certain assumptions. The report does not come down in favour of one option rather than another; rather it says that the information presented in its report should frame future debates. The group has to admit that the figures it gives for potential costs and benefits of the various options are 'pitched at a high level of aggregation and should not be considered definitive'.<sup>10</sup> For example, the report cites the age sector organisations as arguing that doing nothing to change the current law would cost between £35 million and £1,010 million per year for those who cannot drive because they cannot obtain motor insurance due to their age!

According to Harriet Harman's statement in June 2008, another working group was to be set up by the government to help develop the reform of age discrimination legislation in sectors apart from health and social care and financial services, and one of the things this group was to look at was how best to preserve justifiable age-based practices such as concessionary travel for older and younger people. We have been told by an official that this working group has indeed been established but that it has not yet produced any reports.

We are all also awaiting the British government's refreshed 'Age Strategy'. This was first published in 2005 under the title 'Opportunity Age – Meeting the

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<sup>8</sup> See <http://www.pssru.ac.uk/pdf/dp2536.pdf>.

<sup>9</sup> See [http://www.hm-treasury.gov.uk/fin\\_rsf\\_age\\_discrimination.htm](http://www.hm-treasury.gov.uk/fin_rsf_age_discrimination.htm).

<sup>10</sup> *Ibid*, p 1.

Challenges of Ageing in the 21<sup>st</sup> Century’,<sup>11</sup> but Harriet Harman promised a new version of it in ‘early 2009’. In the autumn of 2008 the government published a short discussion paper on this topic, with an introduction by Rosie Winterton, Minister of State for Pensions and the Ageing Society.<sup>12</sup> This reveals, incidentally, that the over-50s spend £260 billion per year in the United Kingdom, about 40% of annual consumer spending. Together with a series of events from November 2008 to January 2009, the discussion paper was said to be the prelude to the publication of ‘a more detailed set of ideas in spring 2009’.<sup>13</sup> This will eventually appear on the website of the Department for Work and Pensions.<sup>14</sup>

It should be noted that Northern Ireland, too, was, until recently, due to benefit from a new ‘Single Equality Bill’, but progress on this in recent years has been painfully slow and now seems to have stalled completely.<sup>15</sup> The Bill, like the one imminent in England, was intended to be a vehicle for harmonising, simplifying and extending the current laws which protect people in Northern Ireland against discrimination and inequality. It would clearly provide an ideal vehicle for plugging the gaps identified in this report regarding age discrimination, the more so if the gaps in England and Wales will already have been plugged by then. But the inquiries we have made suggest that a Single Equality Bill has dropped off the priority list of the Office of the First Minister and deputy First Minister and that the chances of its seeing the light of day within the next two to three years are extremely slim.<sup>16</sup> There is no justification in delaying the reform of age

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<sup>11</sup> See <http://www.dwp.gov.uk/mediacentre/pressreleases/2005/mar/pens2305-oppage.asp>

<sup>12</sup> See [http://www.dwp.gov.uk/opportunity\\_age/preparing/ageingstrategy.pdf](http://www.dwp.gov.uk/opportunity_age/preparing/ageingstrategy.pdf).

<sup>13</sup> *Ibid*, Introduction, p 2.

<sup>14</sup> See [http://www.dwp.gov.uk/opportunity\\_age/preparing/](http://www.dwp.gov.uk/opportunity_age/preparing/).

<sup>15</sup> Nothing much seems to have happened since 2005. See

<http://www.ofmdfmi.gov.uk/index/equality/single-equality-bill.htm>.

<sup>16</sup> In answer to questions from MLAs on 10 September 2007 the then First Minister, Ian Paisley, said: ‘Policy proposals on single equality legislation are being developed, and Ministers will consider the options in consultation with Committee and Executive colleagues over the coming months.’ (See <http://www.theyworkforyou.com/ni/?id=2007-09-10.5.39>). But there has been no further announcement from the Executive since then. In answer to questions from MLAs on 23 February 2009 regarding the timescale for the implementation of the Single Equality Bill, the deputy First Minister, Martin McGuinness, said: ‘... the Executive have agreed the policy approach that is intended to reduce inequalities further in the areas of age ...’ When asked whether the Single Equality Bill has, in effect, been abandoned, the deputy First Minister said: ‘We will continue to keep the broad spectrum of equality legislation under review ... It is a mistake to say that all possible avenues have been closed down by the Executive – they clearly have not’. Reference was made by the deputy First Minister to the draft EU Directive on Goods and Services and the need to consider the implications of this development before deciding the

discrimination law until the OFMdFM is ready to introduce a Single Equality Bill, however desirable such a Bill may be (and we fully support its enactment).

### **The position in the European Union**

As so often in the past, the main driver for reform in this field, both in Northern Ireland and in England and Wales, may not in the end be local law-making policy but the policies adopted within the European Union. Through a series of Directives on equality and discrimination, starting with one on equal pay in 1975, the EU has prompted all of its member states to develop quite a sophisticated body of law protecting people from unfair discrimination. The Directives in question include:

- Equal Pay Directive 1975
- Equal Treatment Directive 1976
- Social Security Directive 1986
- Burden of Proof Directive 1997
- Racial Equality Directive 2000
- Employment Framework Directive 2000
- Equal Treatment (Goods and Services) Directive 2004
- Equal Treatment (Consolidation) Directive 2006

In July 2008 the Commission of the European Communities in Brussels issued a proposal for a new so-called Goods and Services Directive, based on extensive consultation and surveys.<sup>17</sup> In answer to the expression of concerns that a new Directive would bring costs for business the Commission said ‘this proposal builds largely on concepts used in the existing directives with which economic operators are familiar’. The Commission’s impact-assessment report also found that ‘those at risk of discrimination often find themselves less able to participate fully in society and the economy, with negative effects both for the individual and for broader society’. The proposed Directive, as currently worded in Article 2, adopts a broad definition of discrimination, based on the one contained in previous Directives and on the case law of the European Court of Justice. It includes harassment and giving an instruction to discriminate. But the proposed Directive, in a later part of Article 2, also allows Member States a broad let-out: they may provide that differences of treatment on grounds of age shall not constitute discrimination if they are justified

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future direction of equality legislation in Northern Ireland. See Northern Ireland Assembly Official Report (Hansard), 23 February 2009, vol. 38(3).

<sup>17</sup> See COM(2008) 428 final: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0428:FIN:EN:PDF>.

by a legitimate aim and if the means of achieving that aim are appropriate and necessary. Article 2 goes on to say that it does not preclude Member States from fixing a specific age for access to social benefits, education and certain goods and services. Moreover, in the provision of financial services, Member States may permit proportionate differences in treatment where, for the product in question, the use of age is a key factor in the assessment of risk, based on relevant and accurate actuarial or statistical data (Article 2(7)). Article 2 ends with a more general let-out provision, namely that Member States can lay down general measures in their national law which in a democratic society are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health, and for the protection of the rights and freedoms of others.

The proposed Directive is directed only at professional or commercial goods, facilities and services. This means that it will not apply to transactions between private individuals acting as such. Letting a room in a private house would therefore not be a 'service' in this context, whereas letting a room in a hotel would be. And the proposed Directive would not apply in areas of life that are outside the competence of the European Community to regulate, such as the organisation of school systems (Article 3(3)). The proposed Directive (in Article 6) makes it clear that Member States are free to grant a higher level of protection against discrimination beyond the minimum requirements of the Directive if they so wish, but it also insists (in Article 7) that people who believe that they have been the victim of the outlawed form of discrimination must be able to use administrative or judicial procedures to enforce their rights, and in such cases the burden of proof is on the person or body complained against to show that there was no discrimination (Article 8).

Article 5 of the proposed Directive is the provision which allows Member States to retain positive action as a method for redressing disadvantage. It states: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to...age'. Unfortunately the proposed Directive does not provide any further guidance as to what sort of disadvantages are envisaged here, but it is reasonable to assume that it embraces disadvantages based on low income, frailty, and loneliness.

The proposed Directive will not be finalised until after the Commission has consulted the European Parliament and only if the Council of Ministers unanimously agrees to it. This may not be until 2010 or even later. The Committee

on Employment and Social Affairs within the European Parliament is currently considering the provisions of the proposed Directive, and at its meeting on 14 November 2008 various MEPs made suggestions for amendments. One such suggestion was for a new provision to be inserted in Article 2 saying that 'Discrimination shall be deemed to occur where eligibility for welfare benefits, in cash or in kind, granted on account of disability or sickness is subject to a specific age criterion'. The justification proffered for this was that granting invalidity benefits such as hospital care or money payments to sufferers of a certain age while denying them to others is a form of discrimination that deserves to be outlawed. Another suggested amendment would require exceptions from the duty not to discriminate to be *objectively* justified and to be proportionate. Yet another would require the deletion of Article 2(7) in the proposed Directive, which, as noted above, allows for an exception in the case of certain financial services. At least two suggested amendments advocate the inclusion of provisions specifically dealing with multiple discrimination – i.e., where a person has more than one ground on which to complain of discrimination. By the end of February 2009 it seemed that the Committee on Employment and Social Affairs had not reached a final position on the proposed Directive.

Non-governmental organisations working on behalf of older people have generally welcomed the proposed EU Directive but there are some worries that the let-out provisions are potentially too extensive. In particular, there is concern over the fact that Article 2 is very generally worded: it permits any differences of treatment on grounds of age just so long as they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This contrasts with the position in some of the common law countries we surveyed for this report, where the law provides only for very specific exceptions to the general rule outlawing discrimination. We favour the latter approach, since it keeps exceptions to a minimum and strengthens the assumption that age discrimination is not to be tolerated other than in wholly exceptional circumstances.

## Chapter 2

### The Research Findings

#### Introduction

All of the common law countries which we looked at in the course of this research have legislation which prohibits age discrimination when a person seeks access to goods, services or facilities. Indeed, in some countries such legislation has been in place for quite some considerable time. In Canada, for example, federal legislation was passed in 1977 (the Human Rights Act) which prohibits any employer or service provider that falls within federal jurisdiction from making unlawful distinctions between people based on the certain prohibited grounds, including age. This means, for example, that older people are protected against discrimination when dealing with federal agencies and service providers such as national airlines and chartered banks. Also, most provinces and territories in Canada have their own separate human rights legislation which similarly outlaws age discrimination by provincially-governed service providers (this usually covers services in the areas of education and health care). The first comprehensive provincial human rights statute was enacted in Ontario in 1962, although it was not until 1972 that protection against age discrimination was included within this legislation. All other Canadian provinces, with the exception of Alberta and Newfoundland, now provide similar protection from discrimination on the basis of age in relation to goods, services and facilities.

A similar picture can be seen in other countries. In the US, legislation tackling ageism in access to goods, facilities and services can be traced back to the mid-1970s after the first wave of the 'civil rights legislation' enacted in the 1960s. In Australia such discrimination was outlawed at Commonwealth level in 2004 (by the Age Discrimination Act 2004) although similar legislation had been passed at State and Territory level throughout the 1990s. Moving closer to home, age discrimination in relation to access to goods, services and facilities has been outlawed in the Republic of Ireland since 2000 in legislation now referred to as the Equal Status Acts 2000-2004.

It is clear, therefore, that legislation to ban age discrimination when people are accessing goods, facilities and services is not a new phenomenon. As noted in the last chapter, however, there has been little impetus on the part of law-makers to introduce such legislation in Northern Ireland. One concern may be that prohibiting age-based distinctions would impose a heavy financial burden on

businesses and other service providers. For example, there may be significant cost implications for an already stretched health service if a patient's age were to be a prohibited consideration in the distribution of scarce health care resources. Similarly, is it financially viable for the insurance industry to ignore a customer's age when determining the level of risk for insurance premiums, or would this merely increase the premiums for all customers regardless of age? Our research confirms, however, that such laws already exist in many other common law jurisdictions, which clearly shows that –

*legislation can be both created and can be effective in providing for individuals to have rights and in leading cultural change, whilst not creating unnecessary problems for service providers and others.*<sup>18</sup>

It is important, therefore, to look at the detail of the laws from other countries to see what lessons can be drawn as to how the law in Northern Ireland should be reformed. As already mentioned in Chapter 1, the appendices to this report provide details of how the legislation operates in the four countries on which research was conducted. Picking out examples of best practice from the relevant laws in these countries, this chapter will identify the key elements of any law which seeks to effectively prohibit unjustified age discrimination outside of the employment context. We will highlight the merits and demerits of the different models of protection and will detail the optimum approach which should be taken when introducing reforming legislation in Northern Ireland. We will also consider the main areas where the legislature should go beyond the minimum degree of protection which will need to be accorded to older people in order to ensure compliance with the forthcoming EU Directive on Goods and Services.

### **Outlawing age discrimination: preliminary features**

The laws which outlaw age discrimination in the countries on which research was conducted have several common features. First, they all apply outside of the employment context to outlaw age discrimination when a person is accessing goods, services or facilities. Second, they all contain exceptions upon which service providers can attempt to rely in certain circumstances to defend themselves against a claim of unlawful age discrimination. Third, they all attempt to strike a very important balance between protecting people from being discriminated

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<sup>18</sup> Explanatory Memorandum, 'Proposal for a draft directive on age discrimination in goods, facilities and services', European Parliamentary meeting, October 2006, at para 3.6. See also *Addressing Age Barriers*, note 1 above.

against on the basis of their age, whilst still maintaining as lawful the preferential treatment which both younger and older people receive in certain areas (such as concessionary entrance rates and free bus passes).

Given that any legislation in Northern Ireland should accommodate these different features, there are a range of complex issues to take into account when formulating the law prohibiting unjustified age discrimination. Indeed, others have highlighted the ‘particular complexities’ that exist when drafting such legislation –

*A range of issues exist as to the scope of any such legislation and of any permitted exceptions, the degree of justification required to bring discriminatory behaviour within one of these exceptions and the extent of any additional measures that are necessary to enhance the impact of the legislation.<sup>19</sup>*

To deal with these issues, legislative drafting must be prefaced by a thorough examination of the ‘core principles and social policy goals’<sup>20</sup> to be served by the proposed reform. In this respect we have listed below some of the goals which we feel the law on age discrimination should strive to achieve:

- to promote the dignity and worth of individuals;
- to promote the social inclusion of older people;
- to encourage active ageing and the economic and social independence of older people;
- to rid the providers of goods, services and facilities of stereotypical assumptions about a person based on his or her age;
- to outlaw unjustified age discrimination when accessing goods, services and facilities;
- to ensure that any exceptions to this general rule are clearly defined and not susceptible to abuse;

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<sup>19</sup> C. O’Cinneide, ‘Comparative Perspectives on Age Discrimination’ in Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) at p. 195.

<sup>20</sup> *Ibid.*

- to ensure that the permitted exceptions pursue a legitimate aim (defined in the legislation as opposed to judges on a case-by-case basis) and that the reasons for the age distinctions in question are both transparent and objectively justified by real evidence concerning the relevance of a person's age;
- to maintain as lawful the preferential treatment which both younger and older people receive in certain areas (such as concessionary entrance rates and free bus passes).

### **The general prohibition against age discrimination: defining terms**

The countries we studied differed in only minor ways as regards the definitions they attribute to key terms such as 'age', 'discrimination', 'goods', and 'services'.

#### *'Age'*

In the Republic of Ireland, for example, the word 'age' is defined as excluding persons under 18 years, with one exception – 17-year-old drivers who are applying for motor insurance – and in Ontario the exclusion of persons under 18 years is absolute. In the USA federal law protects people against age discrimination *in employment* only if they are over 40 years, but the federal law has no age cut-off at either the lower or the upper end of the age scale in the context of access to goods, facilities and services. By contrast, provincial law in Prince Edward Island contains no lower or upper age limit and thus applies to all ages.

Although this report focuses on the position of older persons, we believe that any reform of the law in this area in Northern Ireland must benefit people of every age. If certain age groups were to be excluded from protection this would immediately undermine the principled objection to ageism, which is that treating people unequally *merely because* they happen to have been alive for a longer or shorter period than someone else is inherently unjust.

#### *'Discrimination'*

Probably the most comprehensive definition of the term 'discrimination' is that which is to be found in the Republic of Ireland's legislation.<sup>21</sup> Like the laws in other countries, it describes discrimination as treating a person less favourably than

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<sup>21</sup> Equal Status Act 2000, s 3(1) and (2).

another person on any one of a number of specified grounds, including age. But it then makes it explicit that such discrimination is unlawful:

- whether the ground exists at present, existed previously and no longer exists, or may exist in the future;
- whether the ground is only imputed to the person concerned or actually exists in relation to that person;
- whether the less favourable treatment is experienced by a particular person or by a person who is associated with that person; and
- whether the person affected suffers directly or indirectly, the latter occurring whenever he or she is obliged by the provider of a service to comply with a condition but is unable to do so, substantially more people outside his or her age category than within it are able to comply with the condition, and the obligation to comply with the condition cannot be justified as being reasonable in all the circumstances of the case.

Amongst the grounds specified as being discriminatory is ‘victimisation’. This embraces applying in good faith for any determination or redress relating to discrimination, attending as a witness in connection with any inquiry or proceedings under the Equal Status Act 2000, giving evidence in any criminal proceedings under the Act, opposing by lawful means an act which is unlawful under the Act, or giving notice of an intention to take any of the four actions just listed.

The Irish legislation also outlaws ‘age harassment’, although it does not categorise this as a type of discrimination. It defines ‘harassment’ as subjecting a person to ‘any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of the victim is based on any discriminatory ground and which could reasonably be regarded as offensive, humiliating or intimidating to him or her.’<sup>22</sup>

The Irish law is also preferable to the Australian federal law in that it does not confine protection against age discrimination to situations where age is the *dominant* reason for the discrimination, nor does it require priority to be given to a claim of disability discrimination if this is alleged alongside age discrimination (a requirement which seems to make the basic mistake of presuming that, if an older

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<sup>22</sup> Equal Status Act 2000, s 11(5).

person has a disability, his or her right to be treated fairly on age grounds is comparatively unimportant).

### *'Goods' and 'services'*

In most of the countries we examined, the laws do not give extensive definitions of terms such as 'goods' and 'services'. But in some (e.g. in Australia and the USA) the relevant law, presumably for the avoidance of doubt, makes explicit reference *in addition* to what might otherwise not be categorised as types of services, for example education, the provision of accommodation, and access to premises. The Australian federal law even expressly mentions requests for information on which unlawful age discrimination might be based, and also the administration of Commonwealth laws and programmes. When the term 'services' is defined in legislation, it is usually stated to include credit and insurance services and the provision of transport, telecommunications, and entertainment. If dealings in land are not expressly listed as a service then they are listed separately as a special kind of transaction where protection still has to be guaranteed.

Some jurisdictions make reference to 'facilities' but others embrace that term within the term 'services'. Purely private or family transactions (such as gifts and wills) tend to be excluded from definitions, in recognition of the principle (which we support) that, however committed one might be to the need for strong laws protecting people against discrimination, there must remain a sphere of private and family life within which it is not appropriate for the state to insist upon a lack of discrimination (e.g. a person must remain free to leave all his or her property by will to a young relative rather than an old relative, even if this is explicitly on grounds of age).

The main difficulty that seems to have arisen around the definition of terms in this context has occurred in the Republic of Ireland, where judicial interpretation of the legislation has led to the position that things done as a 'state function' cannot be taken to be a 'service'. This has meant, for instance, that the work of tax officials, criminal justice agencies and welfare officers has been deemed to be outside the scope of the legislation, thereby leaving many people vulnerable to 'lawful' discrimination at the very moment when they may be most likely to be disadvantaged.

A reforming law in Northern Ireland will need to ensure that gaps are not inadvertently allowed to develop in the law's protection because the terms employed in the legislation are not clearly enough defined. Existing anti-

discrimination in Northern Ireland can be used as a model in this regard. The Fair Employment and Treatment (NI) Order 1998, for example, provides a list of facilities and services which are ‘examples’ of the facilities and services in relation to which discrimination on grounds of religious belief or political opinion is outlawed.<sup>23</sup> There is then a wholly separate provision outlawing discrimination in the disposal or management of premises.<sup>24</sup> The Disability Discrimination Act 1995 also has eminently imitable provisions on this point.<sup>25</sup> If there is to be a Single Equality Bill for Northern Ireland the definitions used for these and other terms should of course be harmonised across all the grounds of discrimination.

