

# Age Related Policies:

## A Global Review on Age Discrimination Legislation

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## **1. Executive Summary**

Age discrimination is an important issue for older people as it can result in unequal treatment or service. Discrimination can be a barrier to necessities of life such as income through employment or social security, access to health service, or accommodations. It can also negatively impact the self worth of an individual. Governments around the world are becoming increasingly aware of this issue, and have been responding through legislation.

The International Federation on Ageing (IFA) recognizes that there is a paucity of research and resources for governments, interest groups and individuals to review various legislative responses to age discrimination from an international perspective. The purpose of this project and is to respond to that gap through contributing a global perspective to an issue usually handled at the national level. The major aim of this paper is to comprehensively review and briefly discuss legislative response to age discrimination from selected countries around the world. It is the intention of the IFA to use this report as a foundation for greater awareness and knowledge sharing among key stakeholders at an international level. In this vein, age discrimination will be featured as an important symposium for the IFA's 9<sup>th</sup> Global Conference on Ageing in September 2008.

The IFA is committed to raising awareness about age discrimination. Age discrimination has been an advocacy area of particular interest for the IFA since 2005, when Age Concern England convened a major International Symposium on age discrimination in London on behalf of the IFA. This symposium was a preliminary event to IFA's 8<sup>th</sup> Global Conference held in Copenhagen in 2006, where issues around age discrimination were discussed. Age Concern England released several important reports responding to the outcomes of this symposium. These reports focused on the experience of age discrimination by region, as well as a full report on the symposium. Interest in generating greater international perspective on age discrimination was partly inspired by that symposium, as lack of such perspective was identified as a major gap in the continuum of understanding policy relating to older people.

This project will be based on eight countries, representative of balanced regional diversity following the United Nations Macro Regions and Components. They include countries from both the developed and developing world. The selected countries will contribute as a base for a central resource of knowledge on age discrimination legislation from many countries.

Each country review will thoroughly consider (where applicable): a documentation of legislation currently in place; the area(s) covered by the legislation; the remedial measures available; and a discussion of the political context in which the legislation was developed. Additionally, a brief summation highlighting some general trends observed across countries will be offered.

This paper is foremost an aggregation and up-to-date review of legislation as it stands for the purpose of reference. Specific recommendations for developing new policies are beyond its scope. It is our belief that advocacy and policy change will be most effective with a strong body of knowledge on policies and practice to support it.

Central to the summary discussion will be a consideration of the position on age discrimination outlined in the Madrid International Plan for Action on Ageing (MIPAA) of 2002, and how the selected countries compare. The MIPAA identifies age discrimination as a barrier to equitable access (notably to income generation and health services), and to full participation as active and valued members society. The release of this report marks the five year anniversary of the MIPAA, an appropriate time for governments, NGOs and other stakeholders to reflect on and evaluate progress to date on policy development relating to age discrimination.

## **2. Abstract: Age Discrimination**

It is a general trend that societies divide themselves into various age cohorts along a stratified division of the life cycle, for the purpose of ascribing rights, rewards and responsibilities. These divisions are often perceived as sensible, even natural, and are embedded into patterns of thinking. While dividing society in terms of age is convenient for this purpose, its simplicity does not reflect the heterogeneous mix of cognitive and physical abilities within each age group and can lead to unfounded stereotypes and discriminatory practices. Age discrimination occurs when age is used as a proxy for determining rights and abilities based on stereotypes (Macinol 2006).

Any age group can experience discrimination. Older people are a large age bracket subjected to particularly high levels of discrimination, much of it institutionalized. Age discrimination toward older people is primarily influenced by the stereotype that an individual's physical and mental capacities are negatively affected through ageing, and younger people are therefore more efficient. Age discrimination can be self-fulfilling and perpetuate its own stereotypes; for

example, cognitive decline may be partly a result of an un-stimulating environment in retirement (Macinol 2006).

Discrimination on grounds of age tends to invoke less public revulsion than acts of racial or gender discrimination as it is considered less likely to be based on malicious intent. While this assertion about intent may be true in certain cases, the effects of discrimination upon the quality of lives of older people are nonetheless significant. This is especially true as age discrimination can go unnoticed, or worse, be considered acceptable behavior.

### **3. Argentina**

Argentina does not have discreet legislation prohibiting age discrimination. The principles of non-discrimination are contained within the provisions of the Constitution of the Republic and these principles were strengthened through amendments in 1994. The first major initiative responding to discrimination was the Anti-Discrimination Law of 1988, however age was not specifically addressed under this law.

The current Argentine government is taking initiatives to eliminate discrimination on multiple fronts, and present government priorities are set around such areas as gender and racial discrimination. The government recently developed a National Action Plan against Discrimination (hereafter the Action Plan) with a corresponding summary of inquiry (entitled Diagnosis and Proposals) that outlines the status of discrimination in Argentina and direction for policy development against all forms of inequality.

Human rights and eliminating discrimination are important to Argentina. After experiencing several decades of political and economic instability, the Argentine government is now working to re-establish a tradition where basic human rights are respected at all levels of society. The present government assumed power in May 2003, and has brought new approaches to the social, economic and cultural life of the country, as well as to human rights. Since 2003 the government has been renewing efforts in social development, particularly aimed at fighting poverty and promoting social inclusion. Also since 2003, the judiciary system has undergone a series of reforms for the purpose of restoring credibility that had been lost due to a perceived lack of independence.

However, the legacy of previous regimes since the 1970s that did not always respect human rights, and the economic crisis of 2000-2001 are still visible. Argentina is still afflicted with some of the societal fragmentation as a result of these historical determinants (CEDAW 2004).

#### **Older people in Argentina**

Approximately 11 percent of Argentines are aged 65 and above. The national median age is 29.7 years old (CIA World Factbook 2007). Demographic trends in Argentina are of an ageing

society, especially in urban centers. Approximately 17% of the population of Buenos Aires, the largest city, is aged 65 and above (6 points higher than the national average).

The economic instability of the 1990s created great societal inequalities with high unemployment and a loss of personal savings for many Argentines. Older people were particularly susceptible to the consequences of losing life savings when currency values plummeted, as they had fewer opportunities to re-enter the workforce to regain what they lost. The economic problems also limited the government's capacity to fund programs to improve conditions for marginalized groups. Beyond the government, there are also comparatively few NGOs advocating for older people in Argentina aside from the Catholic Church.

The Action Plan has noted that discrimination against older people is prevalent in several areas of Argentine society, and that this is a challenge that has yet to be sufficiently addressed (Diagnosis and Proposals 2005). According to the Action Plan, the Argentine paradigm still values youth, and advertising is one area where ageism is still particularly strong. For example, many employment advertisements list inherent job requirements that exclude those over 35 years old. The Action Plan also acknowledges that little is being done to advance further education in older age, or to engage older people as educators for youth.