### **Exceptions to the general prohibition: why have them?**

To re-cap, our starting point is that legislation should be introduced in Northern Ireland to protect people from being discriminated against on the grounds of age when accessing goods, services and facilities. This will plug the primary gap in legal protection where the law currently outlaws age discrimination in the employment context but not in other social areas such as when someone is purchasing motor or travel insurance, registering with a doctor, or seeking admission to leisure centres, hotels or other facilities.

However, the general prohibition against age discrimination in these areas cannot be absolute. There are times when it will be both appropriate and necessary to allow service providers to treat people differently based on their age. It may seem counter-productive to draft a general legal rule prohibiting age discrimination and then dilute the strength of this by allowing certain exceptions. But it is important to realise that all anti-discrimination legislation, whether it be in the context of race, gender or age discrimination, contains exceptions. Certainly an analysis of the laws in other countries reveals that nowhere is there an outright or blanket ban on age discrimination, either in the employment context or when accessing goods, services and facilities. Rather, these laws seek to balance the competing interests involved in age discrimination claims. In other words, they seek to balance the needs of the service provider, the older person seeking protection and, in situations of scarce resources (such as health and social care), other potential beneficiaries of the goods, services or facilities in question. Thus, all countries which have a law of this type provide a range of justifications, both general and specific, for discriminating on the grounds of age. The purpose of the law is to distinguish

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<sup>23</sup> Art 28(2).

<sup>24</sup> Art 29.

<sup>25</sup> See s 19.

between, on the one hand, age differentiation which is based on harmful ageist prejudices that causes unfairness and should be outlawed, and, on the other, age differentiation which is appropriate and lawful.

It is true that allowing age to be used by service providers in certain circumstances will restrict the availability of goods, services and facilities for some people, for example, prohibiting younger people from holding driving licences or purchasing alcohol. It may also, for example, allow insurance companies to continue to use a person's age when calculating insurance premiums, or allow those organising sporting competitions to restrict events to people under a certain age. These exceptions can be described as '*negative*' in that they restrict or limit the availability of some goods, services or facilities to certain people based upon their age. However, there is another type of exception. We also want to allow service providers to continue to benefit older people in a '*positive*' sense by giving them preferential treatment such as discounted admission rates, free bus passes, and free eye examinations. The challenge therefore is to find a principled basis on which to draft legislation which keeps the '*negative*' exceptions to clearly defined circumstances whilst allowing service providers to treat older people more favourably when appropriate. All of the laws we looked at from other countries attempt to strike this balance, but they do so in different ways, and they are not always explicit in their rationale for the positive exceptions.

### **Drafting the exceptions: a note of caution**

It is clear, based on the evidence of the laws in other countries, and also the draft provisions of the imminent EU Directive on Goods and Services, that exceptions to the general prohibition of age discrimination will form part of any such legislation in Northern Ireland. The effectiveness of the legislation in outlawing unjustified age discrimination will depend on how the exceptions are drafted.

Before detailing the options for drafting these exceptions, we wish to stress a word of caution. Evidence from other countries suggests that exceptions to the general rule prohibiting age discrimination tend to be more extensive than exceptions to the laws which prohibit discrimination on other grounds, such as race or disability. This can already be seen in the one area where age discrimination is currently prohibited, that is, in employment. Under The Employment Equality (Age) Regulations (NI) 2006, direct discrimination on the grounds of age can be excused by a court or tribunal if the employer is able to show that the discrimination had an objective justification. However, direct discrimination in employment on other prohibited grounds, such as race, cannot be justified at all. A similar distinction can

be seen in the proposed EU Directive on Goods and Services. The proposed Directive does not just cover age. It also prohibits discrimination based on religion or belief, disability or sexual orientation in a range of social areas outside of employment. However, age has been singled out in the Directive as the *only* ground for which a *general* defence is available to excuse direct discrimination. Article 2(6) permits direct discrimination on the grounds of age provided it is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such a general let-out clause is not available to a claim of direct discrimination on any of the other grounds.

This illustrates that age discrimination tends not to be taken as seriously by the law as discrimination on other grounds. Indeed, one aspect of age discrimination that sets it apart from other forms of discrimination is that it is sometimes regarded as having a useful function, such as when assessing risk in insurance or rationing limited health care resources. Certainly research on ageism has revealed systematic age inequality in the provision of both public and private sector services such as education, health and social care, social security provision, insurance, financial services and housing<sup>26</sup>. Unfortunately the ageist assumptions upon which these practices are based are so deeply rooted that the use of age criteria by service providers is not only routine, but up to now has also been accepted by the law.

Thus, wrongly we would argue, age discrimination is generally not seen to be as harmful as other forms of discrimination. There are a number of reasons for this. First, unlike with other forms of discrimination, older people do not inhabit a fixed and static age-related identity which requires protection from historical hatred or bigotry.<sup>27</sup> As advancing age is something which happens to all of us lucky enough to live a long life, it is quite often perceived as a more acceptable basis upon which to differentiate between people than other personal characteristics such as gender or race. For example, a person's race is an immutable characteristic which historically has subjected certain members of society to prejudice and disadvantage. Unfair treatment based on race is therefore seen to be both morally and legally wrong. Age, on the other hand, is an evolving characteristic to which all members of society who reach a certain age are subjected. As people receive the benefits of youth, it may not appear morally dubious to treat them less favourably in their advancing years, particularly in the context of limited resources which can

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<sup>26</sup> AGE, 'Age Barriers: Older people's experiences of discrimination in access to goods, facilities and services' (2004).

<sup>27</sup> See S. Fredman, 'The Age of Equality' in Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003).

be used instead to benefit younger people.<sup>28</sup> Thus, while it is generally accepted that a person's sex or race should not be a relevant factor in the treatment they receive in employment and other social contexts, this, unfortunately, is not the case with age discrimination.<sup>29</sup> This poses a problem for law-makers, as there is 'no consensus ... as to what equality requires for the purposes of age discrimination'<sup>30</sup>. Allied to this is the 'fair innings' argument which is often used to explain age discrimination, particularly in areas such as health care, where it is said to justify a younger person's greater entitlement to resources. This argument is based on the idea that older people who have had a 'fair innings' –

*should not expect to have as much spent on a health improvement for them as would be spent to generate the same benefit for someone who is unlikely ever to attain what we have already enjoyed.*<sup>31</sup>

This argument will be discussed in more detail in the section on health and social care later in this chapter. For now, we simply want to highlight the general factors which compound the problem of age discrimination. In particular, we wish to stress that the use of age criteria by service providers is, wrongly in our view, not seen by all to be unjustified or discriminatory. This must be borne in mind when drafting the legislation. In particular, the general acceptance of ageism may indicate the potential willingness of courts and tribunals to accept the defences put forward by service providers to justify the differential treatment of older persons.

We therefore want to sound a cautionary note that age discrimination is just as harmful as other forms of discrimination, particularly in light of the ever growing ageing population. The fact that unfair treatment on the basis of age will potentially affect all of us provides, we think, a stronger not weaker justification for taking it just as seriously as other forms of discrimination. Indeed, it was pointed out in Canada as far back as 1970 when age discrimination was first being considered by lawmakers that –

*age discrimination does not seem to invoke the same sense of moral outrage at the community level as is the case with discrimination based on race, creed and national origin. Nevertheless, the consequences of age discrimination are no less severe in the economic sense, in the social sense*

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<sup>28</sup> J. Swift, 'Justifying Age Discrimination' [2006] 35 *Industrial Law Journal* 228-244 at 231.

<sup>29</sup> *Ibid.*, at 232.

<sup>30</sup> *Ibid.*

<sup>31</sup> A. Williams, 'Intergenerational Equity: An Exploration of the 'Fair Innings' Argument', (1997) 6 *Health Economics* 117-132, 129.

*and in the psychological sense. The victims are crippled in equal measure by age discrimination.*<sup>32</sup>

These words, although spoken many years ago, still convey an important message by calling into question the legitimacy of allowing ageist practices to go unchallenged in the provision of goods, services and facilities. The general acceptance of age discrimination is wrong. Every person, whatever their age, should be treated equally when accessing goods, facilities and services, unless there are clear and objectively justifiable reasons for the differential treatment. This presumption of equal treatment and the objectives listed on page 22 should underpin the law, particularly when drafting the exceptions to the general prohibition of age discrimination, because it will be the relative width of, or limitations imposed by, these exceptions which will help to determine the success of the legislation. It is this aspect of the law to which we now turn.

### **Drafting the exceptions: the options**

All of the countries we looked at in the course of our research contained built-in exceptions to the laws prohibiting age discrimination in accessing goods, facilities and services. Exceptions to the general rule will therefore be a necessary feature of any similar law which is enacted in Northern Ireland. While exceptions were a common feature of the legislation, their scope and extent took different forms. There are three types of approach which can be taken:

1. The legislation could give service providers a *general defence* to claims of direct and indirect discrimination (as in the case of age discrimination legislation in the employment context). While the application of the defence would not be limited to certain prescribed areas, its scope would evolve on a case-by-case basis.
2. The legislation could set out the *specific instances* where different treatment on the grounds of age is allowed. These could include both ‘positive’ and ‘negative’ exceptions, as outlined on page 27, to the general rule prohibiting age discrimination. Outside of these specific areas, age discrimination could not be justified.

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<sup>32</sup> Opening remarks of G.A. Brown, “The Older Worker in Today’s Economy and Community”, Report of Proceedings of First Seminar on Age Discrimination and the Age Discrimination Act of Ontario (Toronto: 4 June 1970) [unpublished], cited in *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, Ontario Human Rights Commission, 2000 at p. 5.

3. The legislation could adopt a combined approach, whereby elements of the two approaches above are wed. In other words, certain areas could be singled out where it is deemed appropriate to allow service providers to continue to treat people differently for reasons connected with age. If the provision or practice falls within the scope of one of these exceptions, then it will be lawful (without having to satisfy the general justification defence). This could be accompanied by a general sweeper provision which gives service providers a general justification defence in other non-specified areas.

Our recommendation is a variant of the third option. We feel that different approaches should be adopted for the ‘restrictive/negative’ exceptions and for the ‘expansive/positive’ exceptions. In relation to the positive exceptions, which are designed to benefit older people, a general approach can be justified as we do not wish to be prescriptive about the specific circumstances when service providers can confer preferential treatment based on a person’s age. In relation to the negative exceptions, however, the law should allow only very specific exceptions (as outlined in the legislation) to the general rule prohibiting age discrimination. A generally worded defence should not be adopted as it would allow a service provider to argue, across a range of non-specified areas, that the negative differential treatment complained of was legitimate and justified. The next section will explain in more detail the pitfalls associated with adopting such a general justification defence in the context of the negative exceptions. We will then consider the specific exceptions which could be adopted in this area.

### **The negative exceptions: a general justification defence?**

If the legislation contained a ‘general justification defence’ this would mean that service providers could argue that, while they did treat someone differently based on their age, there was a genuine reason for this which was necessary for the provision of the goods, services or facilities in question. It would then be open to the court or tribunal to decide whether the reason put forward was sufficient to provide a defence to the claim of age discrimination. In answering this question, the relevant issues would be whether the differential treatment was ‘legitimate’ and ‘proportionate’.

This type of general defence can be seen in other areas of discrimination law. For example, it is used in the employment context. If a person claims that he or she have been either directly or indirectly discriminated against in employment on the grounds of age, the employer can attempt to defend the action by passing the

‘objective justification test’. This means that the employer must show that the differential treatment had a ‘legitimate aim’ and that ‘proportionate’ steps were taken to achieve this aim. The employer must produce valid evidence that these thresholds are met. The availability of such a general defence in the employment context has been criticised as creating ‘uncertainty and confusion’.<sup>33</sup> We feel that the same criticisms could be levelled at the use of such a general defence in the context of the law prohibiting age discrimination in the provision of goods, services and facilities.

The first problem is that there is no legislative control over the areas where it can be raised as a defence. Secondly, it cannot be predicted how the justification thresholds would be applied in the context of goods, facilities and services. This will be determined by courts and tribunals on a case-by-case basis. We have already highlighted the systemic nature of age discrimination, its social acceptance, and the extent to which it is, wrongly, seen to be less harmful than other forms of discrimination. In light of this, when will it be regarded as ‘legitimate’ to treat someone differently because of their age? And, if there is a legitimate aim to the differential treatment, what steps will be viewed as ‘proportionate’ in order to achieve this aim? Can we be sure that courts and tribunals will interpret these undefined concepts stringently to ensure that age discrimination is allowed to take place only in wholly exceptional circumstances?

In particular, proportionality (that is, showing that the steps taken by the service provider were appropriate and necessary) involves a balancing exercise. It would have to be established that the unfairness or hardship caused by the differential treatment did not outweigh the objectives to be served by the service provider having the discriminatory rule or practice in the first place. Sometimes this balancing exercise is referred to in plain English as ‘not using a hammer to crack a nut’. It has been pointed out by others that the proportionality test can be interpreted in one of two ways. First, it can be applied ‘loosely’, where the service provider would only have to show that it was ‘reasonable’ to differentiate on the grounds of age. Alternatively, a much stricter interpretation could be taken, where the service provider would have to provide proof that the different treatment was ‘absolutely necessary’ and that there was no other alternative.<sup>34</sup>

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<sup>33</sup> B. Hepple, ‘Age Discrimination in Employment’ in Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003).

<sup>34</sup> S. Fredman, ‘The Age of Equality’ in Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) at p. 51.

There are examples of such a strict justification test being adopted successfully. In Canada, for example, where a general defence is available to service providers to justify age discrimination, a stringent test has been developed by the courts. Once a case of discrimination has been made out, the service provider must prove, amongst other things, that the differential treatment was absolutely necessary and that there was no viable alternative. This means that a doctor could not refuse to take on an older patient because of the perceived heavy workload associated with this. Age discrimination in Canada has developed, not as a separate issue, but as part of a general human rights agenda where the objective is to promote the dignity and worth of individuals.

We could not be sure that such a strict interpretation would be taken by courts and tribunals in Northern Ireland. Thus we would caution against the use of a general justification defence for the negative exceptions. In the alternative, the law should provide only for very specific exceptions to the general rule outlawing age discrimination (as in Australia and the Republic of Ireland). We feel that this is preferable for reasons of clarity and control. It would also allow the scope of individual justifications to be tailor-made to the specific area in question, from education and sporting activities to health and social care. In terms of drafting the negative exceptions, we feel that the aim should be to require very weighty and objectively justifiable reasons to override the general principle of equality between all persons regardless of their age. This cannot be guaranteed if a general defence is made available because the instances when age differentiation is to be regarded as legitimate, and the steps taken by the service provider proportionate, will have to be developed on a case-by-case basis. The general social acceptance of ageism and the potential willingness of courts and tribunals to accept the defences put forward by service providers to justify the differential treatment of older persons may otherwise conspire to reduce the effectiveness of the legislation.

At this point it is worth drawing attention again to the fact that the proposed EU Directive on Goods and Services provides for a general justification defence to claims of direct and indirect age discrimination. Under Article 2(6) different treatment on the grounds of age is permitted if it is justified by a 'legitimate aim', and the means used by the service provider to achieve that aim are 'appropriate and necessary'. The Explanatory Memorandum accompanying the proposal observes that 'exceptions to the general principle of equality should be narrowly drawn' and indicates that this is achieved by the 'double test' laid down in Article 2(6). In other words, where the service provider can show, first, that the differential treatment has a legitimate aim and, second, that the steps taken to achieve this are proportionate. However, in line with the views of non-governmental organisations

working on behalf of older people, we feel that this defence is too loosely worded. We agree with those who argue that the wording be strengthened to require the service provider to put forward not just a ‘legitimate aim’ but an ‘objective and reasonable justification’ for the differential treatment<sup>35</sup>. If not, it is feared that the defence as it currently stands would –

*allow for differences of treatment on the ground of age to be justified very easily with only minimal scrutiny and perhaps without much evidence in support of the policy in question.*<sup>36</sup>

As previously indicated, however, we would go further in our recommendations. Even if the wording of this general defence is strengthened to require an ‘objective and reasonable justification’ for the differential treatment, much would still depend on how this is interpreted by courts and tribunals. We feel that this would still create uncertainty and give too much leeway to service providers to justify negative age discrimination.

### **Specific negative exceptions**

We believe that in relation to the negative exceptions which operate to limit or restrict certain goods, facilities and services to certain people based on their age, the law should clearly list the specific instances when this is allowed. We feel that this would keep the exceptions to a minimum and strengthen the assumption that negative age discrimination is not to be tolerated other than in wholly exceptional circumstances. We do not favour a long list of exceptions to the general rule prohibiting age discrimination. Instead, we argue that exceptions should be allowed only in circumstances where it is deemed to be absolutely necessary to make age-based distinctions. A similar approach is taken in both the Republic of Ireland and Australia, where the legislation provides specific exceptions to the general rule against age discrimination.<sup>37</sup>

The most obvious instances where age-based differentiation may be regarded as permissible include:

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<sup>35</sup> AGE – European Older People’s Platform, ‘AGE response to draft directive on non-discrimination’ (2008). <http://www.age-platform.org/EN/spip.php?article650>

<sup>36</sup> *Ibid.*, p. 4.

<sup>37</sup> See appendices 1 and 4.

1. Legal provisions which restrict certain activities (such as driving or buying alcohol and cigarettes) to people above a certain age.
2. Provisions in the interests of health and safety, such as denying entry to a facility for children unless accompanied by an adult.
3. Circumstances where consideration of a person's age is required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.
4. Competitive sporting and other activities where participation is restricted on grounds of physical ability to persons of a certain age.
5. The conferral of benefits or services by charitable bodies either wholly or in part on persons of a particular age where this is a central requirement of the bodies' charitable objectives.
6. The provision of accommodation by a person in his or her private home.
7. The reservation of premises for persons of a certain age if those premises are reserved for religious purposes or are a nursing home or a retirement home.
8. Provisions which allow primary and post-primary education to be offered to certain age groups.

The instances of differentiation which we believe should be allowed under the proposed new law for Northern Ireland are all drawn from the laws of the other countries we have studied. It is not our intention to produce an exhaustive list of permissible negative exceptions. The central feature of our recommendation is that any negative exceptions must be specifically listed in the legislation, as opposed to being evolved by courts and tribunals on a case-by-case basis. And no item on the list should be based on outmoded assumptions about the characteristics of older people.

The two most contentious areas where specific exceptions to the general rule against age discrimination tend to be made are health and social care, and financial services (especially insurance). Particular attention has to be paid to drafting the exceptions in these areas and the following sections will look at each in turn.

## Health and social care

Before considering the extent to which the law should allow a person's age to be taken into account by health professionals, we wish to provide some background context to the problem of age discrimination in this area. Currently there is no legal basis upon which to challenge age discrimination in the provision of health and social care. However, there is a large body of research which reveals systemic age discrimination in this area. Clinically based research in England has shown ageism in cancer services, coronary care units, prevention of vascular disease, mental health services, and the management of strokes.<sup>38</sup> In 2001, for example, research carried out by the King's Fund in England found evidence of both direct and indirect age discrimination in health care provision. As well as direct discrimination where some services such as cardiac care were found to operate with unpublished upper age limits, more common was the 'general lack of priority for older people's services'.<sup>39</sup> A study published in 2002 found that three out of four senior managers working in health and social services in England believed that age discrimination occurred within their local services, with many indicating that they believed age discrimination to be endemic. Around one in three spoke of examples from their experience of direct discrimination such as access to facilities and treatments based upon upper and lower age limits.<sup>40</sup>

Other research reveals more subtle ageist practices and negative attitudes towards older patients.<sup>41</sup> One study, for example, revealed that doctors, in the management of cardiovascular disease for older people, 'felt uncertain about the best and safest clinical practice, were unaware of the latest research evidence, and were hampered by problems with local services'.<sup>42</sup> Whether it is caused by overt age

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<sup>38</sup> J. Young, 'Editorial: Ageism in services for transient ischaemic attack and stroke' (2006) 333 *British Medical Journal* 508-509.

<sup>39</sup> The King's Fund, *Briefing Note – 'Age Discrimination in Health and Social Care'* (London: King's Fund, 2000) <http://www.kingsfund.org.uk/resources/publications/age.html>

<sup>40</sup> E. Roberts, J. Robinson & L. Seymour, '*Old Habits Die Hard: Tackling age discrimination in health and social care*', (London: King's Fund, 2002).

<sup>41</sup> D. Oliver, 'How do you stand working with all these old people?' (2007) 117 *Health Service Journal* 20-21.

<sup>42</sup> J. Young, 'Editorial: Ageism in services for transient ischaemic attack and stroke' (2006) 333 *British Medical Journal* 508-509 citing the research of A. Fuat, AP. Hungin & JJ. Murphy, 'Barriers to accurate diagnosis and effective management of heart failure in primary care', (2003) 326 *British Medical Journal* 196-201. See also the research of Fairhead & Rothwell which revealed ageism in the treatment of minor strokes, JF. Fairhead & PM. Rothwell, 'Underinvestigation and undertreatment of carotid disease in elderly patients with transient

discrimination or more subtle factors such as lack of knowledge or research into the clinical outcomes of treating older patients, research reveals that ‘older patients are still denied potentially beneficial treatments openly available to younger people’.<sup>43</sup>

To combat such discriminatory practices, the Department of Health in England and Wales published a National Service Framework (NSF) for Older People in 2001, which set out national healthcare standards to guide the delivery of health services in England. Although recognising that there is evidence of excellent care for older people, the NSF lamented the lack of national focus on the health needs of older people and the reports of ‘poor, unresponsive, insensitive, and in the worst cases, discriminatory, services’.<sup>44</sup> As a result, the government made clear its intention to:

*ensure that older people are never unfairly discriminated against in accessing NHS or social care services as a result of their age.*<sup>45</sup>

A similar aspiration can be found in the recently published NHS Constitution, which clearly states that an individual has the right not to be discriminated against on the grounds of age in the provision of NHS services.<sup>46</sup> However, there is currently no legal mechanism to either prevent such discrimination from taking place, or to challenge it when it occurs. The National Service Framework for Older People is a voluntary initiative to ‘root out age discrimination’, but it has no effective enforcement mechanism beyond performance monitoring. However, at the very least, it indicates a high-level aspiration to remove ageist practices in healthcare provision in England.

Unfortunately the NSF for Older People does not apply in Northern Ireland. While its guiding standards can be considered in the delivery of health care, they are not directly applicable and no corresponding framework has yet been published by the

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ischaemic attack and stroke: comparative population based study’, (2006) 333 *British Medical Journal* 525-527.

<sup>43</sup> J. Young, ‘Editorial: Ageism in services for transient ischaemic attack and stroke’ (2006) 333 *British Medical Journal* 508-509.

<sup>44</sup> Department of Health, ‘*National Service Framework for Older People: Executive Summary*’ (London: DoH, 2001), p. 3.

<sup>45</sup> *Ibid.*, at p. 6.

<sup>46</sup> Department of Health, ‘*The NHS Constitution: the NHS belongs to us all*’ (London: DoH, 2009)

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_093419](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_093419)

Department of Health, Social Services and Public Safety in Northern Ireland. This means that, while individual Health Boards have introduced strategies across areas of health and social care to inform and guide the development of services, there are currently no regional policy standards or good practice thresholds to guide the delivery of services. While less research has been carried out in Northern Ireland than in England to investigate the prevalence of age discrimination in health care, it is clear that ageist practices do exist here. A report published by the Eastern Health and Social Services Council in 2003 revealed inadequacies in the quality of care received by older people in hospital, which included negative attitudes from health professionals.<sup>47</sup> A policy document published by the Northern Health and Social Services Board in 2002 recognised that while age should not be a factor in the care and treatment received by older patients, ‘covert or hidden ageism’ can take place even when it is not intended. The document noted that:

*this can be manifest ... in the failure to include older people in research studies, negative attitudes towards age amongst staff or in the failure to provide sufficient or appropriate resources and services according to need, in comparison with other age groups.*<sup>48</sup>

A subsequent report observed that further research was required to uncover the extent of the written and unwritten policies and practices that discriminated against older people in the provision of health care in Northern Ireland.<sup>49</sup> However, the report did highlight the low expectations that older people have in relation to health care. Older people were found to be undemanding and ‘accepting’ of the services which they received due to the fact that they were generally unaware of the standards of care which they should expect. As previously highlighted, the lack of regional quality standards to govern the delivery of health care in Northern Ireland means that there is no ‘benchmark whereby older people can readily judge their experience against other users of health services’.<sup>50</sup>

The issue of health care provision for older people was raised recently in the Northern Ireland Assembly. In particular, the Health Minister was questioned about hospital discharge arrangements for vulnerable older people which, it was suggested, vary across Northern Ireland depending on the practices of individual

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<sup>47</sup> EHSSC, ‘*Attention to Care, Quality of Care of Older People in Hospital*’ (2003).

<sup>48</sup> NHSSB, ‘*Ringing the Changes: A Strategy for Older People*’ (2002), p. 5.

<sup>49</sup> Help the Aged, OFMdfM & NIHRC, ‘*Older People’s Experience of Health Services in Northern Ireland*’ (2004).

<sup>50</sup> *Ibid.*, p. 66.

health Trusts.<sup>51</sup> This is an important issue, because the inappropriate discharge of older patients could raise concerns of indirect discrimination, given that pressure to shorten the length of hospital stays ‘can have adverse consequences for older patients, who take longer than average to recover from surgery or illness’<sup>52</sup>. The Health Minister agreed that older people should be discharged from hospital only when it is ‘safe and proper’ and stated that:

*decisions to admit someone to hospital, and his or her subsequent treatment, are determined by clinical factors that take account of the individual patient’s condition and circumstances, and consideration of the risks and benefits of particular treatments. A patient’s chronological age will not disqualify him or her from receiving the necessary healthcare.*<sup>53</sup>

Concerns were also raised about the lack of regional health care standards in Northern Ireland and the Minister confirmed that the Department was in the process of developing a range of service frameworks. Work has begun on developing these across a range of health areas which will set out the type of service that patients and users should expect, based on recognised good practice guidance. On 13 May 2008, the Health Minister announced that ‘Older People’s Health and Wellbeing’ was one of the priority areas to be developed in the next round of service frameworks.<sup>54</sup> The Department of Health, Social Services and Public Safety has confirmed that work has commenced on developing this service framework and publication is anticipated in 2011.

Age discrimination in health care is endemic for a variety of reasons.<sup>55</sup> First, older people and their needs are not valued as highly as younger people.<sup>56</sup> Second, the ‘fair innings’ attitude<sup>57</sup> leads to the view that older people are less entitled to limited health and social care resources. Third, there is a perception that older people are ‘passive and dependent’ and thus a burden on society. In a market-driven society, this leads to economically active younger people receiving greater

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<sup>51</sup> Northern Ireland Assembly Official Report (Hansard), 25 February 2008, vol. 28.

<sup>52</sup> J. Robinson, ‘Age Equality in Health and Social Care’ Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) at p. 100.

<sup>53</sup> Northern Ireland Assembly Official Report (Hansard), 25 February 2008, vol. 28.

<sup>54</sup> [http://www.dhsspsni.gov.uk/index/phealth/sqs/sqsd-standards-service-frameworks/service\\_frameworks\\_news\\_archive.htm](http://www.dhsspsni.gov.uk/index/phealth/sqs/sqsd-standards-service-frameworks/service_frameworks_news_archive.htm)

<sup>55</sup> King’s Fund, *Briefing Note – ‘Age Discrimination in Health and Social Care’* (London: King’s Fund, 2000), p. 11.

<sup>56</sup> *Ibid.*

<sup>57</sup> As outlined on page 29.

priority for treatment. Studies also suggest that younger people tend to be more demanding in their requests for treatment while older people have traditionally been more passive in their relationships with healthcare professionals.<sup>58</sup> These views were accompanied by the perception that health problems are a normal part of the ageing process, which leads to ‘low expectations about what services and interventions can achieve for older people’.<sup>59</sup> For example, depression is often regarded as a ‘natural’ part of getting older, which means that many older people are being denied the medical help which they need.<sup>60</sup>

These factors, taken together, suggest that setting voluntary standards through which service provision is monitored is insufficient to tackle age discrimination in health and social care. Legislation is required to prohibit age discrimination, although some would argue that as resources in health care are limited, the age-based rationing of treatment is inevitable and necessary. We would question both the financial and the ethical legitimacy of the ‘fair innings’ argument. First, as others have pointed out, any medical intervention which improves the health and quality of life of older people will confer economic benefits on the families of older people who may otherwise have to provide care, and possibly on the social services budget too.<sup>61</sup> Second, we regard it as morally dubious to deny treatment or services to an individual, or to offer them poorer quality care, based on their age. Third, there is the problem of quantifying the number of years which constitutes a fair innings. A person’s life expectancy at birth is not a good indicator, because this depends on a range of social, economic and environmental factors and, as such, will vary between individuals.<sup>62</sup> In addition, scientific developments such as stem cell research could prolong average life spans.<sup>63</sup> Consequently, according to Farrant:

*if there is no natural life span for human beings, the fair innings argument loses its ability to justify redistributing healthcare resources.*<sup>64</sup>

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<sup>58</sup> This has been confirmed by research in Northern Ireland, Help the Aged, OFMdFM & NIHRC, ‘Older People’s Experience of Health Services in Northern Ireland’ (2004).

<sup>59</sup> King’s Fund, *Briefing Note – ‘Age Discrimination in Health and Social Care’* (London: King’s Fund, 2000).

<sup>60</sup> M. George, ‘An age-old problem?’ (2005) 99 *Care and Health Magazine* 22-23.

<sup>61</sup> See J. Robinson, ‘Age Equality in Health and Social Care’ Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) p. 114.

<sup>62</sup> A. Farrant, The fair innings argument and increasing life spans, (2009) 35 *J of Medical Ethics* 53-56.

<sup>63</sup> *Ibid.*, p. 55.

<sup>64</sup> *Ibid.*

We would also stress that the ‘fair innings’ argument tends to misrepresent the problem of ageism in health care as being concerned exclusively with decisions on how to apportion scarce resources between older and younger patients.<sup>65</sup> For example, those supporting this view may cite the stark choice between a young and older person’s respective entitlement to an organ transplant. There may be occasions when such a choice has to be made,<sup>66</sup> but the problem of age discrimination in health care goes far beyond the decision-making required in these situations. As previously highlighted, the problem of age discrimination concerns the general lack of priority accorded to older people and their health needs. As such, legislation is required to ensure that older persons are not discriminated against in the provision of health and social care, and to help to eradicate the ageist assumptions which underpin negative attitudes towards older patients. We also want to ensure transparent decision-making by health professionals. The question that must then be asked is whether a specific exception should be included within the proposed new legislation in Northern Ireland to allow a person’s age to be considered in certain circumstances.

### *A narrowly-drawn exception in health and social care*

Age discrimination laws in both the Republic of Ireland and Australia contain a specific exception to allow a person’s age to be considered in health and social care provided certain thresholds are met. For example, under the federal law in Australia, it is not discriminatory to take a person’s age into account in determining whether or not to provide that person with particular health or medical services or goods, where that determination is *reasonably* based on evidence and professional knowledge about the ability of persons of that age to benefit from those goods or services. In the Republic of Ireland, a person of a certain age can be treated differently solely on the basis of a clinical judgment in connection with a diagnosis of illness or with his or her medical treatment.<sup>67</sup> A relatively young

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<sup>65</sup> See S. Fredman, ‘The Age of Equality’ in Fredman & Spencer (eds.) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) p. 48.

<sup>66</sup> A well-known reported case on this choice is *Soobramoney v Minister of Health* (1997) 4 BHRC 308, where the Constitutional Court of South Africa held that a 41-year-old unemployed man, a diabetic who suffered from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke, should not receive kidney dialysis because his condition was irreversible. Age, however, was not the determinative factor in the Court’s decision. See too the decision of the English Court of Appeal in *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, which involved a 10-year-old girl with leukaemia who was refused a second bone-marrow transplant, a refusal which the court upheld.

<sup>67</sup> Equal Status Act 2000, s 16(2)(a).

person may, for example, be deemed to be better able to withstand certain forms of aggressive therapy more easily than an older person.

We agree with the ethos of these provisions, namely that, in certain limited circumstances, factors relating to a person's age may be a relevant consideration in the decision-making of health professionals. However, we wish to cite one major caveat. Health and social care services should be provided on the basis of a person's health *needs*, regardless of age. To ensure that the general principle of equality is met, the legislation must provide for a very narrowly drawn exception to cover the circumstances when factors relating to a patient's age can be taken into account when assessing his or her clinical needs. This can be achieved by a provision which specifies that *a person of a certain age can be treated differently solely on the basis of evidence and professional knowledge about their health needs and their clinical ability to benefit from the goods or services in question*. This requires the decision-making by health professionals to be transparent and based on clinical evidence of a person's health needs and not on stereotypical assumptions about a person based on his or her age, or assumptions about the ability of an 'average' older person to benefit from the intervention or treatment in question. Nor can decisions be based upon negative assumptions about the quality of life of an older person. In addition, while life expectancy is an issue to be considered as part of the general assessment concerning a person's clinical needs, we wish to stress that stereotypical assumptions should not be made about a person's life expectancy based *solely* on their age.

Our recommendation contains more stringent requirements than the examples from the Republic of Ireland or Australia. In Australia, for example, a person's age can be taken into account if *reasonably* based on evidence and professional knowledge about the ability of persons of that age to benefit from those goods or services. However, much depends on what is deemed to be 'reasonable' in this context. In addition, considering 'the ability of persons of that age to benefit' appears to allow health professionals to take decisions about a particular person based on a more general policy in relation to people of that person's age. This approach could, for example, allow a 90-year-old person to be denied heart valve surgery on the basis of a policy not to provide it to persons over the age of 80 because most of that age group are too frail to benefit. This provides too much scope for decisions to be based on the 'average' older person, which could lead to the unfair treatment of older persons who may be regarded as less likely to benefit from medical treatment than younger people.

By contrast, our recommendation ensures that distinctions cannot be made between people based on their age alone but that health and social care decisions must be based on clear evidence and professional knowledge about a person's health needs and clinical ability to benefit from intervention or treatment. This meets the aspiration of the National Service Framework for Older People, which declared that NHS services will be provided 'regardless of age, and on the basis of clinical need alone'.<sup>68</sup>

## **Insurance and financial services**

Another area where a specific exception is usually included to allow age-based distinctions is insurance. Before considering this in more detail, it is worth highlighting the extent of age discrimination in the financial services and insurance industry. Research commissioned by the Equality Commission for Northern Ireland found evidence of both direct and indirect age discrimination in the provision of financial services in Northern Ireland.<sup>69</sup> It was found that age is routinely used to assess the levels of risk in the insurance industry, and that people over a certain age are denied access to certain financial products such as mortgages and loans.<sup>70</sup> Indirect age discrimination was also found, for example, where the cheapest insurance offers and savings rates were found online and a disproportionate number of older people do not access the internet. The report concluded that protection for older people from abuse and discrimination in the provision of financial services was essential.<sup>71</sup> We agree with this and are satisfied that the general rule we are recommending against age discrimination in the provision of goods, services and facilities will outlaw such discriminatory practices.

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<sup>68</sup> Department of Health, *National Service Framework for Older People* (London: DoH, 2001).

<sup>69</sup> B. Fitzpatrick & I. Kingston, *Older People's Access to Financial Services* (2008), research commissioned by the Equality Commission for Northern Ireland:  
[http://www.equalityni.org/sections/default.asp?cms=Publications\\_Age\\_research%20reports&cmsid=7\\_240\\_603&id=603&secid=8](http://www.equalityni.org/sections/default.asp?cms=Publications_Age_research%20reports&cmsid=7_240_603&id=603&secid=8)

<sup>70</sup> *Ibid.* Similar discriminatory practices have been found in England. See CM Insight/Andrew Smith Research, *Insurance and Age: Exploring behaviour, attitudes and discrimination* (2007), research report commissioned by Help the Aged and Age Concern England; Age Concern, *Age of Inequality? Outlawing age discrimination beyond the workplace* (2007); Help the Aged, *Everyday Age Discrimination: what older people say* (2004).

<sup>71</sup> B. Fitzpatrick & I. Kingston, *Older People's Access to Financial Services* (2008), research commissioned by the Equality Commission for Northern Ireland, p. 13.

### *A specific exception for the purposes of insurance*

However, all of the laws from other countries which we looked at had a specific exception which allowed a person's age to be considered for the purposes of insurance provided certain conditions were met. Further, non-governmental organisations working on behalf of older people accept that 'it is justifiable for age to be used [by the insurance industry] where it is relevant to risk'.<sup>72</sup> Such an exception is also provided in the imminent EU Goods and Services Directive. Given this, it is clear that any legislation in Northern Ireland will include a specific exception relating to insurance. The challenge is to ensure that this is drafted in such a way that decisions about a person are made on actual evidence linking age to risk assessment, and not stereotypical age-based assumptions.

In this respect, it is instructive to look at the laws from other countries. In Canada, for example, most provincial anti-discrimination legislation allows age-related factors to be used as '*bona fide and reasonable*' risk assessment criteria in the insurance industry. This has been accepted as lawful by the Supreme Court of Canada in *Bates v Zurich* (1992) provided that it is based on a sound and accepted insurance practice, and there is no alternative<sup>73</sup>. In the Republic of Ireland, people can be treated differently depending on their age for insurance purposes provided the differences are reasonably based on actuarial or statistical data or other relevant underwriting or commercial factors. In Australia, age-based discrimination is permitted as regards the terms and conditions on which an annuity, insurance policy, membership of a superannuation scheme, or credit is offered, provided (a) that the discrimination is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely and the discrimination is also reasonable or (b) that, in a case where actuarial or statistical data cannot reasonably be obtained (except in relation to offers of credit), the discrimination is reasonable having regard to any other relevant factors.

The common factor emerging from these examples is that age can be taken into account for the purposes of insurance only if it is *supported by accurate data and statistical evidence that age is relevant to the assessment of risk*. A similar model is already used in sex discrimination legislation in Northern Ireland. Under section 46(3) of the Sex Discrimination (Northern Ireland) Order 1976<sup>74</sup>, distinctions can

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<sup>72</sup> Age Concern, '*Discrimination – Does it Matter? European Commission consultation on equality and discrimination, A response from Age Concern England*' (2007) at p. 15.

<sup>73</sup> [1992] 2 S.C.R. 321.

<sup>74</sup> As amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008, Schedule 2, para 13.

be made between men and women in relation to insurance premiums or benefits, provided:

1. the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data, and
2. the data is compiled, published and regularly updated in accordance with guidance issued by HM Treasury.<sup>75</sup>

We recommend that this model be used when drafting a specific exception to allow age to be considered as a factor in insurance in Northern Ireland. It would guarantee that age can be taken into account as an actuarial factor in insurance only when this is based on published statistical evidence that age is relevant to the assessment of risk. We note that this recommendation goes further than the provisions of the imminent EU Directive on Goods and Services, which contains no requirement to publish the actuarial and statistical data being relied upon to justify the use of age as a factor in risk assessment. In line with the views of non-government organisations, we feel that this is ‘not sufficiently stringent’.<sup>76</sup>

We wish to stress that this exception should apply only in the context of annuities, pensions and insurance policies related to the assessment of risk. The providers of other financial services such as loans and credit facilities should not be permitted to base decisions solely on a person’s age, or by reference to statistical data concerning general risk groups. All decisions should instead be based on the general underwriting practice taken for all individuals, that is, on factual evidence relating to the repayment capacity and the financial management of individual applicants, regardless of age. Australia’s law appears to allow age discrimination within the credit industry, while Ireland’s does not. We prefer the Irish approach.