### **The Constitution**

The Constitution of Argentina was first written in 1853, and was most recently amended in August 1994. The Constitution guarantees a series of civil, social and political rights accompanied by institutional methods to protect these rights. Protection from discrimination is covered, though not in great detail. Combating discrimination of all forms in the workforce is identified as a priority. The Constitutional Reforms of 1994 raised several international treaties on the protection of human rights (for example the International Convention on All forms of Racial Discrimination) to a Constitutional level, which means they carry the same legal weight as a clause of the Constitution. The Argentine Supreme Court has ruled on this issue and has upheld the constitutionality of the international treaties (Diagnosis and Proposals 2005).

Regarding labour and employment, the Constitution guarantees equitable and dignified work environments for all employees, and protection from arbitrary dismissal. Discrimination is prohibited on several grounds, including race, gender and age (Bronstein 2000). Further

elaborated is the principle that all inhabitants are admissible to employment with no other requirement than their ability. This stated right theoretically prescribes against discriminatory hiring and firing practices on any basis, including age. However, the requirement of ability is open-ended, and protection against discriminatory hiring practices on the basis of age could be limited if age is allowed as a justification for inability. There are several regulations specific to age in the workforce contained within the Constitution. However, these regulations are targeted primarily for the younger workers, such as setting minimum working age standards and minimum salaries for young people.

The Constitution provides that any citizen may bring a claim before the courts in the event of any form of discrimination; however, it is not explicitly identified which groups would be protected from discrimination. Protection against discrimination for older people is not mentioned within the Constitution.

### **Discrimination Law**

The Anti-Discrimination Law of 1988 was the first discrimination law passed in Argentina, and provides prison terms of up to three years for anyone who arbitrarily restricts, obstructs or restrains an individual based solely on grounds such as race, religion, gender or physical characteristics. Age is not specifically listed within this group, however in theory a particular interpretation could place age within the rubric of physical characteristics. The Law prohibits discrimination in education, employment and the public sphere for persons with a disability, and it further regulates accessibility standards in the public domain (Argentina Country Report 2006). These laws theoretically provide protection for older people in event of double-discrimination, for example an older person that suffers discrimination because of a disability. However, in these laws age is not specifically identified as a disadvantaged or vulnerable group that requires special legal protection from discrimination.

### **The National Action Plan Against Discrimination**

In summer 2005, The Department of Justice released the Action Plan covering discrimination. Argentina first committed to drafting such a strategy at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held at Durban in September 2001 in South Africa (Diagnosis and Proposals 2005). The Action Plan was developed as a



collaboration between the Argentine Government and the United Nations Development Program and the Commission for Human Rights. A corresponding review of discrimination in Argentina (entitled *Discrimination in Argentina: Diagnosis and Proposals*) was also released in conjunction with the strategy, elaborating upon the evidence gathered from several years of nation-wide consultations with individuals and NGOs.

Though responding to racial discrimination was the initial catalyst for creating a national strategy, the National Action Plan is broad in scope and examines numerous areas where discrimination can occur; including race, gender, sexual identity, political views and age. The *Diagnosis* proposes both immediate actions and long-term development strategies for the legislative, judicial and administrative branches of government to promote equality and inclusion, and prevent discrimination. Key recommendations regarding older people are to design specific labour programs to bring older people into the workforce that recognize their wisdom and experience, as well as reinforce surveillance of geriatric and other institutions for discrimination and abuse.

### **The National Institute Against Discrimination, Xenophobia and Racism**

The National Institute Against Discrimination, Xenophobia and Racism (INADI) is an independent agency of the Government that has been under the auspices of the Ministry of Justice since 2005. This organization was created by law in 1995 as an outcome of the Constitutional reforms of 1994. It is charged with promoting social pluralism and combating discriminatory attitudes. The Institute's objective is to ensure the "right to the nondiscrimination, exclusion, restriction or preference by reasons for sort, race, color, national or ethnic origin, religion, political opinion or another one, age, or any other condition that have the intention to affect or to deteriorate to the complete enjoyment of the rights and fundamental liberties." (Servicio de informacion al ciudadano en bibliotecas populares 2007). The INADI states that ageing is typically associated with disease, loss of respect and lack of productivity, and these images have lead to instances of discrimination. The INADI also recognizes that there is a lack of public policy directed at protecting older people from institutional mistreatment.

The INADI has the capacity to act on behalf of older people in four primary ways: first, to elaborate the principles of non-discrimination as outlined in the National Action Plan; second, to monitor legislative progress regarding discrimination of older people; third, to undertake

investigations in cases of discrimination; and finally, to undertake mediation. (INADI 2007). Additionally, the INADI has some capacity to process complaints of discrimination and in some cases present these cases before the courts on behalf of complainants. It also has the ability to advocate for new legislation in Parliament.

National economic problems have reduced its budget and the INADI does not have the financial ability to track statistics on discrimination (Randall 2001). For this reason, it is difficult for the INADI to identify organizations, employers or individuals that have a track record for discriminatory practices.

### **Future Policy Trends**

Reports on legislation and human rights in Argentina suggest that there is a trend toward improving its rights and discrimination record, however, the legacy of political and economic instability means that the government is largely in a position of re-building. The National Action Plan against Discrimination is a major step in the rebuilding process and contains many recommendations. Government attention is currently focused upon political, racial and gender discrimination, while considerations of age discrimination tend to be discussed in relation to younger people.

## 4. Australia

The primary piece of legislation in Australia is the Age Discrimination Act (ADA), which became law on June 22, 2004. This was Australia's first federal law specifically dedicated to age discrimination, and was acclaimed as the world's first stand-alone legislation that extended beyond discrimination in the workforce to cover such areas as the provision of goods and services (Age Concern England, DaneAge Association *et al.* 2004). The Australian Government stated that the enactment of the ADA was consistent with its broader policy objectives of valuing the skills and contributions of mature workers, retaining them in the labour force for longer periods, and addressing the social and economic consequences of an older demographic. Responding to these objectives has become an increasing priority for the Government, with demographic trends indicating that 25% of Australian citizens will be over 65 by the year 2050 (Sargeant 2006). The Revised Explanatory Memorandum accompanying the Act states that the ADA is "an integral part of a wide range of key government policy priorities to respond to the ageing workforce and population."

There are five primary objectives of the ADA. They are: one, the elimination of discrimination on the grounds of age in employment, education, access, and in the provision of goods, services, facilities and accommodations, and other fields; two, ensuring equality of all people before the law regardless of age; three, to facilitate the provision of special consideration and services to people of certain age (especially the young and old) because of unique circumstances; four, to promote the principles of age equality; and five, to respond to demographic pressures by removing age barriers and fighting stereotypes (ADA 2004). The final two objectives take the Act beyond simple prohibitions on discriminatory practices, to the role of a catalyst for attitudinal change, through raising public awareness about the rights of all citizens and promoting the contributions persons of all ages can make in the community (Hemingway 2004).