We should also stress that a distinction can be made between age differentiation in insurance and in the context of health and social care which justifies the different approaches recommended for the respective exceptions. We have recommended that health and social care services must be provided on the basis of clinical evidence regarding a person’s health *needs* regardless of age. Thus, health

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<sup>75</sup> See HM Treasury, ‘*Guidance on the publication of data associated with the use of gender in the assessment of insurance risks*’ (London: 2008), [http://www.hm-treasury.gov.uk/d/consult\\_insurance070308.pdf](http://www.hm-treasury.gov.uk/d/consult_insurance070308.pdf)

<sup>76</sup> AGE – European Older People’s Platform, AGE response to draft directive on non-discrimination, p. 4. <http://www.age-platform.org/EN/spip.php?article650>

professionals would not be permitted to base decisions on general statistical evidence about a person based on their age, as this imbues the decision-making with assumptions about the ability of an ‘average’ older person to benefit from the intervention or treatment in question. An individualised assessment is required to determine the clinical needs of each patient, regardless of age. However, the provision of insurance raises a different set of questions. In this context, unlike health and social care, it is economically impractical to conduct individualised assessments of risk as this would result in a disproportionate increase in the cost of insurance for all customers. Thus, we accept that decision-making in insurance, by definition, is based on evidence concerning general risk groups. We feel that our recommendation which requires such evidence to be based on objectively verifiable actuarial and statistical data, which is publicly available, ensures transparency in decision-making and helps to rid the process of ageist assumptions. It would mean that an insurance company could not refuse to insure someone based on their age alone, but would have to provide the necessary evidence regarding the level of risk posed by a person within that age group.

To illustrate the effectiveness of such a law, it is worth mentioning a case from the Republic of Ireland where an age-based decision by an insurance company was successfully challenged. In *Ross v Royal and Sun Alliance Insurance Company* (2003), the Equality Tribunal found age-based discrimination when an insurance company refused to provide a quotation for car insurance to the complainant (who was 77) based on a general policy that it did not accept new customers over the age of 70. The Equality Officer held that the insurance company had not provided the required statistical evidence to justify its policy and the complainant was awarded 2,000 euro.

Some might still want to argue that the law should absolutely prohibit the use of age as a proxy for risk in insurance. However, evidence shows that attempts to do this have been unsuccessful. For example, the Ontario Human Rights Commission tried to find alternative ways of measuring risk for the purposes of car insurance as opposed to looking at the customer’s age or gender.<sup>77</sup> It concluded that attempts to look for alternative ‘risk classification variables’ in the insurance industry have largely failed. While other factors such as one’s driving experience or annual driving distance have been suggested as substitutes for age, it was observed that actuarial data have not shown annual driving distance to be an accurate indicator of

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<sup>77</sup> Ontario Human Rights Commission, *Human Rights Issues in Insurance*, Consultation Report (2001).

risk<sup>78</sup>. Thus the Commission concluded that a move away from using age in car insurance, such as in the Canadian province of British Columbia, may result in ‘significant rate dislocation (higher costs not proportionate with risk for certain groups)’.<sup>79</sup> As such, we feel that our recommendation, which is based on the common practice in other countries, strikes a satisfactory compromise where age-based decisions in insurance must be transparent and based on accurate statistical and published data.

More indirect discriminatory practices in insurance (such as exclusive online rates and deals) would be tackled by our recommendation to plug the secondary gap in Northern Ireland’s law – whereby the legal duty to have due regard to the need to promote equality of opportunity between people of different ages is currently imposed only on public authorities and not on private bodies.<sup>80</sup> As outlined in Chapter 1, we have recommended that a legal duty be imposed on large private bodies to promote equality of opportunity between persons of different ages. Thus, private employers and suppliers of goods, facilities and services would be required take steps to avoid discriminatory actions by putting in place policies and practices that reduce the likelihood of such actions occurring in the first place.

### **Positive exceptions**

As previously indicated, the purpose of age discrimination legislation is to remove unjustified age discrimination. However, there are occasions when a person’s age is used legitimately by service providers to benefit both older and younger people. Typical examples of this include free bus passes for the over 65s, free eye tests for older people and concessionary entrance rates for certain age groups. It is not our intention to remove these practices which are designed to benefit both older and younger persons. As such the legislation must strike a balance between removing unjustified age discrimination whilst permitting the preferential treatment of older and younger people when appropriate.

It will be recalled that given the endemic nature of *negative* age discrimination, we recommend that this type of discriminatory treatment should not be subject to a general justification defence but should be lawful only if it falls within one of the specific exceptions listed in the legislation. However, we recommend that a more general approach be taken to justify instances of differential treatment which are

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<sup>78</sup> *Ibid.*, p 15.

<sup>79</sup> *Ibid.*, p 18.

<sup>80</sup> See page 9.

designed to *benefit* people of a certain age. Indeed, all of the laws from other countries which were studied for this report contained provisions which authorised the adoption of measures designed to benefit older people although they did so in different ways.

In the Republic of Ireland, for example, age-based distinctions can be made in relation to goods or services which are provided mainly to promote the interests of persons of a certain age, or if the provision is designed to meet the special needs of a certain age group (such as ‘meals on wheels’ for older people). Further, preferential treatment can be conferred on certain age groups if this is *bona fide* intended to promote equality of opportunity for persons who are disadvantaged, or to cater for their special needs. The scope of this provision is unclear, as much depends on the determination of what is *bona fide* in this context. A similar wide threshold to determine the legality of preferential treatment of certain age groups can be found in Australia.

In Canada, both federal and provincial laws usually contain two approaches to justify positive measures to benefit certain age groups. The first is a general rule which simply allows preferential treatment to be given on the grounds of age. For example, under federal law, such preferential treatment can be given when it is prescribed by the Canadian Human Rights Commission to be ‘reasonable’. In Ontario, provincial law allows the preferential treatment of people over the age of 65, seemingly without further qualification. The accompanying Guide to the legislation cites common examples of such preferential treatment as including special seniors’ discounts, reduced senior rates for public transit and ‘golden age’ passes. Second, the law makes provision for special programmes to be designed by service providers to end the long-standing disadvantages of those who experience discrimination on grounds such as age. For example, in Ontario, special programmes can confer preferential treatment on older persons provided they either relieve hardship or economic disadvantage, assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity, or contribute to the elimination of discrimination. Provincial Human Rights Commissions/Tribunals have the power to approve such programmes.

In our view, the law should continue to allow the preferential treatment of certain people based on their age. However, we feel that this needs to be based on a sound rationale, beyond simply saying that such actions are permissible if they are *bona fide* or reasonable. Examples of such treatment include concessionary entrance fees and free public transport for older (and younger) people. These practices are quite often justified on economic grounds, given that there is a greater likelihood of

older people not being as financially well off as younger people. We are aware that this involves making certain assumptions about the financial situation of older people even though in this report we have sought to rid decision-making of stereotypical age-based assumptions. We wish to remain true to this principle but we also do not wish to remove without good reason any benefits or preferential treatment which older (or younger) people currently enjoy. Thus we wish to articulate a clear rationale, based on our stated policy goals (page 22), for allowing service providers to continue to benefit older people. In doing so we recognise that there are other reasons, beyond assumed financial need, for conferring preferential treatment on older persons. Older people have a unique set of genuine age-related needs which positive measures can meet. For example, within our stated objectives (page 22), we sought to promote the social inclusion of older people and encourage active ageing. Preferential treatment such as concessionary fees/rates can be justified on the basis of meeting these important objectives.

Thus, while we are not recommending specific instances where preferential treatment is allowed, we argue that, to be lawful, preferential treatment based on a person's age must fall within one of the following categories:

1. where the treatment is designed to rectify historical disadvantage;
2. where the treatment is designed to promote social inclusion or reduce social isolation;
3. where the treatment is designed to promote the special interests of persons of a certain age, provided the different treatment is reasonable to promote those special interests;
4. where the treatment is designed to meet the special needs of persons of a certain age, provided the different treatment can reasonably be seen as suitable only to that group's needs;
5. where the treatment is based on publicly available, objective and statistical evidence concerning social and economic factors.

These objectives would justify a range of practices designed to benefit older people. For example, free bus passes for the over 65s or free TV licences for the over 75s would be allowed as these practices are not only designed to rectify historical disadvantage but also to promote the social inclusion of older people and encourage their participation in society. Free access to facilities, such as leisure

centres, at particular times (as currently provided by the Belfast City Council<sup>81</sup>) would be allowed as this would not only promote the social inclusion of certain age groups, but could be justified by objective and statistical evidence concerning social and economic factors. These factors could pertain to the older person (to the extent that statistical evidence shows older people to be less well off than younger people) but could also relate to the commercial interests of the service provider. In other words, the service provider may want to develop initiatives to ensure that the facility (ie. the leisure centre) is being used by a range of people at different times and thus, for economic reasons, may offer concessionary rates to certain age groups.

That people of certain age groups could be treated differently to meet their specific needs and/or promote their special interests would allow, for example, ‘meals on wheels’ services to be restricted to older persons, since younger persons can reasonably be expected to have other ways of getting meals. Further, this would allow preventative health care services to be offered to certain age groups provided that this was reasonably necessary to meet the needs of those within that specific group (such as routine flu jabs for the over 65s or vaccinations for children).

Thus, as in other countries, a range of practices designed to benefit older (and younger people) would still be permissible provided that the treatment falls within one of the specified objectives outlined on page 49. We do not feel that this is an onerous burden to impose on service providers. They will not be *required* to make such positive exceptions to the law on age discrimination but will not be acting unlawfully if they choose to do so. We feel that this approach helps to ensure that a balance is struck between the desire to rid decision-making of negative stereotypical ageist assumptions, while at the same time ensuring that the specific needs of certain age groups continue to be met by the provision of preferential treatment where appropriate.

It has been argued that there may be occasions when it is justifiable for a commercial organisation to favour older or younger people where ‘the intrinsic aim of the business is to provide a professional service focused on the needs of specific age groups (for example, specific travel packages for senior citizens)’.<sup>82</sup> We disagree with this. We do not feel that it is justifiable, within the principles of our recommendations, to allow service providers to operate upper and lower age limits

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<sup>81</sup> <http://www.belfastcity.gov.uk/boost/over60s.asp>

<sup>82</sup> AGE – European Older People’s Platform, AGE response to draft directive on non-discrimination, p. 5. <http://www.age-platform.org/EN/spip.php?article650>

for the provision of commercial services such as 18-30 holiday packages, or insurance for the over 55s. To be justified, such practices would have to meet the specific interests and/or needs of the particular age groups concerned, but we do not in fact believe that the specific interests and/or needs of particular age groups genuinely require age restrictions to be placed on the availability of commercial services. Thus, while businesses could still pursue the *targeted marketing* of particular age groups for particular services, they would not be permitted to impose age restrictions on the actual availability of those commercial services.

## **Remedies**

A victim of age discrimination must have access to the same legal remedies as one who has been discriminated on other grounds in accessing goods, facilities or services in Northern Ireland. That is, they must have access to a county court, access to legal advice and (if financially eligible) legal aid, and a right to compensation.

Under existing discrimination law on the provision of goods, facilities and services, claims of unlawful discrimination must be made within six months of the act complained of, although this can be extended by two or three months if an application for assistance is made to the Equality Commission for Northern Ireland. Once the claimant has established a case of discrimination, the burden of proof is on the service provider to prove that there has been no breach of the prohibition of discrimination. Where the court finds in favour of the person making the complaint, it may award any of the following remedies:

- an order declaring the rights of the parties;
- an injunction or order; and
- damages, including compensation for injury to feelings.

We recommend that these existing remedial procedures should be extended to victims of age discrimination under our proposed new law. An effective enforcement mechanism is essential in order to deter age discrimination taking place in the future and to vindicate the rights of individuals who have been disadvantaged by such discriminatory practices.

## **Other necessary measures**

As previously highlighted, one of the main problems in tackling age discrimination is that, wrongly in our view, it does not ‘invoke the same sense of moral outrage’

as other forms of discrimination.<sup>83</sup> Thus, while legislation to outlaw age discrimination in the provision of goods, services and facilities is essential to plug the primary gap in legal protection where the law currently outlaws age discrimination in the employment context but not in other social areas, we recognise that such legislation will not, by itself, end all instances of age discrimination. This model of legal protection seeks to outlaw discrimination by allowing individuals to go to a tribunal or court to seek a remedy. Its effectiveness depends upon individual complaints being made and, by definition, only resolves individual disputes. While such legal protection is essential, it will not, by itself, achieve far-reaching cultural change. Evidence from other countries indicates that the majority of legal complaints regarding age discrimination relate to the employment context and that it is not uncommon for instances of age discrimination in the provision of goods, facilities and services to remain unreported. Thus, having well-drafted anti-discrimination provisions on the statute books is only the first step in tackling age discrimination. In conjunction with this, other measures (both legislative and non-legislative) are necessary to tackle this social problem.

### ***Promoting equality of opportunity***

It will be recalled that we identified a secondary gap which exists in the law of Northern Ireland, whereby the legal duty to have due regard to the need to promote equality of opportunity between people of different ages is currently imposed only on public authorities and not on private bodies.<sup>84</sup> This legal duty requires public employers and suppliers of goods, facilities and services to take steps to avoid discriminatory actions by putting in place policies and practices that reduce the likelihood of such actions occurring in the first place. The aim is to prevent age discrimination before it happens. We feel that a variant of this positive duty to promote equality of opportunity should be extended to certain private bodies.

Section 75 of the Northern Ireland Act 1998 imposes a duty on all public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity between people of different ages. It is already quite difficult for the Equality Commission for Northern Ireland to police the implementation of this

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<sup>83</sup> Opening remarks of G.A. Brown, “The Older Worker in Today’s Economy and Community”, Report of Proceedings of First Seminar on Age Discrimination and the Age Discrimination Act of Ontario (Toronto: 4 June 1970) [unpublished], cited in *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, Ontario Human Rights Commission, 2000 at p. 5.

<sup>84</sup> See page 9.

duty, because of the number of authorities involved, so to some people it is unthinkable that such a duty should be imposed on every private body as well. However, if the policing system for the section 75 duty were to be significantly altered (so that, for example, it no longer required the approval of ‘equality schemes’ but was triggered instead by complaints being lodged with the Equality Commission for Northern Ireland), there would be less objection to subjecting private bodies to the same exacting standards on the promotion of equality of opportunity as public authorities are subjected to.

In one particular area – the procurement of goods and services from private businesses by public authorities – there is a trend towards insisting that only private businesses which are complying with good practice in relation to equality of opportunity should be eligible to supply the goods and services required. In 2008 the Equality Commission for Northern Ireland and the Central Procurement Directorate of the Northern Ireland Executive’s Department of Finance and Personnel issued a report on *Equality of Opportunity and Sustainable Development in Public Sector Procurement*.<sup>85</sup> This is a guide to how policy makers and procurement professionals can work together with suppliers to promote equality of opportunity (and sustainable development) in the delivery of public services in Northern Ireland, from the initial development of a policy or strategy right the way through to the delivery of a project or programme. The guide contains diagrams illustrating examples of good practice and positive outcomes in procurement exercises. These bring the guidance to life, demonstrating what can be achieved through application of equality principles.

While this guide is authoritative, there is at the moment no legal obligation to follow it. We are of the view that the law should be changed so as to require companies with more than 10 employees to abide by the guide. There is a precedent for imposing additional obligations on employers of this size: the ‘fair employment’ legislation in Northern Ireland<sup>86</sup> already requires all employers with a workforce of more than 10 employees to register with the Equality Commission. Failure to register is a criminal offence, carrying a fine of up to £2,000. All registered employers are in turn required to monitor the composition of their workforce by religion. The 1998 Order does not actually impose a specific duty on any employer to ensure equality of opportunity or fair participation in the workforce, but it does give the Equality Commission powers to require action

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<sup>85</sup> Available on the Equality Commission’s website.

<sup>86</sup> The Fair Employment (NI) Act 1989 and the Fair Employment and Treatment (NI) Order 1998.

where an employer is failing to ensure either. The Commission can, for example, issue a notice declaring an employer to be ‘unqualified’ (if the employer has been successfully prosecuted for not registering with the Commission or for failing to supply a monitoring return), and this means that that employer is then disqualified from entering into contracts with any public authority. Since around 40% of private companies in Northern Ireland currently receive some sort of public funding through purchase of their services by public authorities, this ‘stick’ can be an effective way of ensuring that private companies adhere fully to codes of practice and guides on equality.

The purpose of the ‘fair employment’ legislation in this specific area is obviously to help ensure that employers of more than 10 people do not discriminate on religious grounds when recruiting employees, but we think that a similar incentive system should be designed to help ensure that private suppliers of goods, facilities and services do not discriminate on age grounds when they are offering their ‘products’ to public authorities. We would not be averse to this preventive mechanism being applied in relation to other grounds of discrimination too, but that is an issue beyond the scope of this study and we do not think reform of the law on age discrimination needs to await more general reform of the law on discrimination. We do not advocate a registration system in this context, but we do think that private companies which employ more than 10 people, when offering their ‘products’ to public authorities, should be legally obliged to demonstrate that they have had due regard to the need to promote equality of opportunity on age grounds not just in their employment practices but also when developing and marketing their goods, facilities and services. If they cannot do so to the satisfaction of the Equality Commission for Northern Ireland, the public authority should be entitled to treat the company as ineligible to win the contract in question. In this way companies will, over time, be incentivized to give full recognition to the importance of age equality.

In terms of remedies for any breach of this legal duty, we do not recommend that compensation be payable to individuals. Rather, we feel that this legal duty on private bodies employing more than 10 people should be enforced through complaints to the Equality Commission for Northern Ireland who should be given the power to order the business in question to implement the necessary policies and practices to ensure compliance with the legislative requirements to promote equality of opportunity.

### *Non-legislative measures*

A range of non-legislative measures are also required to raise awareness of how the law protects older people from discrimination. Both older persons and service providers must be educated that age discrimination in the provision of goods, facilities and services is unlawful. We feel that government, non-governmental and community organisations working towards equality should take measures to raise public awareness of ageism and age discrimination. For example, in 2002, the Ontario Human Rights Commission embarked on a public awareness campaign in partnership with CARP (Canada's Association for the Fifty-Plus) to combat ageism and empower victims of age discrimination to 'recognize what it is and how to respond'.<sup>87</sup> The campaign featured posters of older persons with stickers on their foreheads stating a "Best Before" age with a tag line, "*Nobody has a shelf life. Stop age discrimination now. It's illegal, and it's just plain wrong*". The Commission concluded that this campaign successfully raised awareness about ageism and the use of traditional ageist assumptions, thus contributing to the important social goal of ending the discrimination that denies older people equal opportunity.<sup>88</sup> We feel that public awareness campaigns should be implemented in Northern Ireland to create a climate of cultural change where differential treatment based on age is taken just as seriously as other forms of discrimination. Thus, in conjunction with reforming legislation, education programmes must be developed to inform both older persons and service providers that the denial or restriction of goods, facilities or services based on age is unlawful and that there is direct access to legal mechanisms to challenge such discriminatory treatment.

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<sup>87</sup> Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perceptions and Getting Results. Case Study of the Ontario Human Rights Commission* (Prepared for the International Symposium on Age Discrimination, 2005), at p 11.

<sup>88</sup> *Ibid.*, at p 15.

## **Chapter 3**

### **Summary of Recommendations**

**We believe that the law on age discrimination in Northern Ireland should meet the following goals:**

- to promote the dignity and worth of individuals;
- to promote the social inclusion of older people;
- to encourage active ageing and the economic and social independence of older people;
- to rid the providers of goods, services and facilities of stereotypical assumptions about a person based on his or her age;
- to outlaw unjustified age discrimination when accessing goods, services and facilities;
- to ensure that any exceptions to this general rule are clearly defined and not susceptible to abuse;
- to ensure that the permitted exceptions pursue a legitimate aim (defined in the legislation as opposed to judges on a case-by-case basis) and that the reasons for the age distinctions in question are both transparent and objectively justified by real evidence concerning the relevance of a person's age;
- to maintain as lawful the preferential treatment which both younger and older people receive in certain areas (such as concessionary entrance rates and free bus passes).

**To meet these objectives, we have made the following recommendations:**

1. We recommend that the law of Northern Ireland be amended to outlaw discrimination on age grounds when people are accessing goods, facilities or services. This will plug the primary gap in legal protection where the law

currently outlaws age discrimination in the employment context but not in other social areas.

2. We recommend that *negative* exceptions permitting service providers to discriminate *against* older people should be very specifically set out in the reforming legislation. There should be no general defence available to a claim of age discrimination based around the concept of ‘reasonableness’ as this would give service providers too much scope to defend unfair and ageist practices.
3. In the field of health and social care, the legislation must provide for a very narrowly drawn exception to cover the circumstances when factors relating to a patient’s age can be taken into account when accessing their clinical needs. We recommend a provision which specifies that a person of a certain age can be treated differently solely on the basis of evidence and professional knowledge about their *health needs* and their *clinical ability to benefit* from the goods or services in question.
4. In the field of insurance, we recommend that age can be taken into account as an actuarial factor *only* when this is based on objectively verifiable and published statistical evidence that age is relevant to the assessment of risk.
5. We recommend that in relation to *positive* exceptions, service providers should be permitted to discriminate *in favour* of older people where this is designed to meet one of the following requirements:
  - to rectify historical disadvantage;
  - to promote social inclusion or reduce social isolation;
  - to promote the special interests of persons of a certain age, provided the different treatment is reasonable to promote those special interests;
  - to meet the special needs of persons of a certain age provided the different treatment can reasonably be seen as suitable only to that group’s needs;
  - where the treatment is based on publicly available, objective and statistical evidence concerning social and economic factors.

6. We recommend that a victim of age discrimination should have access to the same legal remedies as one who has been discriminated against on other grounds in accessing goods, facilities or services in Northern Ireland. That is, they must have access to a county court, access to legal advice and (if financially eligible) legal aid, and a right to compensation.
7. To plug the secondary gap which exists in the law of Northern Ireland, whereby the legal duty to have due regard to the need to promote equality of opportunity between people of different ages is currently imposed *only* on public authorities, we recommend that private bodies which employ more than 10 people should be under a similar legal duty. We recommend that this should be enforced through complaints to the Equality Commission for Northern Ireland, which should be given the power to order the business in question to implement the necessary policies and practices to ensure compliance with the legal duty to promote equality of opportunity.
8. In conjunction with reforming legislation, we recommend that government, non-governmental and community organisations working towards equality take measures to raise public awareness of ageism and age discrimination, and to inform both older persons and service providers that the denial or restriction of goods, facilities or services based on age is unlawful.

## Appendix 1 – The Law in the Republic of Ireland

Age discrimination in relation to access to goods, facilities and services has been outlawed in the Republic of Ireland since the Equal Status Act 2000 came into force in October 2000. That Act has been supplemented by provisions in the Equality Act 2004. Together these laws are referred to as the Equal Status Acts 2000-2004.

### *Different types of discrimination*

In general, the Acts protect people against various manifestations of age discrimination (as well as other forms of discrimination) when they are seeking access to goods, facilities or services, namely:

- *Direct discrimination*: e.g. where a leisure centre says that an aerobics class is not available to anyone over 50.<sup>89</sup>
- *Indirect discrimination*: e.g. where a leisure centre says that no-one can advertise their exercise classes at the centre unless they have had ten years' experience of running such classes.<sup>90</sup>
- *Discrimination by association*: e.g. where someone who is accompanying a person who is over 50 is also denied access to the aerobics class mentioned above under 'direct discrimination'.<sup>91</sup>
- *Discrimination by imputation*: e.g. where a leisure centre bars someone from taking an aerobics class that is restricted to persons under 50 because it thinks that that person is over 50 when in fact he or she is not.<sup>92</sup>
- *Harassment*: e.g. where a leisure centre repeatedly discourages an elderly person from attending an aerobics class even though there is no ban on his or her attending the class.<sup>93</sup>
- *Victimisation*: e.g. where a leisure centre refuses to allow a person to become a member because in the past that person has made a complaint about the centre's ageist policies.<sup>94</sup>

### *The scope of the protection*

There are, however, three important limits to the scope of the protection provided by these Acts in the field of age discrimination:

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<sup>89</sup> Equal Status Act 2000, s 3(1)(a).

<sup>90</sup> Equal Status Act 2000, s 3 (1)(c).

<sup>91</sup> Equal Status Act 2000, s 3(1)(b)(i).

<sup>92</sup> Equal Status Act 2000, s 3 (1)(a).

<sup>93</sup> Equal Status Act 2000, s 11(5).

<sup>94</sup> Equal Status Act 2000, s 3(2)(j).

- They do not protect people who are under 18 years of age.<sup>95</sup> The only exception to this is that 17-year-olds who are licensed to drive vehicles have a right not to be discriminated against by insurance companies when they are seeking insurance cover for their driving.
- They do not protect people who are seeking to use services which are provided as functions of the State.<sup>96</sup> So the State's immigration authorities, prison services, criminal justice agencies and tax offices are free to discriminate on the ground of age.
- They do not protect people when there is statutory authorisation for the alleged discrimination, whether that authorisation was enacted before or after the Equal Status Acts came into force.<sup>97</sup>

### *Exceptions to the ban on age discrimination*

In addition to these three significant limits to the scope of the Acts' protection, the Acts create some specific exceptions to the general rule against age discrimination. The reason behind these exceptions is usually fairly obvious and understandable, although people might reasonably disagree as to exactly how far they should extend in practice. The most important exceptions are these:

1. People can be treated differently depending on their age for insurance purposes – provided the differences are reasonably based on actuarial or statistical data or other relevant underwriting or commercial factors.<sup>98</sup> In Ireland, as in most countries in the world, young drivers tend to have a worse accident record than older drivers, so insurance companies are allowed to reflect this in the premiums they charge to young drivers. In relation to health insurance, the Health Insurance (Amendment) Act 2001 has stipulate that insurance may not be refused to applicants who are over 65 (except in prescribed circumstances).
2. People can be treated differently depending on their age in relation to sporting facilities, but only if the different treatment is reasonably necessary.<sup>99</sup> For example, a leisure centre may offer high-intensity fitness training classes and restrict admission to persons below a certain age.
3. People can be treated differently depending on their age in relation to goods or services that are provided mainly to promote the special interests of persons of a certain age, again provided the different treatment is reasonably necessary to promote those special interests.<sup>100</sup> This could mean, for example, that ballroom dancing sessions might be made

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<sup>95</sup> Equal Status Act 2000, s 3(3).

<sup>96</sup> This is not made explicit in the Act itself but is the result of judicial interpretations of the Act. For an explanation of how the law in the UK has managed to steer away from this position, see Karon Monaghan, *Equality Law* (Oxford: Oxford University Press; 2007) 505-508.

<sup>97</sup> Equal Status Act 2000, s 14(a).

<sup>98</sup> Equal Status Act 2000, s 5(2)(d).

<sup>99</sup> Equal Status Act 2000, s 5(2)(f).

<sup>100</sup> Equal Status Act 2000, s 5(2)(h).

available only to people above a certain age limit because that age group has a special interest in such activity.

4. People can be treated differently depending on their age in relation to a dramatic performance or entertainment, but again only if the differences are reasonably required and are for reasons of authenticity, aesthetics, tradition, or custom.<sup>101</sup> The director of a production of *Romeo and Juliet*, for example, may legally restrict auditions for the role of *Juliet* to women below a certain age.
5. An age requirement can be applied when a person wants to adopt a child or be a foster parent to a child – provided this is reasonable having regard to the needs of the child.<sup>102</sup> This exception is primarily intended to prevent a rather elderly person becoming the adoptive or foster parent of a young child, but it is not an absolute prohibition against such adopting or fostering.
6. People can be treated differently depending on their age in relation to goods or services that are provided for people of a certain age who have special needs, again only if such provision can reasonably be seen as suitable only to that group's needs.<sup>103</sup> Local council 'meals on wheels' services, for example, could be restricted to older persons, since younger persons can reasonably be expected to have other ways of getting meals.
7. In relation to the provision of accommodation, it is still lawful to reserve premises for persons of a certain age if those premises are reserved for religious purposes or are a refuge, a nursing home, a retirement home, a home for persons with a disability, or a hostel for homeless persons.<sup>104</sup> Housing authorities, moreover, can provide different treatment depending on a person's age. Such an authority could, for example, give priority to older persons when allocating ground floor flats. Also, a person can discriminate if providing accommodation in his or her own home, or where the provision of accommodation affects the private or family life of any other person residing in the house.<sup>105</sup>
8. In relation to the provision of education, third level or adult education institutions can provide different treatment in the allocation of places to mature students.<sup>106</sup> They might, for example, want to judge the suitability of such students for their course of studies in a different way from that used when they judge the suitability of applicants who have just left school.
9. Private clubs can discriminate on age grounds if their principal purpose is to cater for the needs of persons of a particular age, or if they confine benefits or privileges to persons of a particular age category and it is not practicable for persons outside this category to

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<sup>101</sup> Equal Status Act 2000, s 5(2)(i).

<sup>102</sup> Equal Status Act 2000, s 5(2)(j).

<sup>103</sup> Equal Status Act 2000, s 5(2)(l).

<sup>104</sup> Equal Status Act 2000, s 6(5).

<sup>105</sup> Equal Status Act 2000, s 6(2)(d), as amended by Equality Act 2004, s 49(b).

<sup>106</sup> Equal Status Act 2000, s 7(3)(e).

enjoy the benefits or privileges at the same time as those within the category.<sup>107</sup> A social club, for example, can restrict membership to older persons if its principal is to provide such persons with greater access to leisure pursuits.

10. Providers of goods and services are permitted to impose reasonable preferential charges in respect of anything offered to persons in a specific age group.<sup>108</sup> A cinema, for example, can offer tickets to older persons at a concessionary price because, on average, the disposable income of such persons is likely to be less than that of other customers.
11. A person of a certain age can be treated differently solely on the basis of a clinical judgment in connection with a diagnosis of illness or with his or her medical treatment.<sup>109</sup> A relatively young person may, for example, be deemed to be better able to withstand certain forms of aggressive therapy more easily than an older person.

As an example of where there is room for argument over the exact extent of one of the exceptions listed above, we can consider the second exception. Would it be 'reasonably necessary' to limit admission to high-intensity fitness classes to persons aged below 40? The provider of the class will no doubt want to be able to ensure that everyone taking part can work at a similar pace, especially if the participants are to exercise together in teams. The question he or she would need to consider is, at what age, in general, can it be assumed that a participant in the class would be unlikely to be able to keep pace with the others, thereby impeding the efficacy of the class for those others? Would it be more sensible to do a preliminary fitness on applicants rather than to impose what might be a fairly arbitrary age restriction?

#### *Taking positive steps to promote age equality*

The Equal Status Act 2000 also allows preferential treatment or the taking of positive measures which are *bona fide* intended to (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or (ii) cater for the special needs of persons who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.<sup>110</sup> As in Australia, the test for the legality of such positive measures is whether they are *bona fide*, but no further test is supplied as what that actually means. It literally suggests a 'good faith', or 'good intention', requirement, but in truth it does not provide a properly objective criterion against which to assess measures ought to be permissible and which ought not.

In the Republic of Ireland there is no legal requirement, even on public authorities, to promote equality of opportunity, though the Equality Authority called for a new public authority duty to be imposed in its 2002 report *Equality for Older People in Ireland*. But unofficial initiatives have since been taken in this regard. In 2005 the Equality Authority and the National Council on Ageing and Older People teamed up to produce a booklet called *Towards Age Friendly Provision*

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<sup>107</sup> Equal Status Act 2000, s 9(1).

<sup>108</sup> Equal Status Act 2000, s 16(1).

<sup>109</sup> Equal Status Act 2000, s 16(2)(a).

<sup>110</sup> Equal Status Act 2000, s 14(b).

of *Goods and Services* and in 2007 the Equality Authority produced reports on how five organisations in the transport sector had worked to enhance the age friendly character of services they provided to older people and how 15 different organisations had done the same in the health sector. These documents provide some practical guidance on the steps organisations can take to ensure that they supply goods and services in a way that is fully accessible to older people.

### *Enforcement of the law*

In the Republic of Ireland the law on age discrimination in access to goods, facilities and services is enforced in the first instance by the Equality Tribunal, also known as the Office of the Director of Equality Investigations.<sup>111</sup> This is a wholly separate body from the Equality Authority, although the latter can advise and support a claimant in bringing a claim to the Tribunal. The Tribunal hears or mediates claims of unlawful discrimination on a wide number of grounds, including age. A Tribunal mediator will first of all try to enable parties to reach a mediated agreement which is legally binding, but where parties object to mediation the complaint will be heard by a Tribunal Equality Officer, who will take evidence from both parties before issuing a legally binding decision. If the Tribunal upholds a claim of discrimination in its decision, it will award redress and can direct a person to take specific action. It is a criminal offence to obstruct or impede the Director or a Tribunal Equality Officer in the course of an investigation or to fail to comply with a requirement of the Director or a Tribunal Equality Officer.<sup>112</sup> The Director of the Equality Tribunal and the Tribunal Equality Officers are all independent in their functions, but the Director reports annually to the Minister for Justice, Equality and Law Reform.

Every year the Equality Tribunal publishes an overview of the legal issues arising in the decisions it has issued, although the last such ‘Legal Review’ currently available relates to 2006.<sup>113</sup> The Tribunal also makes the full text of its decisions available on its website.<sup>114</sup> So far there have been relatively few decisions on age discrimination in the non-employment sphere (2 in 2001; 1 in 2002; 5 in 2003; 7 in 2004; 5 in 2005; 2 in 2006). A few examples of the decisions are given here in order to provide a flavour of the kinds of issues that have arisen.

In *O’Reilly v Q Bar* (2002) the Equality Officer found discrimination based on age when a 72-year old man celebrating his wedding anniversary with a small family party was refused admission to a pub. While the Officer recognized the wide difference between the complainant’s age and that of the pub’s preferred target clientele (25 to 35), the omissions in the respondent’s evidence led the Officer to draw an inference of discrimination under the Equal Status Act. The respondent had not provided any convincing alternative explanation for the refusal to allow admission. By the same token, in *Scanlon and Ryan v Russell Court Hotel* (2001) the Equality Officer upheld the complaints from two people who were refused entry to a night club (for a function for which they had bought tickets well in advance) on the ground that there were ‘already too many young people on the premises’.

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<sup>111</sup> See <http://www.equalitytribunal.ie>.

<sup>112</sup> Equal Status Act 2000, s 37.

<sup>113</sup> See [http://www.equalitytribunal.ie/uploadedfiles/AboutUs/LegalReview\\_10\\_07.pdf](http://www.equalitytribunal.ie/uploadedfiles/AboutUs/LegalReview_10_07.pdf).

<sup>114</sup> See <http://www.equalitytribunal.ie>.

In *Ross v Royal and Sun Alliance Insurance Company* (2003) the Tribunal found age-based discrimination when an insurance company refused to provide a quotation for car insurance to the complainant (who was 77) based on a general policy that it did not accept new customers aged over 70 (customers over that age). The Equality Officer held that the insurance company had not provided the required statistical evidence to justify its policy. Likewise, in *Nicholas Burke v Lynskey Ryan Insurance Limited* (2006), the respondent company had failed to give the complainant a quote for public service vehicle insurance because of his age, saying it was merely acting as an agent in passing on information supplied by the underwriter. But the Equality Officer held that in the respondents were restricting the provision of a service even if they did so as an agent.<sup>115</sup> The complainant was awarded 2,000 euros for the effects of the discrimination and the respondent was ordered to arrange for the comprehensive training of all members of staff on the terms of the Equal Status Acts 2000-2004. However, in *O'Donoghue v Hibernian General Insurance* (2004) the Tribunal upheld the insurance company's practice of charging more for motor insurance issued to 31-year-olds than to 41-year-olds, because it was able to produce statistical evidence showing that the differential was based on the risks incurred.

In *Phyllis Fahey v Ulster Bank* (2008) the complainant, who was aged 70 at the time, had applied for a bank loan to buy a car but was informed by a bank official that it was the bank's policy not to provide loans to persons over the age of 65. The Equality Officer found that this was direct discrimination and awarded the complainant 2,000 euros in compensation for the upset and humiliation experienced.

In *Dalton v Limerick City Council* (2004) the local authority charged householders a set fee for weekly collection of refuse, but a preferential rate was available to persons aged over 65 if they used a smaller bin. The complainant wanted to avail of the preferential rate, but was refused since he was aged under 65. He lost because the Equality Officer was satisfied that the practice fell within one of the exceptions allowed by the legislation ('imposing or maintaining a reasonable preferential fee, charge or rate' on persons in a specific age group).<sup>116</sup>

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<sup>115</sup> This confirms the Tribunal's view in the 2005 decision of *Colm O'Donoghue v An Post t/a One Direct*.

<sup>116</sup> Equal Status Act 2000, s 16(1)(a).

## Appendix 2 – The Law in Canada

Canada is a jurisdiction with a long pedigree in equality and human rights. As a federal jurisdiction there are several layers of legislation which protects against age discrimination. At the federal level, both the Charter of Rights and Freedoms (1982) and the Canadian Human Rights Act 1985 (originally enacted in 1977) contain provisions prohibiting discrimination on the grounds of age. At the provincial level, human rights legislation protects against age discrimination in relation to employment, and in the provision of goods, services and facilities. The notable feature of age discrimination law in Canada is that both federal and provincial legislation provides a general justification test whereby service providers, across a range of non-specified areas, can argue that the age-based differentiation is ‘reasonable and *bona fide*’ in the circumstances. However, the Supreme Court of Canada has provided a stringent test for establishing whether the justification proffered by the service provider meets these requirements. This strict interpretation can be explained by the general approach taken to discrimination law in Canada.

Age discrimination in Canada is firmly rooted in an equality framework which is designed to ‘create a climate of understanding and respect for all persons, without discrimination’<sup>117</sup>. Inherent within this framework is the promotion of each person’s dignity and worth and the prevention of any ‘violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice’.<sup>118</sup> The core of human rights protection is to promote the needs of historically disadvantaged groups (such as older persons) and to challenge the use of stereotypical assumptions which impact upon the dignity and worth of individuals thus affecting their enjoyment of equal rights and opportunities. This approach underpins both federal and provincial age-discrimination legislation.

### Federal law

The Canadian Charter of Rights and Freedoms is part of Canada’s constitution. Its provisions apply to the actions of the Canadian federal government and the governments of the provinces and territories. As such, federal and provincial law which does not comply with the Charter can be challenged. Under section 15(1) of the Charter, every individual has the right to the equal protection of, and equal benefit of the law without discrimination based on numerous grounds, including age. This means that an individual who feels that an existing law does not protect them against age discrimination can challenge the law in question under section 15(1) of the Charter. However, the violation of an individual’s right to equality can be justified under section 1 if the violation is deemed to be reasonable in a free and democratic society. Gunderson points out that this means that ‘social trade-offs are allowed in that discrimination can be allowed if it sufficiently serves other important social objectives’.<sup>119</sup> Age discrimination in employment, in particular, mandatory retirement, has been the main age-related issue to be challenged under the Charter.

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<sup>117</sup> Ontario Human Rights Commission, *Guide to the Human Rights Code* (1999).

<sup>118</sup> Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (2002), para 4.1. See *Law v Canada* [1999] 1 S.C.R. 497.

<sup>119</sup> M. Gunderson, ‘Age Discrimination in Employment in Canada’ (2003) 21(3) *Contemporary Economic Policy* 318-328, 322.

The next layer of protection against discrimination is the Canadian Human Rights Act 1985. The provisions of this federal legislation apply to all federal employers and service providers such as the federal government, Canada Post, chartered banks, interprovincial communications and telephone companies, and national airlines. The Act prohibits any employer or service provider that falls within federal jurisdiction from directly or indirectly discriminating against an individual on the grounds of age in the provision of goods, services or facilities, or accommodation customarily available to the general public.<sup>120</sup> This general prohibition against age discrimination is not absolute, and the federal legislation makes provision for both negative and positive exceptions.

The Canadian Human Rights Act is administered by the Canadian Human Rights Commission which is composed of up to two full-time and up to six part-time commissioners. If an allegation of discrimination is made under the Act, the matter is referred to the Resolution Services Division which was set up in 2007 to encourage early dispute resolution between the parties. If the issue cannot be resolved, a complaint can be filed and the allegation of discrimination is investigated by the Commission. The Commission can dismiss the complaint, appoint a conciliator or refer the matter to the Canadian Human Rights Tribunal. The Tribunal will hear the complaint and make a decision which can be appealed to a Review Tribunal or the Federal Court of Canada. The Commission's Annual Report in 2007 shows that age was cited as a ground of discrimination in 12% of complaints filed in 2007.<sup>121</sup> The figures do not indicate which of these complaints related to the provision of goods, services and facilities. Separate figures show that discrimination in the provision of goods, services and facilities was cited in 10% of complaints filed in 2007 (although, again, the figures do not reveal how many of these, if any, related to age discrimination).