Australia is a federal system of government with strong state (provincial) governments. Prior to the enactment of federal legislation, all of the country's states and territories had legislation in place covering various forms of discrimination. By the 1990s, those discrimination acts were amended to include a ban on age discrimination; the first of these amendments was to the Equal Opportunities Act of South Australia in 1990. State-level legislation was an incentive for action at the federal level for two reasons; first, the state legislation on discrimination was strong compared to legislation at the federal level; and second the federal government sought to

provide legislative equality on age discrimination due to inconsistent regulations between States on issues such as compulsory retirement.

### **Administration**

Prior to the enactment of the ADA, there were several pieces of legislation in place at the national level that paid attention to the issue of age discrimination. However, these were limited in scope and focused on very specific instances of age discrimination in employment. The Human Rights and Equal Opportunities Commission Act (HREOC) of 1986 was the first piece of legislation to identify age discrimination as a grounds for complaint, though it did not specifically make it a criminal offense to discriminate on the basis of age, nor did it provide any remedial measures.

Proposals for legislative action first appeared in the 1995 Government National Action Plan. The Action Plan contained proposals for a wide variety of government priorities, among them the possibility of implementing age discrimination legislation and removing compulsory retirement ages in the future (HREOC 2000). While the proposals for major legislation within the Action Plan were not fulfilled until later, several smaller initiatives were taken. The Federal Workplace Relations Act of 1996 contained several clauses prohibiting the termination of employment based on age in some industrial sectors. Mandatory retirement on the basis of age was abolished within the Australian Public Service under the Public Service Act of 1999 (HREOC 2000).

In 1999, HREOC commissioned a report on age discrimination entitled *Age Matters* to identify trends for future policy development, giving great momentum toward enacting major legislation. At this time, HREOC was collecting a growing volume of evidence of legal cases where older people were experiencing age discrimination (HREOC 2000). Much of this evidence was from a series of public inquiries HREOC undertook during the process of drafting *Age Matters* on age discrimination. These inquiries showed that for Australians, finding employment and mandatory retirement were two key issues that created a pressing need for a legislative response to age discrimination (HREOC 2000). The majority of complaints of discrimination focused on recruitment, and specifically in returning to the workforce in older age. There was less of a problem holding employment once in the workforce. The Commission also noted other sources of age discrimination, including public employment agencies being discouraging as employers

themselves, and mandatory driving tests after a certain age, regardless of driving record (HREOC 2000).

The report concluded that within the context of an ageing demographic, it made good economic sense to encourage and maintain older people as engaged in society, both as a market with money to spend, and to maintain a diverse workforce. Proactive measures could be taken such as extending legislation to the fields of education and training in the context of rapid technological advancement in the workforce (HREOC 2000).

Responding to these findings, the HREOC Report recommended that all age determinants be prohibited, so long as there were no legal requirements for those age determinants (HREOC 2000). Australian Human Rights Commissioner Dr. Sev Ozdowski later referred to aged discrimination as the “missing piece of a national patchwork [...] of discrimination laws” (Ozdowski 2001).

The recommendations from both the National Action Plan and *Age Matters* established the case for implementing age discrimination legislation. Both major Australian political parties, the victorious Australian Liberal Party and their primary opponent the Australian Labour Party, incorporated promises for enacting age legislation into their platforms during the 2001 elections (Age Concern England, DaneAge Association *et al.* 2004).

### **Guidelines on Discrimination**

The ADA is structured in a similar manner to other contemporary federal discrimination laws, such as the Australian Disability Discrimination Act of 1992 (Hemingway 2004). A brief summary of what the Act specifically covers is as follows: direct and indirect discrimination against any individual or group on the grounds of their age unlawful, subject to certain limitations and exemptions. The provisions of the Act extend to employment, health and the provisions of services, advertisement and other areas, with provision for other related matters.

The general definition of age discrimination understood in the ADA is when an opportunity is denied to an individual based on chronological age and where age is irrelevant to that individual's ability to take advantage of that opportunity. Age discrimination can be direct or indirect. Direct discrimination refers to an individual treating or proposing to treat another individual in a

manner less favourable than they would treat a different individual of a different age, for reasons relating to that individual's age. Indirect discrimination refers to a condition or requirement that is likely to disadvantage an individual of a particular age, and cannot be demonstrated to be relevant. Further, differential treatment based on age is misused when it serves as a proxy for desired characteristics such as fitness, financial viability, honesty, or skill. These differentiations become discriminatory when there is no evidence of direct correlation between the characteristic and age (HREOC 2000).

The ADA stands in contrast to age regulations in other countries as it extends to areas beyond the employment sector. The ADA uniquely prohibits discrimination in a number of key areas such as education, access to premises, the provision of goods and services, the dispensation of land, facilities, accommodations, the administration of Commonwealth laws and requests for information.

There are a variety of exemptions in the law where age differentiation may be permitted, among them is the provision for positive discrimination for the purpose of ameliorating disadvantage (Elder Law Review 2004). The Act seeks to achieve substantive equality rather than actual equality; meaning that differential treatment may be required to compensate for disadvantage toward an equality of outcomes over equality of method (Hemingway 2004). There are certain exemptions for inherent requirements of the job, which reflect the influence of state and territory regulations that allow similar exemptions (Sargeant 2006). Harassment was not included in the law, as it was determined to be too vague to be adequately covered.

## **Portfolio**

Authority of administration regarding complaints is conferred upon the Human Rights and Equal Opportunities Commission (HREOC). The various functions of HREOC within the ADA range from enforcement of the Act, promoting knowledge and acceptance of the Act and the principles of non-discrimination, undertaking research on the effectiveness of the ADA, advising legislators and examining enactments, and publishing guidelines for avoiding age discrimination. HREOC has the authority to grant exemptions from the law under certain circumstances.

The HREOC Act of 1986 gives any individual or group the right to lodge a complaint alleging unlawful discrimination on behalf of themselves or on behalf of others. Complaints of age discrimination are brought before a HREOC tribunal for resolution. The Commission may make inquiries and try to establish settlements in cases of complaint. When there is evidence that some form of discriminatory practice has occurred but is not covered by law, HREOC may make recommendations to legislators to enact amendments.

The ADA respects the provisions of the diverse State-level legislation that remain in place. No complaint can be lodged with both state and federal jurisdictions; the complainant must decide whether to present their case at the state level, or at the federal level through HREOC (Elder Law Review 2004).

To register a complaint of discrimination where double discrimination may have occurred, (where several factors may have influenced unequal treatment such as age and gender) or when the motives for differential treatment are unclear, the ADA requires demonstration that the dominant reason for differential treatment was age in order to be considered as age discrimination. For example, it is emphasized that discrimination on age is separate from discrimination on disability and that such cases are not to be treated equally. This is a notable difference from other Australian legislation covering forms of discrimination such as gender or race, where no such determination is necessary (Hemingway 2004).