#### *A general justification defence*

Unlike the position in Australia and the Republic of Ireland, the Canadian Human Rights Act does not list specific exceptions to the general rule against age discrimination in the provision of goods, services or facilities. Rather, the legislation provides for a general justification defence where the service provider must show, under section 15(1)(g), that there was a *bona fide* justification for the age-based differentiation. The wording of this defence may appear to be quite loose as much depends on what is deemed to be *bona fide* in this context. However, an amendment made to the Act in 1998 states that to be considered as a *bona fide* justification, service providers must show that they cannot accommodate the affected person within incurring undue hardship.<sup>122</sup> The concept of *accommodation* in this context simply means taking the necessary steps to ensure that the goods, services and facilities in question are equally accessible to all individuals regardless of age. This stringent approach was reinforced by decisions of the Supreme Court of Canada in 1999 which had a major impact on how the general justification

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<sup>120</sup> Canadian Human Rights Act, section 5. Section 6 also makes it a discriminatory practice to differentiate on the basis of age in the provision of commercial premises or residential accommodation.

<sup>121</sup> Canadian Human Rights Commission, *Annual Report 2007*, [http://www.chrc-ccdp.ca/pdf/ar\\_2007\\_ra\\_en.pdf](http://www.chrc-ccdp.ca/pdf/ar_2007_ra_en.pdf)

<sup>122</sup> Section 15(2) states that '... to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.'

defence (which appears in both federal and provincial legislation) applies to allegations of both direct and indirect discrimination.<sup>123</sup>

In the *Grismer* case,<sup>124</sup> the applicant was denied a driving licence because he suffered from a particular medical condition which gave him only limited peripheral vision. Under a policy adopted by the B.C. Superintendent of Motor Vehicles, no one with this condition was permitted to hold a licence. The applicant complained that this amounted to direct discrimination on the basis of disability, contrary to the British Columbia *Human Rights Code*. Once a case of discrimination was made out (which it was), the onus was on the defendant to prove, on the balance of probabilities, that this discriminatory standard had a 'bona fide and reasonable' justification. The Supreme Court of Canada held that the following three-step test must be satisfied in order to prove this. That is, the service provider had to show:

1. that the challenged policy or rule was rationally connected to the provision of the service;
2. that the policy was adopted in honest and good faith belief that it was necessary to the fulfilment of the legitimate service-related purpose;
3. that the policy was reasonably necessary to accomplish the legitimate service-related purpose.

In relation to the latter point, the court held that it must be shown that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.

On the facts of the case, the claimant established that there was discrimination by showing that he was denied a driving licence on the basis of his disability. The burden of proof was then passed to the respondent to defend this practice. The court rejected the respondent's argument that the blanket refusal of licences to persons with the claimant's disability had a *bona fide* and reasonable justification. The goal of the policy was reasonable road safety but, on the evidence, it was not established that persons with this particular disability could not drive to this standard. Thus, the discrimination against the claimant lay, not in the refusal to grant a licence, but in the refusal to give him a chance to prove, through an individual assessment, that he could be licensed without jeopardising the goal of reasonable road safety. Rather than automatically refusing him a licence on the ground of his disability, he should have been offered an assessment to test his ability to drive safely. The court was not convinced that the risk or cost associated with providing such individual assessment would cause undue hardship to the service provider.

While this case concerned discrimination on the basis of disability, the same principles apply to a case concerning direct or indirect discrimination on the grounds of age. The Canadian Human

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<sup>123</sup> See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 S.C.R. 3, (known as the *Meiorin* case) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (1999) 36 C.H.R.R. D/129, (known as the *Grismer* case).

<sup>124</sup> *Ibid.* This case concerned provincial law in British Columbia which prohibits discrimination on various grounds and contains a general justification defence similar to that contained in the federal legislation. As the Supreme Court of Canada gave guidance on the application of such a general defence, this decision had relevance outside of the province of British Columbia.

Rights Commission has made it clear that the approach outlined in this case applies to all complaints of discrimination that fall under federal jurisdiction.<sup>125</sup> As such, this is a very important decision regarding discrimination in the provision of goods, facilities and services across federal (and provincial) law because it means that the differential treatment of older persons is justifiable *only* where the service provider has made every possible effort to accommodate individuals falling within this group to the point of undue hardship.<sup>126</sup> The significance of this approach is that the question of accommodation is incorporated into the *design* of policies and practices adopted by service providers.<sup>127</sup> While there have been few reported cases dealing with discrimination on the grounds of age in the provision of goods, services and facilities, other cases show how the duty to accommodate works in practice. For example, in *Eldridge v British Columbia (Attorney General)*,<sup>128</sup> the Supreme Court of Canada held that service providers must take positive measures to ensure that all persons benefit equally from their services. This meant that a hospital had to provide sign-language interpreters for deaf patients in order for them to benefit equally from the law without discrimination on the basis of their physical disability.

While the federal law does not list the specific instances where age- differentiation is allowed, the interpretation of the general justification defence operates as a tight control on the actions of service providers. Further, Canadian courts have made it clear that service providers cannot rely on the presumed characteristics of an individual or group in an attempt to justify differential treatment. As the Court noted in the *Grismer* case, ‘a standard that excludes members of a particular group on impressionistic assumptions is generally suspect’.<sup>129</sup> Combined with the duty to accommodate, this means that each person is assessed according to his or her own personal abilities rather than presumed group characteristics. As such, a service provider cannot rely upon discriminatory assumptions based on stereotypes to justify age discrimination.

### *Preferential treatment*

The federal legislation also permits preferential treatment to be given on the grounds of age in two sets of circumstances. First, age discrimination is allowed when it takes place ‘in a manner

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<sup>125</sup> Canadian Human Rights Commission, ‘*Bona fide Occupational Requirements and Bona Fide Justifications under the Canadian Human Rights Act*’ (2007) <http://www.chrc-ccdp.ca/pdf/bfore.pdf> .

<sup>126</sup> Undue hardship means that if accommodating a person’s age would pose an undue risk to the health or safety of that person (or others), or if it would impose an undue cost on the service provider, then age-based differentiation may be permitted.

<sup>127</sup> At a conceptual level, this bears some resemblance to the duty on public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity among people of different ages (section 75(1) of the Northern Ireland Act 1998). The duty to accommodate in Canada imposes a *positive* duty on service providers to take steps to ensure that the goods, services or facilities in question are accessible to all individuals regardless of age. The difference is, of course, that public authorities in Northern Ireland are under a duty to produce equality schemes whereas there is no such duty in Canada. Rather, the duty to accommodate, up to the point of undue hardship, is a legal requirement when a service provider (in the public and private sector) is attempting to *defend* a discriminatory standard or policy as having a *bona fide* and reasonable justification.

<sup>128</sup> [1997] 3 S.C.R. 624.

<sup>129</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (1999) 36 C.H.R.R. D/129, [31].

that is prescribed by guidelines issued by the Canadian Human Rights Commission ... to be reasonable',<sup>130</sup>. The Age Guidelines which were issued by the Commission in 1978 exempt –

*a reduction or absence of rates, fares or charges with respect to children, youths or senior citizens' from the prohibition of discrimination with respect to the provision of goods, services, facilities or accommodation customarily made available to be public*<sup>131</sup>.

Under this provision, federally-governed service providers can offer concessionary rates to older (and younger) people but no clear rationale is given for these positive measures. Second, section 16 allows special programmes to be implemented to prevent, eliminate or reduce the disadvantage experienced by certain groups. A service provider, of its own accord, may design a special programme to benefit certain groups (such as older persons). Further, a court or tribunal can order a special programme to be put in place, or it can arise as a condition of settlement of a complaint under the Human Rights Act. The Canadian Human Rights Commission has issued guidelines on the design and implementation of special programmes by federal employers and service providers.<sup>132</sup> The guidelines make it clear that, to be valid, special programmes must address genuine disadvantage and meet the actual needs of a disadvantaged group.

## **Provincial law**

Most provinces and territories in Canada have their own separate human rights legislation which outlaws age discrimination by provincially-governed service providers (this usually covers services in the areas of education and health care). The first comprehensive provincial human rights statute was enacted in Ontario in 1962, although it was not until 1972 that protection against age discrimination was included within this legislation. All other Canadian provinces, with the exception of Alberta and Newfoundland, now provide similar protection from discrimination on the basis of age in relation to goods, services or facilities.

For example, in Ontario, the *Human Rights Code* protects against direct and indirect discrimination on the ground of age in relation to accommodation, housing, goods, services and facilities, employment, contracts and membership of trade and vocational associations.<sup>133</sup> The Code also states that every person has the right to equal treatment in relation to accommodation<sup>134</sup>, housing<sup>135</sup> and membership of trade and vocational associations<sup>136</sup>. Section

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<sup>130</sup> Canadian Human Rights Act, section 15(1)(e).

<sup>131</sup> Age Guidelines, S.I./78-165.

<sup>132</sup> [http://www.chrc-ccdp.ca/legislation\\_policies/special\\_programs-en.asp](http://www.chrc-ccdp.ca/legislation_policies/special_programs-en.asp).

<sup>133</sup> While 'goods' are undefined in the Ontario *Human Rights Code*, the Guide to the *Code* states that 'services' includes stores, restaurants and bars, hospitals and health services, schools, universities and colleges, public places, amenities and utilities such as recreation centres, public washrooms, malls and parks, services and programs provided by municipal and provincial governments including social assistance and benefits, and public transit, services provided by insurance companies, and classified advertisement space in a newspaper. It does not include a levy, fee, tax or periodic payment imposed by law.

<sup>134</sup> Under section 2 of the *Code* an individual has the right not to be discriminated against on the basis of age when buying, selling, renting or being evicted from an apartment, house, condominium or commercial property. It also covers renting or being evicted from a hotel room.

<sup>135</sup> Section 3 of the *Code*. The *Code* covers all types of contracts, including contracts for the purchase of a house, condominium or other type of residential accommodation, and contracts for buying a business, such as office or retail space.

10(1) of the Code defines ‘age’ as eighteen years or older<sup>137</sup>. Most provincial laws which protect against age discrimination only apply to those over the age of 18, although the law in Prince Edward Island applies to persons of all ages.<sup>138</sup>

### *Exceptions under provincial law*

Provincial legislation follows a similar format to the federal legislation, namely, containing a general provision which prohibits age discrimination when accessing goods, facilities or services, and then providing for instances of both negative and positive exceptions.

*General justification defence:* most of the provincial laws contain a general justification defence to permit age discrimination to be regarded as permissible if there is a ‘*bona fide* and reasonable’ justification for it (similar to the general defence in the federal legislation). While the wording used is very broad, the *Grismer* case (page 67) ensures that service providers, when defending discriminatory practices, have to show that they have taken all steps to accommodate the excluded or affected person. For example, a document issued by the Ministry of Attorney General in British Columbia, which provides information on age discrimination under the British Columbia *Human Rights Code*, states that the ‘duty to accommodate means there is a legal duty to adjust a policy, practice or service to meet a person’s special needs because of their age ... [and] unless adjusting to their needs would result in undue hardship, refusing to take reasonable steps to serve the special needs of older persons could be discriminatory’.<sup>139</sup> When deciding whether meeting the needs of older persons would amount to undue hardship, several factors can be considered under provincial law, namely, costs, the size and flexibility of the business, the kind of changes needed, and the impact on the health and safety of everyone involved.<sup>140</sup>

*Insurance:* most of the provincial laws which prohibit age discrimination in the provision of goods, services and facilities provide a specific exception in relation to insurance (although this does not usually extend to other aspects of financial services such as the availability of credit or loans). For example, section 22 of the Ontario *Human Rights Code* provides that automobile, life, accident or sickness or disability insurance, or group insurance, or life annuity policies may make distinctions based on age, provided that these distinctions are made on ‘reasonable and *bona fide*’ grounds. While this wording is broader than that found in similar provisions relating to insurance in Australia and Ireland, the Ontario Human Rights Commission has made it clear that age can only be used as a factor in insurance if this can be shown to be for ‘valid business reasons based on sound and accepted practices, such as actuarial evidence’.<sup>141</sup> In *Bates v Zurich*<sup>142</sup> the Supreme Court of Canada held that discriminatory treatment in insurance is ‘reasonable’ if it is based on a sound and accepted insurance practice, and there is no practical alternative. While the Ontario Human Rights Commission has accepted that the use of age as an

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<sup>136</sup> Section 6 of the Code provides that every has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of age.

<sup>137</sup> Parents or guardians can file a complaint on behalf of children under the age of 18.

<sup>138</sup> Prince Edward Island, *Human Rights Act*.

<sup>139</sup> <http://www.ag.gov.bc.ca/human-rights-protection/pdfs/AgeDiscrimination.pdf>.

<sup>140</sup> *Ibid.* See also Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (2002), para 9.

<sup>141</sup> Ontario Human Rights Commission, *Human Rights Issues in Insurance*, Consultation Report (2001), p 18.

<sup>142</sup> [1992] 2 S.C.R. 321.

actuarial factor in insurance is lawful, it has recommended that the insurance industry strive to move away from using a person's age in risk assessment. However, evidence shows that attempts to do this have been unsuccessful. For example, the Ontario Human Rights Commission tried to find alternative ways of measuring risk for the purposes of car insurance as opposed to looking at the customer's age or gender.<sup>143</sup> But it concluded that attempts to look for alternative 'risk classification variables' in the insurance industry have largely failed. While other factors such as one's driving experience or annual driving distance have been suggested as substitutes for age, it was observed that actuarial data have not shown annual driving distance to be an accurate indicator of risk<sup>144</sup>. Thus the Commission concluded that a move away from using age in car insurance, such as in the Canadian province of British Columbia, may result in 'significant rate dislocation (higher costs not proportionate with risk for certain groups)'.<sup>145</sup>

*Preferential treatment:* all provincial laws allow for the preferential treatment of certain age groups. Some of the legislation contains very wide provisions. For example, in Ontario, section 15 of the *Human Rights Code* allows the preferential treatment of people over the age of 65, seemingly without further qualification. The accompanying Guide to the legislation cites common examples of such preferential treatment as including special seniors' discounts, reduced senior rates for public transit and 'golden age' passes. In Nova Scotia, section 6(a) of the *Human Rights Act* allows age-based differentiation in the provision of facilities and services if the result has been to confer a benefit on, or to provide protection to, youth or senior citizens. In Saskatchewan, section 12(4) of the *Human Rights Code* allows preferential treatment on the grounds of age with respect to membership dues, fees or other charges for services or facilities.

The laws in other provinces do not generally contain such wide provisions to allow the routine preferential treatment of older persons. However, all make provision for special programmes to be designed by service providers to end the long-standing disadvantages of those who experience discrimination on grounds such as age. Provincial Human Rights Commissions/Tribunals have the power to approve such programmes. For example, in Ontario, special programmes can confer preferential treatment on older persons provided they either relieve hardship or economic disadvantage, assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity, or contribute to the elimination of discrimination. As noted by the Ontario Human Rights Commission, this 'allows preferential treatment or programs aimed only at older persons, even if they have not yet reached the age of 65, if the purpose of the program is to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equal opportunity'.<sup>146</sup> However, to be protected under the Code, the age-based criteria must be rationally connected to the objective of the programme<sup>147</sup>. A special programme was upheld in *Broadley v Steel Co of Canada Inc.*<sup>148</sup> where a provision in a collective agreement giving employees with 25 years' service extended vacations from the age of 61 was challenged on the basis that it discriminated against those under the age of 61. The Board of Inquiry accepted that this was designed to relieve the hardship and disadvantage often experienced by older workers.

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<sup>143</sup> Ontario Human Rights Commission, *Human Rights Issues in Insurance*, Consultation Report (2001).

<sup>144</sup> *Ibid.*, p 15.

<sup>145</sup> *Ibid.*, p 18.

<sup>146</sup> Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (2002), para 4.2.

<sup>147</sup> See *Ontario (Human Rights Commission) v Ontario (Ministry of Health)* (1994) 21 C.H.R.R. D/259.

<sup>148</sup> (1991) 15 C/H/R/R D/408 (Ont. Bd. Inq.).

The Ontario Human Rights Commission observed that this decision ‘demonstrates a desire on the part of the decision-makers to uphold schemes that give benefits to older persons when they are challenged by younger persons who cannot access the benefits’<sup>149</sup>.

*Special interest organisations:* some provincial laws also permit certain special-interest organisations to limit participation or membership based on age. For example, section 18 of the Ontario *Human Rights Code* allows certain organisations such as charities, schools, social clubs or fraternities, to limit their right of membership and involvement to persons of a certain age. The Guide accompanying the Code states that ‘because this is an exception to the *Code*, it must be read narrowly, so that only organizations that clearly qualify as religious or charitable, etc. can use this section’. Under section 20(3) of the *Code*, recreational clubs can restrict or qualify access to its services or facilities, or give preferences with respect to membership dues and other fees because of age.

*Age discrimination permitted by statutory authorisation:* some provincial codes limit the prohibition of age discrimination by providing that age-related restrictions in other statutes do not constitute discrimination (Quebec and Prince Edward Island). This is similar to the provision in Ireland’s legislation which does not protect people against age discrimination when there is statutory authorisation for the alleged discrimination.<sup>150</sup>

## **Effectiveness**

The Human Rights Commission in Ontario is notable for its commitment to outlaw unjustifiable age-based discrimination and to eradicate negative attitudes about aging. Thus, it is worth looking at evidence from this jurisdiction when considering the effectiveness of the law prohibiting age discrimination. The Ontario Human Rights Commission has conducted extensive research on the issue of discrimination against older people<sup>151</sup> and, despite having provisions to deal with such discrimination, noted in 2001 that -

*ageism persists as a problem in services and facilities. Myths and stereotypes impact on the level and quality of service available to older persons, for example service providers may prefer not to take on older clients because of a perception that they take up more time... medical decisions about certain types of treatment may also be based on a patient’s age and the amount of time a particular person would have to benefit from a particular type of intervention...*<sup>152</sup>

The Commission recognises that part of the problem is that age discrimination is regarded as having a social utility and is thus not taken as seriously as other forms of discrimination. Under-

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<sup>149</sup> Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (2000) at p. 35.

<sup>150</sup> Equal Status Act 2000, s 14(a).

<sup>151</sup> Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues facing Older People in Ontario* (2000); Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (2001).

<sup>152</sup> Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perceptions and Getting Results. Case Study of the Ontario Human Rights Commission* (Prepared for the International Symposium on Age Discrimination, 2005), at p 9.

reporting of age discrimination is a problem. A review of complaints received by the Commission revealed that age is cited as a ground of discrimination in approximately 7-9% of cases<sup>153</sup> and that most of the complaints filed relate to employment. Indeed, in 2003/04, only 0.5% of the total number of complaints and 5% of complaints relating to age discrimination were in the field of goods, services and facilities<sup>154</sup>. The Commission speculate that instances of age discrimination in relation to accessing services remain unreported.<sup>155</sup>

In an attempt to address these concerns, the Commission published a new policy on age discrimination in 2002<sup>156</sup>. As well as stressing the importance of positive action by government and community partners,<sup>157</sup> the purpose of the policy was to raise awareness of how the *Code* protects older people against discrimination across many social areas. In practical terms, the Commission embarked on a public awareness campaign in partnership with CARP (Canada's Association for the Fifty-Plus) to help 'combat ageism [and] empower those experiencing ageism to recognize what it is and how to respond'.<sup>158</sup> The campaign featured posters of older persons with stickers on their foreheads stating a "Best Before" age with a tag line, "Nobody has a shelf life. Stop age discrimination now. It's illegal, and it's just plain wrong". As noted by the Commission -

*The message was intended to serve as a reminder that people's skills, abilities and contributions do not diminish simply because they reach a certain age and negative attitudes about aging should not stand in the way of equal opportunity and participation in employment, transit services, health care and housing for older persons.*<sup>159</sup>

The Commission concluded in 2005 that this campaign successfully raised awareness about ageism and thus 'hopefully has helped to begin to reverse the discrimination that limits the ability of older citizens to fully enjoy the opportunities available to other individuals in the province'<sup>160</sup>. It is also worth pointing out that the Human Rights Code Amendment Act 2006 has altered the complaints process in Ontario which may result in improved compliance. Responsibility for individual complaints of discrimination has moved from the Human Rights Commission to the Human Rights Tribunal of Ontario and the newly created Human Rights Legal Support Centre. As such, this becomes a 'direct access' model of rights enforcement and the Commission, in losing responsibility for individual complaints, will now concentrate exclusively on 'proactive research, policy development, public education, and outreach to

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<sup>153</sup> Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (2002), para 1; Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perceptions and Getting Results. Case Study of the Ontario Human Rights Commission* (Prepared for the International Symposium on Age Discrimination, 2005), at p 7.