### **Future Policy Trends**

The ADA was well received in Australia. However, certain interest groups took issue with various aspects of the law. For instance employer organizations such as the Australian Chamber of Commerce and Industry, who felt that the regulations would hurt the ability of employers to “get the best from their employees” (Elder Law Review 2004). There were also concerns from the NGO community about the possibilities for exemptions to be taken too far, and used too liberally. Council of the Ageing Australia (COTA) supports more sweeping powers of investigation for HREOC to determine patterns in employer behavior; presently each complaint can only be reviewed on a case by case basis (Bryant 2006).

The legal and academic communities have contributed to the dialogue and debate from various perspectives. Some have been critical of the effects of legislating social change, also noting that

legislation does not counter the inherent problem that the contractual relationship between employer and employee gives the employer a privileged status that is impervious to change through the law. Notwithstanding the ongoing debate even the harshest critics concede that legislation is important in establishing age discrimination as a public concern, and not simply a problem of the individual on a case-basis (Elder Law Review 2004).

The Age Discrimination Act is still very new, and it is too early to make a sweeping appraisal of its effectiveness. Despite the intentions of the law to counter ageist attitudes, campaigners still point out that such attitudes remain prevalent. Mr. Ian Yates of COTA told the BBC in 2006 that “the Act has not worked terribly well [...] partly because it hasn’t received a huge amount of publicity and partly because it’s still very hard to prove that someone didn’t get a job or get training because of their age.” Mr. Yates’ claim that the law hasn’t received a great deal of publicity is supported by the fact that only 78 complaints were filed within the first year of the Act being passed (Bryant 2006). It is reasonable to conclude that there will be a period of transition before the effectiveness of the law can be understood.



## **5. Canada**

Discrimination based on age is prohibited in all jurisdictions in Canada. There is no separate piece of legislation covering age discrimination at the national level, rather prohibition falls alongside other forms of discrimination covered by two pieces of legislation, the Canadian Human Rights Act of 1977 (CHRA), and the Canadian Charter of Rights and Freedoms of 1982 (passed as part of the Canada Act and entrenched as Section 1 of the Constitution of Canada). Both Acts share common fundamental values, but are separate and distinct pieces of legislation. The CHRA is an act of parliament and deals specifically with equality and discrimination. The Charter of Rights and Freedoms is broader in scope and covers many diverse aspects of Canadian society; it is designed to protect all citizens against all programs and activities from all levels of government (Monaghan 2006).

From these two Acts, protection from age-based discrimination has been framed as a matter of human rights, with legal prohibition against age discrimination evolving alongside other areas of discrimination. Protection is extended to both direct and indirect discrimination in all sectors of society regulated by the government, including employment, access to health and services, housing, transit and other areas.

### **Guidelines on Discrimination**

Under the CHRA, prohibited grounds of discrimination are “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.” Certain circumstances of differential treatment based on age are permissible under the CHRA. A subsection contained within CHRA entitled Age Guidelines identifies permissible differential treatment where differentiation in the provision of goods, services or rates resulting in a reduction or absence of fees for youths and older people from the customary charge available to the general public is not considered discrimination.

The Charter states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” As with the Age Guidelines in the CHRA, certain affirmative

action differentiations are permitted. Further, the Charter does not preclude “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups”, including age. A stay was granted in the enforcement of these clauses until 1985, allowing time for discriminatory laws to be amended (Monaghan 2006).

### **Portfolios**

The two Acts are overseen by different agencies within the Canadian system; the judiciary system covers the Charter of Human Rights in the courts, while the executive branch of government (through the federal Parliament) has ultimate responsibility for the CHRA. Furthermore, Canada is a federal system where the provinces also hold strong jurisdictional powers in human rights legislation; each province has its own code that prohibits discrimination within their jurisdiction, including age discrimination. The first legislative bans on age discrimination originated in the provinces, contained within human rights codes. British Columbia was the first to single out age as an unacceptable form of discrimination in 1964.

### **Administration and Enforcement**

Administration of the CHRA falls to the authority of the Department of Justice in the Parliament of Canada, specifically to the Human Rights Commission. The Commission is responsible for investigating and determining settlements of discrimination cases regarding employment and the provision of goods and services in the federal jurisdiction. Additionally, the Commission has the responsibility of monitoring equality measures implemented in the federal jurisdiction. As a part of the Canadian Constitution, administration of the Charter falls to the Canadian judicial branch, with ultimate authority resting with the Supreme Court of Canada. The authority of the Charter extends only to the public sector (Monaghan 2006).

The key recourse for action in instances of discrimination under the CHRA is stated as: “Any individual or group having reasonable grounds to believe discrimination has been committed may file a complaint in acceptable form to the [Human Rights] commission” (International and Intergovernmental Labour Affairs Labour Program 2007). The Commission’s mandate for enforcing regulations stipulates that “cases of non-compliance be resolved through persuasion and the negotiation of written undertakings”, and that court orders are a last resort (Monaghan 2006). In the case of age discrimination, the complaint would go to Human and Youth Rights

Commission (HYRC) which has the power to investigate and implement remedial measures. The Supreme Court of Canada is the ultimate arbiter in all cases involving the Charter of Human Rights (Gunderson 2003).

### **Socio-Economic Environment**

Historically, the government response at the federal level on age discrimination has been set as a matter of human rights evolving within broader equality frameworks. The development of human rights legislation and a charter of freedoms developed in the late 1970s and early 1980s corresponded to broader initiatives in Canadian nation-building that culminated in the Canada Act of 1982 and the development of the Constitution.

The growing diversity of Canada's population in recent decades has brought increased attention to human rights and discrimination (Gunderson 2003). In this context, age discrimination and its implications on Canadian society has developed as an issue of specific importance. Focus has centered primarily upon age discrimination in employment, especially that of mandatory retirement and moreover whether it constitutes unjust dismissal. Mandatory retirement refers to setting parameters of a specific age after which a person's employment status will be terminated without evaluation.

Canada has a growing ageing demographic where older workers are forming an increasing percentage of the Canadian workforce and greater numbers are approaching retirement (Agarwal 2005). This demographic shift has direct implications on the workforce and the overall fiscal situation of the country, from the size of the labour force, the potential tax base, and also the viability of pension systems. For these reasons, mandatory retirement can have a direct impact on the development of the economy.

### **Mandatory Retirement**

In Canada, the relationship between age discrimination and mandatory retirement is highly complex. Mandatory retirement is permissible under certain regulations, but those regulations can be contested in a court (Gunderson 2003). No federal law in Canada specifies a universal retirement age, however, there are laws covering specific fields of employment that dictate a mandatory retirement age (International and Intergovernmental Labour Affairs Labour Program

2007). Although it is not the norm, approximately one-quarter of federally regulated employers have mandatory retirement ages, including the Royal Canadian Mounted Police and the military (Agarwal 2005).