<sup>154</sup> Age Concern England et. al., 'Addressing Age Barriers: An international comparison of legislation against age discrimination in the field of goods, facilities and services' (2004), at p 18.

<sup>155</sup> *Ibid.*

<sup>156</sup> Ontario Human Rights Commission, *Policy on Discrimination against Older Persons because of Age* (2002).

<sup>157</sup> See Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (2001).

<sup>158</sup> Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perceptions and Getting Results. Case Study of the Ontario Human Rights Commission* (Prepared for the International Symposium on Age Discrimination, 2005), at p 11.

<sup>159</sup> *Ibid.*, at p 12.

<sup>160</sup> *Ibid.*, at p 15.

address systemic and public interest matters'.<sup>161</sup> That the Commission no longer filters cases to be referred to the Tribunal may improve compliance. It has been pointed out that the 'direct access model' (as in the Republic of Ireland) where the complainant goes directly to the judicial body, 'has the benefit of empowering individuals who wish to complain of age discrimination'.<sup>162</sup> And, it avoids the Commission being both judge and jury.

Evidence from Ontario shows that legislation is only the first step in tackling age discrimination. Not only must there be effective enforcement procedures, but both older persons and service providers must be educated that the denial or restriction of goods, facilities or services based on age is unlawful, and that there is direct access to legal mechanisms to challenge such discriminatory treatment. As noted by the Ontario Human Rights Commission –

*Protection of rights depends on people knowing about what rights they have and available mechanisms to enforce them, as well as knowing and accepting their obligations to uphold those rights. Human rights promotion supports prevention of violations, encourages a culture of human rights and ultimately is empowering for individuals and groups.*<sup>163</sup>

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<sup>161</sup> Ontario Human Rights Commission, *Annual Report 2006-2007*, at p 1.

<sup>162</sup> Age Concern England, et. al., 'Addressing Age Barriers: An international comparison of legislation against age discrimination in the field of goods, facilities and services' (2004), at p 19.

<sup>163</sup> Ontario Human Rights Commission, *From Research to Legislation: Challenging Public Perceptions and Getting Results. Case Study of the Ontario Human Rights Commission* (Prepared for the International Symposium on Age Discrimination, 2005), at p 6.

### Appendix 3 – The Law in the United States of America

#### *Federal law*

In the United States, federal legislation specifically aimed at older people dates back to the 1960s, with the Older Americans Act being passed by Congress in 1965.<sup>164</sup> This established the Administration on Aging, within what is now the Department of Health and Human Services, and it authorised the granting of money to individual States for the provision of services – as well as research and training – in the field of aging. The Act has been amended on several subsequent occasions, and was officially ‘re-authorised’ by President Clinton in 1999. The effect of the Act is to ensure that many home and community-based services are provided to more than 7 million people in the US, more than one-third of this group being people on incomes that are below the poverty level for the country.

The first federal legislation dealing with age discrimination was the Age Discrimination in Employment Act 1967, which was enacted shortly after the wave of other ‘civil rights legislation’ in the mid-1960s and is still in force (in an amended form). It protects people against age discrimination in employment but, unlike the more recent laws in jurisdictions such as Ireland and Australia, it protects only those who are aged 40 or more and only if the employer in question has 20 or more employees. The employer, however, can be a public organisation or an entirely private entity. Complaints are investigated by the Equal Employment Opportunity Commission which, if it does not succeed in reaching a conciliated settlement of the complaint, can bring a suit in the federal courts on the issue.

Federal legislation dealing with age discrimination in relation to access to goods, facilities and services arrived almost a decade later, in the form of the Age Discrimination Act 1975, which is also still in force, though again amended.<sup>165</sup> Like some of the earlier civil rights statutes dealing with the non-employment field, this Act tackled the problem of age discrimination not simply by outlawing it and giving people a right to complain about it directly to an agency or court, but rather by prohibiting the payment of any federal money to any organization which discriminates on the basis of age.<sup>166</sup>

Before the 1975 Act came fully into force, on 1 January 1979, the US Commission on Civil Rights (an official body charged with researching and investigating discrimination issues) was directed to conduct a study of the extent and nature of existing discrimination in this field. Published in January 1978, the report’s two main conclusions were that, first, barriers had been erected by both public and private administrators between, on the one hand, persons falling

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<sup>164</sup> See [http://www.aoa.gov/about/legbudg/oaallegbudg\\_oaa.aspx](http://www.aoa.gov/about/legbudg/oaallegbudg_oaa.aspx).

<sup>165</sup> 42 USC Sections 6101-6107.

<sup>166</sup> 45 Code of Federal Regulations §91.11: (a) General rule: No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance. (b) Specific rules: A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual licensing, or other arrangements, use age distinctions or take any other actions which have the effect, on the basis of age, of: (1) excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or (2) denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

within particular age groups, particularly children and older persons, and, on the other hand, federally funded services, and, second, these barriers were having a serious adverse impact on the lives of children and older persons who needed those services and they were in conflict with the concept of the dignity and worth of the individual.<sup>167</sup>

Under the 1975 Act federal grant-giving agencies must issue regulations implementing the Act,<sup>168</sup> and they can end the assistance given if recipients of grants do not comply with the duty not to discriminate on age grounds.<sup>169</sup> Recipients of grants must tell the beneficiaries of their federally-funded programmes about the obligations placed on the grant recipients by the 1975 Act.<sup>170</sup> The grant recipients must also keep records of their activities and allow federal agencies to have access to these records in order to check whether the law on age discrimination has been complied with.<sup>171</sup> A particularly novel feature of the US system is that the Department of Health and Human Services can require recipients to undertake a self-evaluation of their compliance with the Act.<sup>172</sup> The 1975 Act does not in terms outlaw harassment on the basis of age, but its prohibition of the victimization of people who complain about age discrimination does to some extent plug this gap.

The USA also differs from the other jurisdictions reviewed for this report in that it has in place a sophisticated system for ensuring that exceptions from the statutory duty not to discriminate on the grounds of age are properly justified. The exceptions are not set out within the parent Act itself but are published by each government agency in the Federal Register,<sup>173</sup> together with a statement justifying their existence. The public can comment on these proposed exceptions before they are finalised, in accordance with the standard practice provided for by the USA's Administrative Procedure Act 1946.<sup>174</sup> Once the exceptions are officially registered they are presumed to be legal, but this of itself does not preclude them from being subjected to additional close scrutiny if a complaint is later taken about them. Likewise, agencies can still try to rely on age distinctions which have not been listed in the Federal Register, provided they are prepared to shoulder the burden of proving the legality of these distinctions if a complaint is raised. As has been pointed out elsewhere, this system does at least reassure the public that registered age distinctions have been carefully considered and that there is an underlying rationale for them which suggests they are worth retaining.<sup>175</sup>

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<sup>167</sup> *The Age Discrimination Study: Part I* (Washington DC: US Commission on Civil Rights; December 1997). Part II of the Study, published in January 1979, describe in more detail each of the federally-assisted programmes that were studied for the 1978 report.

<sup>168</sup> See <http://cfr.vlex.com/source/1094/page/32>.

<sup>169</sup> 42 USC Sections 6102 reads: 'Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) of this title and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.'

<sup>170</sup> 45 Code of Federal Regulations §91.32.

<sup>171</sup> 45 Code of Federal Regulations §91.34.

<sup>172</sup> 45 Code of Federal Regulations §91.33.

<sup>173</sup> This is the official daily publication in the USA for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents. See <http://www.gpoaccess.gov/fr>.

<sup>174</sup> This is the Act which governs the way US federal administrative agencies may propose and establish regulations.

<sup>175</sup> See *Addressing Age Barriers*, note 1 above, p 106.

Exceptions from the duty not to discriminate on the grounds of age are allowed if the action in question ‘reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity’.<sup>176</sup> If, for example, a higher education college wanted to make classes available to people aged over 65 at a reduced rate, it would need to be able to show four things, namely:

- that, in general, people aged 65 or over have another characteristic;
- that it is necessary to take that characteristic into account for the programme in question to operate normally or for its statutory objective to be met;
- that this other characteristic can be reasonably measured by reference to age;
- that it would be impracticable to measure this other characteristic in relation to each individual who applies for the programme.

It is likely that, in the example given, the higher education college would argue that, in general, people aged 65 or over are less able to afford to pay the full price of the classes on offer, this being the ‘other characteristic’ involved (the first requirement). It is also likely that this characteristic can be reasonably measured by reference to age (even if there are other groups of people who may also be less able to afford the full price) and that it would be impracticable to means test each individual applicant for the classes (the third and fourth requirements). But whether the second requirement could be fulfilled is more dubious, though it might depend on what type of class is being offered and whether it is intended to implement a particular statutory objective (e.g. enabling older people to benefit more from information technology).

One consequence of the fact that the Age Discrimination Act 1975 requires an intermediary organization between the federal funder and the complainant is that a person cannot make a complaint in relation to programmes which provide direct federal assistance to individuals (e.g. social security payments). Moreover, somewhat akin to the position in the Republic of Ireland, the 1975 Act does not grant protection against age distinctions ‘established under authority of law’, which is defined to mean federal, state or local statutes, or any ordinance adopted by an elected legislative body with general rule-making powers.<sup>177</sup> This means, for example, that the services provided under the Older Americans Act 1965 (referred to above<sup>178</sup>) are not in breach of the Age Discrimination Act 1975. It should also be noted that the 1975 Act does not always prohibit ‘equal but separate’ treatment on the basis of age: it allows it whenever such separate treatment is necessary for the ‘normal operation’ or for the achievement of the statutory objective of the programme in question.<sup>179</sup> Thus, a mental hospital can have a separate geriatric wing, but the patients in that wing must enjoy the same level of service as patients elsewhere in the hospital. Moreover the Regulations issued by the Department of Health and Human Resources allow for recipients of federal funding to take voluntary affirmative action measures designed to

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<sup>176</sup> 45 Code of Federal Regulations §91.13.

<sup>177</sup> 45 Code of Federal Regulations §91.2. A School Board would not, for example, have such general rule-making powers.

<sup>178</sup> See text at note 164 above.

<sup>179</sup> 45 Code of Federal Regulations §91.13.

overcome the effects of conditions that have to date resulted in limited participation by older people in the programme in question.<sup>180</sup>

Without providing any really solid rationale for the provision, the Regulations also allow recipients of federal funding to give ‘special benefits’ to the elderly (or to children).<sup>181</sup> These ‘special benefits’ are said not to be examples of ‘voluntary affirmative action’ designed to overcome former under-participation in programmes, but of actions necessary to the ‘normal operation’ of the programmes. However their validity is only presumed: they can be challenged if a complainant believes that they have the effect of excluding other people from the programme in question or if they are inconsistent with the intent of the relevant law-making body. The example given above – of a higher education college offering classes at reduced prices to persons aged 65 or over – may be one where exception is more readily available under this ‘special benefits’ heading.

### *Enforcement of federal law*

If a complaint is made about age discrimination practiced by an organization which is in receipt of federal funding, Regulations issued by the US Department of Health and Human Services require the organisation to take remedial action, and the organization cannot victimize the complainant or anyone else who cooperates in the investigation of a complaint.<sup>182</sup> Other regulations issued by the US Department of Education in 1993 prohibit discrimination on the basis of age in the educational programmes which receive federal assistance. These regulations also explain how to decide whether age discrimination has occurred, what the duties are on grant recipients, and how complaints are to be investigated and solutions enforced.<sup>183</sup>

Individual complaints (and indeed class actions) can be brought under the 1975 Act provided they are lodged within 180 days of the alleged discriminatory act taking place. This time limit may be extended if good cause is shown, but in a recent case (brought by a woman who was alleging pay inequality) the US Supreme Court held that the 180 day period begins to run as soon as the first of a series of discriminatory acts occurs.<sup>184</sup> So unjust was this decision deemed to be that the very first Act of Congress signed by President Obama in January 2009 was an Act whose purpose was to reverse that decision.<sup>185</sup>

Once a complaint is filed under the 1975 Act it is transferred to the Federal Mediation and Conciliation Service. This office will keep trying to mediate the dispute for up to 60 days, but if a mediated solution cannot be reached the complaint will be passed for investigation to the

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<sup>180</sup> 45 Code of Federal Regulations §91.16 (‘Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient’s program or activity on the basis of age.’)

<sup>181</sup> 45 Code of Federal Regulations §91.17 (‘If a recipient operating a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of 91.13.’)

<sup>182</sup> 45 Code of Federal Regulations §90.42(a).

<sup>183</sup> 34 Code of Federal Regulations §§110.1 and following.

<sup>184</sup> *Ledbetter v Goodyear Tire and Rubber Co* 550 US 618 (2007).

<sup>185</sup> The Lilly Ledbetter Fair Pay Restoration Act 2008. See

[http://voices.washingtonpost.com/44/2009/01/29/obama\\_signs\\_lilly\\_ledbetter\\_ac.html?hpid=topnews](http://voices.washingtonpost.com/44/2009/01/29/obama_signs_lilly_ledbetter_ac.html?hpid=topnews).

Office for Civil Rights of the Department of Health and Human Services.<sup>186</sup> Only if no action has been taken on the complaint by that Office within 180 days of being lodged, or within 180 days from the date that a determination has been made in the complainant's favour, can the complainant file a civil action in the federal courts, and even then the claim can only be for an injunction to stop the discrimination, not compensation. Like the researchers who wrote *Addressing Age Barriers* in 2004,<sup>187</sup> we have tried to unearth reported cases decided by the US federal courts in this field, but we were unable to discover any. This is itself some evidence that few such cases are brought to court and / or that, when they are brought to court, they are easily dealt with under the legislation.

As yet the United States Supreme Court has not had to consider a case in which age discrimination in the provision of goods, facilities or services was at issue, but as recently as 22 June 2008 it did decide a case concerning the burden of proof in age discrimination in the employment field. In *Meacham v Knolls* the Court ruled that in federal cases, employers who take actions that have a disproportionate impact on older workers must prove that those actions resulted from 'reasonable factors other than age'.<sup>188</sup> The burden is not on the employees to prove that the employer's decision was unreasonable. However this was a case about indirect discrimination (what the Americans sometimes call 'disparate impact'), not direct discrimination (which they call 'disparate treatment'). In the latter type of case the employee still has to prove that there was an intent to discriminate. It remains to be seen where the US federal courts would place the burden of proof if a person took a complaint against an organization which had received a federal grant and had then allegedly discriminated against him or her on the basis of age. The likelihood is that the courts would place the burden of proof on the organization, the service-provider, since that is the party better able to explain why the action complained about took place as it did. As explained above, the Regulations already impose upon the recipient of the federal grant the burden of proving that an act of apparent age discrimination falls within a statutory or registered exception.<sup>189</sup>

Individual states within the USA are free to adopt laws which go further than federal law in protecting people against age discrimination, but many seem not to have done so in the field of access to goods, facilities and services.<sup>190</sup> Protection against age discrimination by providers of insurance, credit, or entertainment – services which are not funded by federal (or State) money – is therefore less available than in the other jurisdictions reviewed for this report. In the two most economically important States in the USA, California and New York, the emphasis has been on age discrimination in the housing sector. New York, however, has also established an Office of the Ageing and tasked it with extensive promotional duties in this field.

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<sup>186</sup> See <http://www.hhs.gov/ocr>.

<sup>187</sup> Available at [http://www.ageconcern.org.uk/AgeConcern/Documents/Addressing\\_Age\\_Barriers\\_final.pdf](http://www.ageconcern.org.uk/AgeConcern/Documents/Addressing_Age_Barriers_final.pdf).

<sup>188</sup> Decision of 23 June 2008.

<sup>189</sup> 45 Code of Federal Regulations §91.15

<sup>190</sup> In the employment field some States have outlawed age discrimination even in relation to people under the age of 40 (who are not protected by the federal legislation).

### *The law in the state of California*

California's Civil Rights Act (which is section 51 of the state's Civil Code) is very far-reaching in its commitment to equality and non-discrimination, but, surprisingly, it does not extend to protecting people against age discrimination. It reads:

*All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.*

A separate provision in the Civil Rights Act does stipulate that a person who engages in a real estate transaction must not discriminate on the basis of age, but that seems to be the extent of the protection (in a non-employment context). In *O'Connor v Village Green Owners Association* the question was how far even this duty extended. The Village Green Owners Association had a restriction limiting residency in an estate to persons who were over 18, and this was held to be a violation of the Act.<sup>191</sup> On the other hand, in *Sunrise Country Club Association v Proud*, the court held that dividing an apartment block development into an adult region and a family region was not unreasonable or arbitrary age discrimination.<sup>192</sup> And in *Schmidt v Superior Court* a rule which restricted residence in a private mobile home park to persons aged 25 or over was also held to be valid.<sup>193</sup> Both these cases were decided the way they were because the court felt it was important to allow some housing projects to make special provision for older people, or at any rate people who were not children or adolescents.

In the wake of these cases California's legislature inserted section 51.2(a) into the Civil Code to clarify the law. This creates an exception to the general rule protecting people against ageism in the housing market by providing that a business establishment may establish and preserve accommodation that is designed to meet the physical and social needs of senior citizens (unless the accommodation in question is covered by the federal Fair Housing Amendments Act of 1988, which permits discrimination on the basis of familial status).

### *The law in the state of New York*

Section 296.2(a) of the Executive Law of the State of New York provides that it is an unlawful discriminatory practice for any person having the right of ownership or possession of housing accommodation to discriminate against a person to whom that accommodation is being sold, rented or leased because of that person's race, creed, colour, disability, national origin, sexual orientation, military status, age, sex, marital status, or familial status. The inclusion of the 'age' ground means that, unlike under the federal legislation discussed above, age discrimination in the housing sector is outlawed in New York whether or not any federal or State funding is involved.

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<sup>191</sup> 33 Cal. 3d 790 (1983).

<sup>192</sup> 190 Cal. App. 3d 377 (4<sup>th</sup> Dist. 1987).

<sup>193</sup> 48 Cal. 3d 370 (1989).

Even more importantly, section 202 of the State of New York's Elder Law sets up an 'Office of the Aging' and requires it, for example, to advise and assist the governor of the State in developing policies designed to help meet the needs of the aging and to encourage the full participation of the aging in society. The Office must also make such studies of the needs of the aging as it may deem appropriate or as may be requested by the governor, conduct a programme of education and information on age discrimination and the preparation and filing of complaints relating to persons aged 60 or more, and prepare model zoning and planning guidelines that foster age-integrated communities. There is a branch of the Office of the Aging in each county of the State of New York.

In its annual report the Office of the Aging must, amongst other things, describe the progress and problems related to the provision of services to older persons by programmes administered by the Office, and present in quantitative, as well as qualitative, terms a report on the quality of life of the aged in New York which refers, for example, to the impact of inflation, crime trends, the numbers of elderly people living in substandard housing, and the recreational services available for the aged, including numbers of senior centres and clubs. Section 202.4 of the Elder Law makes it explicit that:

*as a matter of state policy...caring services and programs for seniors should be shaped by the principles of strengthening independence, affirming dignity, and maximizing choice, and a recognition that seniors and their families and intimates provide a vast potential source of social, cultural, historic, and spiritual enrichment and leadership.*

Indeed the Office is required to enunciate these principles in the form of a Bill of Rights for seniors, though as yet this does not seem to have materialised. Moreover, the section ends by making it clear that no declaratory relief, injunction or compensation is to be made available against the State of New York on the basis of the principles set out above.