There are essentially two methods by which mandatory retirement is legally permitted. First, in certain provincial jurisdictions, a maximum age under which individuals are exempt from mandatory retirement is determined; this age is often set as 65. Employees older than this age may be legally forced to retire by their employer. In this way, the existence of such an upper age limit may deny protection to the oldest segment of the population who might be the most vulnerable to age discrimination. The second method used in many jurisdictions including the federal outlaws discrimination at any age but allows bona-fide exceptions to age discrimination, notably mandatory retirement. Under the CHRA, for example, mandatory retirement is permitted when: (a) limitation is established by the employer as a bona-fide occupational requirement; (b) if government law dictates an age limit on that employment; or (c) if that person has reached the normal age of retirement in that same position (Agarwal 2005). Part “c” is problematic as the defined normal retirement age may be based on discriminatory stereotypes of ability and performance.

To have a bona-fide occupational requirement of mandatory retirement under the CHRA, permission must be sought from the Human Rights Commission; however the process of obtaining such requirements is not difficult (Agarwal 2005). An amendment to the CHRA in 1998, Bill S-5, shifted the requirements of bona-fide restrictions to the employer to demonstrate that accommodating the complainant would impose some form of hardship upon the organization; for example, there would have to be demonstrable evidence presented that persons of a particular age would be a hazard for the safety of other employees. Additionally, regulations establish that it is not discrimination to have pensions set around age restrictions.

The Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The concept of reasonable limitation is particularly important because of how it relates to mandatory retirement. Case law indicates that some legislation of mandatory retirement does fit under Section 1 of Canadian Charter of Rights and Freedoms, when reasonable limits prescribed by

law can be demonstrably justified (International and Intergovernmental Labour Affairs Labour Program 2007).

### **Age Discrimination and Mandatory Retirement at the Provincial Level**

There are variations in Canada at the provincial level in the definition of mandatory retirement ages. For example, Alberta, Manitoba, Ontario, Prince Edward Island, and the three Canadian Territories consider mandatory retirement as age discrimination unless the mandatory age meets bona-fide and reasonable requirements. There is direct protection offered against age discrimination in Saskatchewan and British Columbia, but only until the age of 65. In May 2007, Newfoundland matched amended its laws to match British Columbia and Saskatchewan by setting the age restriction at 65. Retirement at 65 is not considered discrimination in Nova Scotia if it is uniform for a certain job, however, the Nova Scotia Human Rights Commission will investigate complaints if mandatory retirement is unequal. In New Brunswick and Newfoundland, termination of employment is not discrimination if it is carried out under the terms and conditions of retirement or pension plans, but complaints can be lodged if these terms are not met or if no such plan exists. (International and Intergovernmental Labour Affairs Labour Program 2007).

Ontario is the first province to respond through legislation to the growing issue of mandatory retirement by prohibiting it entirely within its jurisdiction in the 2005 amendment of the Ontario Human Rights Code. This amendment removed the upper limit of 65 years old from the term “age” in the Ontario Human Rights Code. This had the effect of extending protection to all individuals over the age of 18, effectively eliminating the legality of mandatory retirement, although certain limitations still apply (Sargeant 2006). The Minister of Labour the Honourable Chris Bentley stated that “Ending mandatory retirement would allow workers to retire based on lifestyle, circumstances and priorities” (Sargeant 2006).

### **Public Reaction**

An IPSOS-REID pole (2006) shows a large percentage of older Canadians would prefer to gradually reduce their working hours as they approach retirement, for example a transition into part-time capacity, than to work in a full time capacity until the day of retirement. Consultations conducted by the federal government have indicated that few retired persons would choose to

return to work, however, those that do want to re-enter the workplace often face discriminatory barriers: “I send out resumes and never hear back”; “They don’t want us”; “There should be some form of affirmation action for seniors” (HRSDC 2006).

Those persons forced to retire due to age limits can face severe economic hardships if they have not accumulated sufficient savings for retirement (Agarwal 2005). A lack of mature age employment opportunities deprives many persons from further savings and adequate pension contributions, which increase the likelihood of an older person facing financial shortcomings in retirement. Women and minority groups face a particularly high likelihood of living in poverty when forced from the workforce before they are economically positioned to do so, due to an average of shorter pay-in times to the pension system.

### **Future Policy Trends**

There is not a wide selection of studies on the impact of age discrimination on older Canadians. Generally speaking, age discrimination is more difficult to identify unless tied to a concrete plan or action like mandatory retirement. Gunderson believes that it is the complicated relationship between age and productivity, and therefore the necessity of mandatory retirement is very difficult to prove; this methodological challenge limits thorough empirical studies from being conducted.

Initiatives to extend age discrimination legislation vary across Canadian jurisdictions, with individual provinces, notably Ontario in 2005, taking unilateral initiatives on areas like mandatory retirement. Gunderson observes that the long-term outcomes of legislation relating to age discrimination in Canada may be an interesting test-case because of the variations in coverage by jurisdiction (Gunderson 2003).

## **6. Jamaica**

The Jamaican Constitution is the central document concerning human rights and the principles of non-discrimination and equality for all citizens. The primary legal instrument contained within the Constitution is the Charter of Rights. The Charter of 1999 contains clauses that prohibit discrimination and promote human rights, although age is not specifically mentioned. In all areas concerning the rights and the wellbeing of older people, Jamaica takes the approach of encouragement and facilitation over prohibitions under law.

Jamaica is one of many countries that do not presently have stand-alone legislation prohibiting age discrimination and there appears no plans to table such legislation in the immediate future. The National Policy for Senior Citizens of 1997 is the primary document outlining the central priorities for policy development regarding older people. The National Policy identifies areas such as health and social protection as priorities for policy development regarding older people, notably efforts to improve access to health care and financial services. Affirmative action steps have also been taken, the most notable being government action to provide drugs at lower cost to older people than younger citizens (Economic Commission for Latin America and the Caribbean 2004).

### **Older People in Jamaica**

Jamaica's population of approximately 3 million is a comparatively young population with the national median age just over 23 years old. (CIA World Factbook 2007) This contrasts dramatically with other countries such as Canada, Australia, Japan, United Kingdom and the United States, with national median ages of between 37 years (Australia) to 43 years (Japan). Despite the comparatively younger population, it is clear that Jamaican seniors (legally identified as those over 60 years of age) make up a significant percentage of the population, projected to reach 20% by 2020. Government recognition of this demographic dynamic has had a consequence for determining priorities for policy development, with the format of the National Policy for Seniors being the primary example.

## **Human Rights and the Jamaican Constitution**

Discrimination in Jamaica is regarded as a matter of human rights. In 1999 consultations began on a constitutional amendment to introduce the Charter of Rights Act into the Jamaican Constitution. This Charter was designed to be more comprehensive and effective in protecting human rights than the previous Constitutional clauses that covered rights and freedoms. The original provisions for human rights were based upon the format set out in the European Convention on Human Rights and Fundamental Freedoms (Lawyers' Christian Fellowship *et al.* 1999). However, protection offered under these clauses was criticized as insufficient because rights were often stated, but followed by a list of permissible exemptions that reduced their overall effectiveness. Furthermore, the burden of evidence was placed upon the complainant to not only demonstrate that a right had been violated, but also demonstrate that there were no legal exemptions for violations of that right.

The consultations around the development of the new Charter of Rights Act identified the Canadian Human Rights Act as a model, where rights are only limited by a general qualifying statement (Joint Select Committee 1999). The Canadian Human Rights Act has it that rights are subject only to reasonable limitations prescribed by law that can be demonstrably justified in a free and democratic society (Canadian Human Rights Act 1982). A similar statement was incorporated into the Jamaican Charter. Such an inclusion is important as it reverses the burden of proof of permissible exemptions away from the complainant, to the responsibility of the organization seeking to establish a reasonable limitation upon a certain right.

Under the Constitution, any citizen may bring a complaint of discrimination on any grounds before a court of appropriate jurisdiction in Jamaica. This report was unable to secure evidence of whether cases of discrimination based on age had been brought before the courts.

## **National Policy for Senior Citizens**

The National Policy was designed to be a multi-sectoral response to the needs of older Jamaicans, under the auspices of the Ministry of Labour and Social Security. The policy establishes eight guiding principles for future policy and program development: individuality, independence, choice, accessibility, role changes, productive ageing, family care, and dignity. Each of these principles will be mainstreamed into national legislation. The National Policy does



not provide detail on how each goal will be achieved, nor does it outline a timetable to enact legislation. Its primary purpose is to define clear direction for future policy development for the government.

The government has the responsibility of ensuring the rights of senior citizens. Strategies to achieve this goal include the review of existing policy and recommendations for future policy to adjust for omissions, contradictions and discrimination against older people in law. An important domain for establishing equality for all citizens is ensuring universal and equitable access to social insurance and welfare services, as many older Jamaicans do not presently have full access.

The National Policy references the International Principles for Older People as an influence in developing the eight principles. Several of these principles relate to age discrimination. For example, 'independence' contains several clauses that have potential consequences for age discrimination in the workplace: first, that older persons should have "the opportunity to work or to have access to other income generating opportunities"; second, that older people should be able to determine when and at what pace they leave the labour force; and finally, that older people should have access to suitable education and training. Therefore, policies of mandatory retirement on the basis of age could be considered in conflict with the objectives of the Policy, if they were to force a person to leave the workforce at a time or pace that was not of their choosing or deprived them of necessary income generation.

In defining the 'dignity' principle, the National Policy states that older people should be treated fairly regardless of age, gender or racial background. In defining 'participation', it is stated that all older persons should remain integrated in society. Under 'family care', several clauses outline the necessity of access to care, shelter and legal services. Achieving the outcomes of these principles will not be possible if age discrimination is allowed to freely manifest itself.

### **Discrimination and the Workforce**

Age discrimination in employment is identified by many countries as a critical area for legislation. By contrast, a statement in the National Policy (under the economic recommendations) reads that "many seniors continue in productive activities." This statement is not expanded upon in the policy however it seems to indicate that the loss of employment is not a common practice

and not considered the most serious issue for older people. Statistical evidence suggests that Jamaican older workers have comparatively high employment rates for the Caribbean region (Economic Commission for Latin America and the Caribbean 2004).

In the National Policy Jamaica identifies the primary economic problems for older people as inadequate or non-existent financial security, especially from the lack of pensions, augmented by inflation and market instability. This situation may be the primary reason for the present lack of discreet legislation on age discrimination in employment.

### **Future Policy Trends**

The principles of the National Policy for Senior Citizens will be the primary instrument in determining the government agenda on older people in the future. The National Policy is very important for older Jamaicans as it draws attention to their needs. Central to this theme, the Policy calls for a national information and media campaign to raise awareness and promote the importance of the contributions of older people; this will be a critical step to change the attitudes that contribute to discrimination. However, an information campaign alone will not be enough to eliminate ageist practices. Jamaica may require specific legislation covering age discrimination in the future.

## 7. Japan

The Japanese government has taken efforts to respond to age discrimination and has identified the employment sector as a crucial area for taking legislative action. The government has enacted legislation promoting and encouraging the employment and non-discriminatory treatment of older people. Current legislation focuses particularly on two issues; first, eliminating compulsory retirement as a barrier to employment, and second, enabling older Japanese people to work until the minimum age of qualification for pensions.

The “Law to Partially Amend the Law Concerning the Stabilization of Employment of Older Persons” (so amended in 2004) is the key piece of legislation. This Law (hereafter referred to as the Stabilization of Older Persons Law) takes the approach of encouraging employers to adopt non-discriminatory employment practices. It specifically highlights the importance of increasing the national retirement age and promoting the re-entry of retired older workers back into the workforce for the purpose of maintaining the workforce. However, it does not provide a penalty for committing acts of discrimination. This reflects broader economic policy values of persuasion and promotion as a method for changing behavior in the workforce (UN Department for Economic and Social Affairs 2007). In this way, the Japanese Government places important responsibility upon employers to initiate age-friendly practices.

In addition to the Stabilization of Older Persons Law, there are certain regulations in Japan that focus on particular forms of differential treatment based on age within a particular sector, such as access to housing through The Act for the Stable Living of the Elderly (2001).

### **Trends in Legislative on Older People**

Alleviating age barriers by method of guidance and encouragement over penalty is a long-standing policy of the Japanese government (Kitaura, 2003). This trend began with the Employment Measures Promotion Act of 1966, which was replaced by the Law Concerning the Stabilization of Employment of Older Persons in 1971 (now the Stabilization of Older Persons Law). This approach encourages practical and voluntary changes to be made by employers.

## **Population Demographics in Japan**

Nearly 22% of Japan's population is aged 65 or older, and this number may increase to up to 40% by 2055 according to government projections (Williamson and Higo 2007). The Japanese people as a nation enjoy great longevity with men expect to live on average to 79 years old, and women to 85 years old (Associated Press 2007).

These figures place Japan as one of the oldest societies in the world. Responding to the social and economic consequences of the ageing demographic is a high priority for the national government. Rapid ageing and a declining birthrate have raised concerns that future generations will not generate enough tax revenue to support older generations. Some estimates project the worker-to-retiree ratio at almost one to one by 2050.

A Government White Paper from 2006 (Asahi Shimbun 2007) expressed concern that some current hiring practices excluded older workers, and recommended that employers be more willing to hire older people that wanted to work. This report calculated 9% of people aged 60 to 69 were unemployed but were interested in working but, 2.6 points higher than the national average (Asahi Shimbun 2007) This figure suggests that a significant number of potential workers faced barriers that prevented their participation in the workforce.