## Appendix 4 – The Law in Australia

### *Commonwealth law*

It is only since the coming into force of the Age Discrimination Act 2004 on 23 June 2004 that people across the Commonwealth of Australia have been protected against discrimination on the basis of age in any way. Age was the last ground of discrimination to be comprehensively protected at the national level.<sup>194</sup> Compulsory retirement in Commonwealth employment had been abolished by the Public Service Act 1999, and age discrimination in employment was prohibited by the Workplace Relations Act 1996. Since 1986, moreover, the Human Rights and Equal Opportunity Commission (which now calls itself the Australian Human Rights Commission<sup>195</sup>) had been empowered<sup>196</sup> to receive, investigate and report to the Commonwealth Attorney General complaints of age discrimination under four international human rights conventions.<sup>197</sup>

The 2004 Act fulfilled the national government's 2001 election manifesto commitment<sup>198</sup> and redressed the balance all at one go, by outlawing age discrimination not just in the employment sphere but also in the provision of goods, facilities and services (including education and accommodation services). When piloting the Bill through its Second Reading the Attorney General noted<sup>199</sup> that it was consistent with the international commitment to eliminate age discrimination and ensure the full participation by older persons in public life, as reflected in the declaration adopted at the Second World Assembly on Ageing in 2002. The Bill was nevertheless opposed by the Australian Chamber of Commerce, whose views did influence the final shape of the Act to some extent.

The 2004 Act applies to Commonwealth (i.e. federal) activities, leaving each State and Territory to develop its own protections for State and Territorial activities if it so wishes,<sup>200</sup> and where complainants have a choice as to jurisdiction they must choose whether to pursue their complaint under Commonwealth, State or Territorial legislation.<sup>201</sup> The Commonwealth Act is overseen by

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<sup>194</sup> The Australian Human Rights Commission has recently published a very useful exposition of the law as ch 2 in *Federal Discrimination Law* (Sydney: HREOC; 2008). At the time of publication, however, there had not yet been a successful claim of age discrimination under the 2004 Act, even in an employment context. For a good practical account of age discrimination law in the employment context, both nationally and at the State and Territory levels, see P Thew, K Eastman and J Bourke, *Age Discrimination: Mitigating Risk in the Workplace* (Sydney: CCH Australia Ltd; 2005). For a more general account of the law affecting older people in Australia (though it was published just before the enactment of the Age Discrimination Act 2004), see Rodney Lewis, *Elder Law in Australia* (Chatswood, NSW: Butterworths LexisNexis; 2004).

<sup>195</sup> [www.hreoc.gov.au](http://www.hreoc.gov.au).

<sup>196</sup> Human Rights and Equal Opportunity Commission Act 1986 (Cth).

<sup>197</sup> The International Labour Organisation's Discrimination (Employment and Occupation) Convention 1958, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, and the UN Convention on the Rights of the Child 1989.

<sup>198</sup> Itself influenced by a report produced by the Human Rights and Equal Opportunities Commission, *Age Matters* (2000). One of the first calls for age to be introduced as a ground for complaint against discrimination into legislation at the State level in Australia was made in a review of the social security system completed in 1988: C Foster, *Towards a National Retirement Incomes Policy* (Issues Paper, Social Security Review, no 6).

<sup>199</sup> House of Representatives, *Hansard*, 26 June 2003, p 17622.

<sup>200</sup> See p 87 below.

<sup>201</sup> s 12(5).

the Human Rights and Equal Opportunities Commission (HREOC), one particular Commissioner being allocated the current responsibility for the Act (currently this is Ms Elizabeth Broderick). The Commission's website contains a useful section headed 'Federal Discrimination Law Online', chapter 2 of which is devoted to age discrimination.<sup>202</sup> The passing of the 2004 Act seems to have stimulated greater academic and official interest in the economic and social implications of ageism, as has the fact that Australia's population, like that of many other developed countries, has a growing proportion of people aged over 65. In 2002 the national government estimated that the percentage of the population aged 65 or over would rise from what was then 2.5% to 3.1% in 2012 and to 4.3% in 2022.<sup>203</sup>

One of the criticisms of the Act has been that it requires age to be the dominant reason for discrimination if it is to be actionable.<sup>204</sup> Simply being one of the reasons for the discrimination is not enough. This requirement applies to all claims of age discrimination at the federal level, even though it was lobbied for only in relation to age discrimination within the employment sphere by the Australian Chamber of Commerce at the time when the Act was being drafted. More particularly, section 6 of the Act insists that if a complainant is complaining about conduct that could amount to discrimination on the grounds of both disability and age (e.g. impaired hearing or mobility) he or she must pursue it under the Disability Discrimination Act 1992. Parliament apparently thought this approach was necessary in order to provide certainty (given that the Disability Discrimination Act sets out specific tests to deal with disability issues that do not apply to other forms of discrimination), yet in situations where there may be an overlap between other grounds of discrimination (e.g. disability and gender) there is no obligation to choose a particular avenue of redress. More generally, Australian law shares with English law the 'structural weakness'<sup>205</sup> that conduct has to be categorised under one discrimination ground or another: there is no recognition of what is called 'intersectionality', where discrimination occurs on the basis of inter-related attributes.<sup>206</sup> Commentators have also noted that legislation by itself is not sufficient to eradicate age discrimination: as in other fields, steps need to be taken to publicise the law, to educate potential discriminators and to facilitate victims of discrimination who may want to do something about how they have been treated.<sup>207</sup>

The national Act mostly treats age discrimination as a civil law matter, but it does create criminal offences for the following behaviours: displaying an advertisement which indicates an intention to unlawfully discriminate on the basis of age, intentionally causing detriment to a person because he or she has taken part in discrimination proceedings (this is known as 'victimisation' and can give rise to civil liability as well), and failing to disclose the source of actuarial or statistical data when required to do so by the Australian Human Rights Commission. (There are

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<sup>202</sup> It currently states that the Act has been considered in only two cases, in neither of which the applicant was successful: *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978, and *O'Brien v Crouch* [2007] FMCA 1976. See <http://www.hreoc.gov.au/legal/FDL/chap2.html>, last visited 8 December 2008.

<sup>203</sup> Commonwealth Treasury, *Intergenerational Report 2002-2003*, Budget paper No 5, 14 May 2002, at 22.

<sup>204</sup> s 16. There used to be a dominant reason requirement in race discrimination law, but it was removed in 1990.

<sup>205</sup> This is the term used by Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Sydney: The Federation Press, 2008) 309.

<sup>206</sup> A Thackrah, 'From Neutral to Drive: Australian anti-discrimination law and identity' (2008) 33 *Alternative Law Journal* 31.

<sup>207</sup> Rachael Patterson, 'The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A cause for Celebration and Concern' (2004) 3 *Elder Law Review* 65.

similar provisions in Australia's federal laws on sex discrimination, disability discrimination and [except in relation to the last offence] race discrimination.)

The federal law applies specifically (as well as to employment and occupation) to (a) access to goods, facilities and services (with 'services' being broadly defined), (b) education, (c) accommodation, whether residential or business, (d) access to premises that the public is entitled to use, (e) dealings in land, (f) requests for information on which unlawful age discrimination might be based, and (g) the administration of Commonwealth laws and programmes.<sup>208</sup> In this list, 'services' is broadly defined to include superannuation, banking, insurance, grants, loans, credit or finance, transport, travel, entertainment, recreation or refreshment, telecommunications, services provided by a professional or tradesperson or services provided by a government, government authority or local government body.<sup>209</sup> As regards education, there is an exception for educational institutions that have been established for people of particular ages, such as primary schools.<sup>210</sup> As regards accommodation, there is an exception for accommodation offered to three or less persons by someone who lives on the premises concerned, or whose near relative lives on those premises.<sup>211</sup> For land dealings there is an exception for the gifting of land, whether in a will or while the donor is still alive.

Civil liability for age discrimination can exist not just when a person him- or herself directly or indirectly discriminates against another, but also when he or she 'causes, instructs, induces, aids or permits another person' to do so.<sup>212</sup>

As in other countries, Australia's ban on age discrimination in access to goods, facilities and services contains many exceptions, some of which were made explicit by the Age Discrimination Amendment Act 2006. The Council on the Ageing has expressed concern at the width of these exceptions, though mostly in relation to how they operate in the employment field. The exceptions are as follows:

1. Positive discrimination: Australia's Age Discrimination Act 2004 is broader in its acceptance of positive discrimination measures than are the Australian Acts dealing with sex, race and disability discrimination in that it allows positive measures to be taken even for purposes other than achieving substantive equality or meeting special needs.<sup>213</sup> It permits acts that provide a bona fide benefit to a person of a particular age (such as a discount for 'seniors' at a hairdresser's), or that are intended to meet a need that arises out of age (e.g. providing for the welfare needs of young homeless people), or that are intended to reduce a disadvantage experienced by persons of a particular age (e.g. requiring a longer period of notice to be given to older people who are about to be made redundant). The Act does not provide a definition of 'bona fide', leaving it for judges to assess. The federal government's Explanatory Memorandum which accompanied the Act justified the 'bona fide benefit' exception in rather circular terms: 'Such benefits are not

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<sup>208</sup> ss 26-32.

<sup>209</sup> s 5.

<sup>210</sup> s 26(3).

<sup>211</sup> s 29(3).

<sup>212</sup> s 56.

<sup>213</sup> s 33.

seeking to give older people an unfair advantage or to exclude or disadvantage people of other ages, and have broad social acceptance'. No-one has yet challenged the legality of, say, transport concessions for older people, even though many older people may be able to afford full fares and younger unemployed people may not be. There may not yet be 'broad social acceptance' for such benefits being extended to unemployed people. No such 'bona fide benefit' exception is found in any other anti-discrimination legislation in Australia.

2. Superannuation, insurance and credit: Age-based discrimination is permitted as regards the terms and conditions on which an annuity, insurance policy, membership of a superannuation scheme, or credit is offered, provided (a) that the discrimination is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely and the discrimination is also reasonable or (b) that, in a case where actuarial or statistical data cannot reasonably be obtained (except in relation to offers of credit), the discrimination is reasonable having regard to any other relevant factors. Section 54 of the Act gives HREOC the power to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the above exceptions, be unlawful and it is an offence not to provide the source of any such data if required to do so. A similar exception exists in relation to disability discrimination, and there is some case law elucidating how it operates. It has been made clear, for example, that discrimination might be reasonable in the light of actuarial or statistical data, but still be unreasonable more generally. In *QBE Travel Insurance v Bassanelli*<sup>214</sup> the applicant was refused travel insurance because she had breast cancer. She argued that all she wanted was theft and accident insurance, not health insurance. The court held in her favour because, whether or not there was actuarial or statistical data to support the company's position, it was not a reasonable one. The fact that another company was able to offer the applicant the limited insurance she wanted was some evidence of the unreasonableness of the first company's position.
3. Charities, religious and voluntary bodies: Charitable instruments can confer benefits wholly or in part on persons of a particular age, and acts or practices of a body established for religious purposes that conform to the doctrine of that religion or are necessary to avoid injury to the religious sensitivities of adherents of that religion are also exempt. In practice it is difficult to imagine any religious group arguing that its doctrine or the sensitivities of its adherents require services to be restricted to a certain age group or to be excluded from another age group, in the way that they might argue, for example, that their services should not be extended to person of a particular type of sexual orientation. Voluntary bodies are exempt only when they discriminate in relation to admission to membership of the voluntary body or the provision of benefits, facilities or services to members of the body (not to the public).
4. Health: There is an exception for health programmes that are *reasonably* based on evidence about matters (including safety, effectiveness, risks, benefits and health needs) that affect people of a particular age in a different way from people of a different age, e.g. free influenza vaccines to older people on the basis of evidence showing that older people are at greater risk of complications as a result of influenza than are people of other

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<sup>214</sup> (2004) 137 FCR 88.

ages.<sup>215</sup> Moreover it is not discriminatory to take a person's age into account in determining whether or not to provide that person with particular health or medical services or goods, where that determination is *reasonably* based on evidence and professional knowledge about the ability of persons of that age to benefit from those goods or services. This appears to allow health professionals to take decisions in relation to a particular person based on a more general policy in relation to people of that person's age, e.g. a 90-year-old person could be denied heart valve surgery on the basis of a policy not to provide it to person over 80 because most of that age group are too frail to benefit. Obviously a lot will turn in this context, as above in relation to insurance and credit facilities, on what is deemed to be 'reasonable'. The test, however, is a higher one for the alleged discriminator to satisfy than in the case of supposed 'bona fide benefits' conferred by way of positive measures.<sup>216</sup>

5. Direct compliance with laws: Acts done in direct compliance with certain Commonwealth, State or Territory laws, court orders, or industrial awards and agreements are exempt. This means, for instance, that if legislation already stipulates (by way of exception to the ban on compulsory retirement ages) that a person's appointment to serve on a tribunal will come to an end when he or she reaches the age of 70, this law must be obeyed in preference to any law prohibiting age discrimination.<sup>217</sup> The general rule in common law countries is that when there appears to be a clash between laws on specific topics and laws on more general topics, the former must be given priority, but on this occasion the law which appears to be on the more specific topic (age discrimination) expressly defers to the law on a more general topic. The exception is limited, however, to laws which are listed in Schedules to the 2004 Act or the Age Discrimination Amendment Act 2006, so it is not as broad as that which is contained in Ireland's Equal Status Act.<sup>218</sup>
6. Migration and citizenship: The 2004 Act exempts anything done in relation to the administration of certain pieces of legislation in this field. The Australian Human rights Commission sees this as potentially a broad exception because it appears to exempt discretionary acts not *mandated* by the legislation in question.<sup>219</sup>

The Age Discrimination Act 2004 makes no exception in the realm of sporting activities and does not permit exceptions based only on health and safety grounds.

In 2007-08 Australia's Human Rights Commission received 126 complaints under the Age Discrimination Act 2004, 24% of which did not concern employment.<sup>220</sup> The issues covered by these non-employment related complaints were goods, facilities and services (41), education (9), administration of Commonwealth laws and programmes (4), superannuation or insurance (2),

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<sup>215</sup> This flu vaccine example is actually mentioned within the Age Discrimination Act 2004 itself (at s 42(1) and (2)), a good example of how legislation can be written in more accessible language.

<sup>216</sup> See text at note 213 above.

<sup>217</sup> For a case with these facts at the State level Tasmania), see *Pyrke v Minister for Health and Human Services* [2001] Tasmanian Anti-Discrimination Tribunal 1, referred to in Rees, Lindsay and Rice, note 205 above, 315-316.

<sup>218</sup> See p 60 above.

<sup>219</sup> See note 194 above, p 30.

<sup>220</sup> Annual Report of the Human Rights and Equal Opportunities Commission for 2007-08, para 4.2.4. The number of complaints received in 2005-06 and 2006-07 was 106 in each year.

and accommodation (1).<sup>221</sup> Of the 114 complaints which were finalised during the year, 50 led to conciliated settlements, the rest being withdrawn or otherwise terminated on procedural grounds. It is not possible to determine from the Commission's report how many of these conciliated settlements related to non-employment complaints.

If a complainant is dissatisfied with the outcome of the investigation by the Human Rights Commission, he or she can take the case to the Federal Court of Australia, but so far no such case has been decided. The nation's top court – the High Court of Australia – has considered age discrimination in one case,<sup>222</sup> but that was an employment case dealt with under the now-repealed Industrial Relations Act 1988, which was not an anti-discrimination statute.

### *State and Territory law*<sup>223</sup>

Protection against ageism, both in the employment sphere and in other spheres, was prevalent at the State and Territory level in Australia before it became a national phenomenon. The trend began in 1990, when New South Wales abolished compulsory retirement (with some exceptions); by the end of the 1990s every State and Territory had passed similar laws (as had the Commonwealth, through the Public Service Act 1999). South Australia – a state with a reputation for being the most liberal in the nation – was the first region to ban ageism more generally, when it extended its Equal Opportunity Act 1984 to age in 1990.<sup>224</sup> There then followed Queensland (1992), Western Australia (1993), New South Wales (1994), the Northern Territory (1994), the Australian Capital Territory (1996), Victoria (1996) and Tasmania (1999). When the nation as a whole did so in 2004 it was catching up with its regional entities, but the 2004 Act is the most comprehensive of all the laws<sup>225</sup>.

Only New South Wales defines 'age' as including 'age group' for the purpose of complaints against discrimination, but the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Victoria all refer to 'age group' when setting out exceptions to the law. As noted in one textbook, this 'seems to give greater scope to the concept of age for excepting discriminatory conduct than for complaining of it'.<sup>226</sup> On the other hand, all State and Territory legislation, like the federal Age Discrimination Act 2004, defines 'age' in a way which allows commonly attributed characteristics of age to be taken into account. So the Equal Opportunity Act 1984 of South Australia, for example, provides that a person discriminates on the ground of age 'if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other's age or age group, or on the basis of a presumed

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<sup>221</sup> *Ibid*, Table 33. A single complaint can cover a number of different areas.

<sup>222</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

<sup>223</sup> See generally Sol Encel, 'Age Discrimination in Law and Practice' (2004) 3 *Elder Law Review* 13.

<sup>224</sup> New South Wales would have been the first by some distance if employers' organisations had not successfully lobbied for the removal of age as prohibited ground of discrimination from the draft of that State's Anti-Discrimination Act 1977.

<sup>225</sup> There is a useful comparative table of age discrimination provisions in federal, state and territorial laws in Rees, Lindsay and Rice, note 205 above, 314. The 2004 Act still has gaps – e.g. it does not protect 'associates' of a person who has been discriminated against on age grounds (nor does the Act in South Australia), and it does not extend to those to whom an age has been imputed (unlike the law on disability discrimination).

<sup>226</sup> Rees, Lindsay and Rice, note 205 above, 307.

characteristic that is generally imputed to persons of that age or age group'.<sup>227</sup> So discriminating against a 61-year-old person on the basis that he or she is assumed to be less adroit or more slow-witted than a younger person would be unlawful under such a test.

All of the State and Territory laws, with the exception of that applying in the Australian Capital Territory, require a complainant to demonstrate that he or she had been treated less favourably than a comparator on grounds of age. It is usually enough if such treatment was one reason for disadvantage suffered, although in Queensland and South Australia it has to be a 'substantial' reason. Only at the national level does it have to be the dominant reason. However at no level – whether national, State, or Territory – does the provider of goods, facilities or services have to take steps to accommodate the needs of a person based on his or her age.<sup>228</sup> And only in one part of the country – the Northern Territory – is it unlawful to harass someone on the basis of his or her age: the Northern Territory outlaws this in all spheres,<sup>229</sup> not just the employment sphere, whereas all other places outlaw it in no sphere.

The States and Territories recognise just as many exceptions to their laws on age discrimination as the Commonwealth does. Thus, they exempt legal provisions which restrict certain activities (such as driving or buying tobacco) to people above a certain age, they allow age-based discrimination in the fields of insurance and credit-provision (but only, usually, if this is justifiable in actuarial terms), and most of them permit exceptions based on health and safety reasons (e.g. denying entry to a facility for children unless accompanied by an adult). The States and Territories do all allow exceptions in relation to sporting activities, although South Australia and the Australian Capital Territory limit these to *competitive* sporting activities. On occasions tribunals have had to decide whether, for example, girls aged 13 or 14 should be allowed to play alongside boys of the same age in Australian Rules football.<sup>230</sup> The States and Territories also allow for 'special measures' to be taken to meet a need based on age.

The State and Territory laws on age discrimination have been at the centre of a few court cases, but all of these cases have concerned age discrimination in the employment field. Further interpretation of the provisions on age discrimination in the field of goods, facilities and services is still awaited.

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<sup>227</sup> s 85A(c).

<sup>228</sup> This is the case even in relation to age discrimination in the employment sphere.

<sup>229</sup> Anti-Discrimination Act 1992 (NT), s 20(1)(b).

<sup>230</sup> *Taylor v Moorabbin Saints Junior Football League and Football League Victoria Ltd* [2004] VCAT 158, extracted in Rees, Lindsay and Rice, note 205 above, 320-322. The Tribunal held that 13-year-old girls could play alongside their co-evals, but not 14-year-old girls because evidence showed that, on average, the differences between girls and boys in terms of strength, stamina and physique do not become significant until the age of around 14 years and six months.

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The Research presented in this report was supported by:  
A Changing Ageing Partnership (CAP) Research Seed Grant

Cap is a Partnership between:  
Queen's University Belfast (Institute of Governance)  
Age Concern Northern Ireland  
Help the Aged in Northern Ireland  
Workers' Educational Association

Cap's vision is of a strong informed voice capable of challenging attitudes and approaches to ageing.

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Cap is funded by The Atlantic Philanthropies

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