These demographic forecasts and concern for the impact it will have on Japanese society are well documented (Hogg 2007). For this reason ageing issues, specifically compulsory retirement and its relation to the growing income gap between older people in the workforce and those not employed, played a central role in political discourse running up to the federal parliamentary elections of June 2007 (Hogg 2007).

## **Portfolio**

The Government Ministry responsible for overseeing laws relating to older people in Japan is the Ministry of Health, Labour and Welfare. This Ministry is also responsible for drafting and proposing future regulations concerning the status and needs of older people.

Various divisions within the Ministry handle different laws. For the case of the Stabilization of Older Persons Law, jurisdiction is given to the Elderly Worker's Affairs Division of the

Employment Measures for the Elderly and Persons with Disabilities Department. Within this department, the Japan Organization for Employment of Elderly and Persons with Disabilities is the body charged with such activities as providing re-employment services and advice to older people, and consultation services to employers.

### **The “Law to Partially Amend the Law Concerning the Stabilization of Employment of Older Persons”**

The stated purpose of the Stabilization of Older Persons Law is to promote the secure and stable employment of older persons in the workforce by raising the national retirement age, establishing continuous employment strategies, and promoting and assisting the re-employment of older workers into the work force. The Law outlines in detail the responsibilities of employers, employees and government in ensuring a diverse and productive workforce where older workers are accepted. Voluntary initiatives are recommended for both employers and employees.

The Stabilization of Older Persons Law state that older workers themselves must voluntarily develop and improve their skills and contributions. The law emphasizes the personal responsibility of workers to maintain their health to enable effective contributions throughout the life cycle. Employees are further encouraged to undertake long-term occupational planning. Concurrently, employers are encouraged to improve working conditions, endeavor to employ older workers, and provide adequate training to older workers to facilitate their employment prospects. For example, the Stabilization Law encourages employers to appoint a special resource person to coordinate the development of appropriate facilities and conditions that promote secure working environments for older people. An important role in this appointment is to ensure that there is sufficient vocational training and guidance accessible to older workers.

The role of the state under the Stabilization Law is to assist employers and employees in achieving these objectives. For example, the government created the Silver Human Resource Centre network, a government-run corporation with the purpose of assisting and promoting the participation of older people in the work force (Weiss, Bass et al. 2005).

In addition, the government may provide incentives to encourage the employment of older people. For example, the 2004 amendments to the Stabilization Law included provisions for

direct government subsidies to assist employers to employ older workers, such as free consultations or financial assistance to new businesses set up by older people (Williamson and Higo 2007).

### **Compulsory Retirement**

In addition to defining the roles of government, employers and employees in ensuring active participation in the labour force, the Stabilization Law contains provisions covering compulsory retirement. The Law stipulates that where an employer institutes a mandatory retirement age, that age shall be no lower than 60. The employer is then obligated to raise the compulsory retirement age incrementally to 65 years old by March 31, 2013.

### **Continuous Employment**

Under the Stabilization Law, employers setting a mandatory retirement age under 65 must undertake one of the following steps to ensure employees are able to work until at least the state pension age of 65: (1) raise the retirement age; (2) eliminate mandatory retirement; or (3) initiate a continuous employment strategy (whereby the employer secures the employment of older persons that wish to remain employed after reaching the mandatory retirement age). In 2004 approximately 70% of employers in Japan had implemented programs to support older workers in employment up to at least the state pension age (Wijers-Hasegawa 2002). Exemptions are permitted for employers that have positions denoted as difficult for older people to fulfill; however these exemptions must be authorized by the Ministry of Health, Labour and Welfare (MHLW).

### **Administration**

Failure to comply with regulations on mandatory retirement is not a federal offense. In instances where the mandatory retirement is set below the specified minimum age, Article 10 provides that the MHLW may give guidance to an employer in violation of the Act. If after the consultation, the employer continues to violate the age guidelines of the Stabilization of Older Persons Law, the MHLW will then recommend to the employer that the regulations be followed. In this instance, the MHLW may also stipulate that the employer is to make an annual report on efforts to secure or retain the employment of older workers; failure to issue such a report would result in fines.

If dismissed from their position, the dismissed employee may request the issue of a document outlining re-employment conditions (including work history and job skills), along with support measures available for re-employment from their employer. The employer is obliged to comply.

### **Age Discrimination beyond the workforce**

The link between age discrimination and the employment sector, especially mandatory retirement, is the central government priority. However, there are other areas where older people can face discrimination, and in some instances there are general laws that indirectly counter these instances of discrimination. The Act for the Stable Living of the Elderly was passed in 2001 to help counteract some of the problems that older Japanese find in the housing market (UN Department for Economic and Social Affairs 2007)

The importance of this law can be seen from studies such as those conducted by Professor Masayuki Nakagawa, who found that discrimination against older people in housing existed on a statistically significant level. Nakagawa's research shows that older rental-housing seekers may not receive the same level of information from real-estate agents about available units in certain neighbourhoods as their younger counterparts (Nakagawa 2003). As with the Law Concerning the Stabilization of Employment of Older Persons, this Act focuses on promotion over penalty by encouraging land-lords and developers to rent or advertise to older people.

### **Future Policy Trends**

There is evidence that the promotional measures of the Stabilization Law are having an impact on the Japanese workforce. In recent years some employers in Japan have been taking initiative in hiring older people and targeting them in employment campaigns. For example, a struggling electrical appliance factory in 2003 overcame a local labour shortage and returned to prosperity by specifically hiring unemployed retirees interested in returning to the workforce (The Asahi Shimbun 2003). The precedent set by this company and others is the model that Japanese law makers believe will be the most efficient method of breaking down discriminatory barriers to the full participation of older people in the workforce.

However, this affirmative action model has not been universally employed, and ageist attitudes persist. Government statistics from 2004 indicate that that only about 30% of Japanese companies consider all employment applications up to the age of 65 (Wijers-Hasegawa 2002).

Hiroshi Shibata of Obirin University has conducted studies indicating that ageist attitudes continue to be prevalent. “Ageism [...] is largely due to a lack of social education.” he argues. Eliminating stereotypes and promoting the acceptance and contributions of older people will require continued education to overcoming discriminatory attitudes (Wijers-Hasegawa 2002).



## **8. South Africa**

The Constitution of the Republic of South Africa (1996) is the cornerstone for all legislation covering all forms of discrimination. The Constitution contains a Bill of Rights, which enshrines the principles of equality for all South African citizens. The Bill of Rights requires government to build a legal infrastructure respecting human rights and freedoms. Respecting its constitutional obligations, the South African government has introduced legislation responding to various forms of discrimination since the collapse of the Apartheid government in 1994. Many non-discrimination Acts in South Africa address multiple variants of discrimination such as race, gender and age within the same law. The two central laws on discrimination that affect older people are the Employment Equity Act (1998) and the Promotion of Equality and Prevention of Unfair Discrimination Act (2000). These Acts aim to provide for and promote environments free of all forms of discriminatory practice.

There are also certain laws that target a specific sphere where discrimination may occur. For example, The Rental Housing Act (1999) protects individuals from unfair evictions (on the grounds of their age, race or other characteristic) and provides a tribunal to handle complaints. The South African government has also made moves to ensure equality by enacting a series of new laws that standardize mechanisms of the provision of services. For example, the Social Assistance Act (2004) is designed to standardize access to and provision of social assistance to all people. The Promotion of Administrative Justice Act (2000) guarantees administrative action affecting an individual will be both respectful of that individual's rights, and be procedurally fair. Individuals may also bring a complaint to a court of law if they feel that administrative action was unfair.

The Aged Person's Act (2006) is the one piece of legislation where the rights of older people are specifically highlighted distinct from the rights of all disadvantaged groups. The Aged Person's Act is broad, and covers many areas important to older people however equality rights are emphasized.

### **The Legacy of Apartheid on Current Equality Legislation**

Legislation in South Africa as it pertains to discrimination has developed in a unique way, reflecting the country's historical development, especially the dramatic societal upheaval of the

collapse of the apartheid system in the early 1990s. The South African history of colonialism, patriarchy and apartheid required that special legislative attention be given to eradicate social and economic inequalities that had developed and become institutionalized in the South African system.

The pre-ambble for the Employment Equity Act (1998) aptly summarizes the position taken by the government regarding the challenges for developing South African legislation on equality and non-discrimination. The text reads that the impact of apartheid and other discriminatory laws and practices in South Africa have led to disparities in many aspects of South African life (for example employment, education, and income) and that these disparities cannot be overcome by simply repealing discriminatory Acts. Therefore, the state must pass legislation that ensures the principles of equality to eliminate unfair discrimination and fulfill the obligations of a just and democratic state.

### **Older people in South Africa**

The term older person in South Africa presently refers to males 63 and over, and females 60 and over, though this difference will soon change. The difference was justified by the government as “fair” discrimination as women do not have the same opportunities as men, and was established primarily for the purpose of access to means-tested pensions (Lindgren 2007). However, the Department of Social Development was successfully challenged on this issue in the courts in 2007, and by 2010, parity between the sexes will be established (Ferreira 2008).

Older people face compounding challenges to differential treatment in access to services. For example, they may have less access to income generation. Concurrently, HIV and AIDS have taken a toll on younger generations and forced older people to take on additional responsibilities of Carers for their families and communities. Ensuring equality of access to health and social services for older people is a challenge where policy development in South Africa has often placed a focus on younger generations, particularly the very young (McIntyre 2004).

### **The Older Persons Act**

The primary South African law for older people is the Older Persons Act of 2006. This Act replaces the earlier Aged Persons Act (1967), although it differs radically from this Act, and is far

more progressive in nature (Ferreira 2008). The Older Persons Act is the primary document where the rights of older South Africans are distinct from the rights of all disadvantaged groups. The Act is very broad in scope, however ensuring commitment of all organs of the State to the protection and promotion of the rights of older people is one of its important functions. General rights from the Constitution that are emphasized in this Act as important for older people are the right of participation in the community, in inter-generational programs, associations for older persons, activities that enhance income generation, as well as access to appropriate living environments and opportunities that maximize physical, social, mental and physical health.

### **The Constitution (Bill of Rights)**

The Constitution of South Africa contains the Bill of Rights. It enshrines and affirms the democratic values of equality, dignity and freedom for all people, and binds the state to respect, promote and fulfill these rights. The Bill of Rights sets everyone as equal before the law. The State may not unfairly discriminate (either directly or indirectly) on grounds of age (one among many grounds); private individuals may not discriminate on grounds of age either. The state is bound to enact national legislation to prevent or prohibit unfair discrimination. This obligation was met with the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act in 2000, discussed below.

In addition, the Bill of Rights outlines very specific principles of equality which are then translated into discreet legislation. For example, the Bill of Rights states that everyone has a right to basic education, including adult basic education, or that no one can be legally evicted from his or her home without a court order. All other legislation must not infringe on any right presented in the Constitution. Under the Bill of Rights, any individual that believes their rights have been infringed upon may bring such an allegation to a competent court of law.

### **The Promotion of Equality and Prevention of Unfair Discrimination Act**

The South African Government, responding to the necessity to counteract discrimination and in recognition of its responsibility outlined in the Constitution, established the Promotion of Equality and Prevention of Unfair Discrimination Act (2000). This Act was designed to facilitate

the transition into a society respecting the principles of equality, and helping fulfill the requirements of the Constitution to enact equality legislation.

Under the terms of this Act, neither the state nor an individual may discriminate against any person, in sectors such as employment, education, service provision, housing, and insurance. Under this Act, courts at all levels are the arbiters of violations of this Act for their jurisdictions; the Supreme Court thereby having final jurisdiction. The court, seeing fit to do so, will determine a settlement and may award a payment of damages to the complainant.

This Act further emphasizes the responsibilities of individuals to practice and promote equality in the public domain, and the social contract for all organizations and community structures to promote equality and non-discrimination.

### **The Employment Equity Act**

The Employment Equity Act (1998) requires all employers to promote equality in the workplace by eliminating discriminatory practices and policies. Both direct and indirect discrimination on any grounds is forbidden in the workplace. Harassment is identified as an act of discrimination and is also forbidden. Certain instances of differential treatments for inherent requirements of the job are permitted however, permissible inherent requirements of the job are not elaborated in this Act. Additionally, affirmative action strategies are encouraged.

Resolutions to complaints of discrimination or unfair treatment may be referred to the Commission for Conciliation, Mediation and Arbitration, (a labour tribunal set up under the Labour Relations Act of 1995) although there must be a reasonable attempt to resolve the dispute between the parties before referral. The Act also establishes a Commission for Employment Equity, with a mandate to hold public forums, submit reports and advise the Minister on the effectiveness of legislation on equality in the workplace.

Affirmative action and employment equity plans are requirements by law for employers under the Employment Equity Act. These plans must be formulated to meet a series of guidelines outlined in the Act, be presented to appropriate authorities and be followed up with a yearly status report. In addition, appropriate employment records must be kept to demonstrate affirmative action strategies.

## **Labour Law**

The Labour Relations Act (1995) is the primary law regulating the responsibilities of and relationship between employers and employees. This law stipulates that an employee may be dismissed from their position only on reasonable and procedurally fair grounds based only upon their performance and capacity. Mandatory retirement is permissible however. In the language of the Labour Relations Act a “dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.” Dismissing employees over a certain age has been identified by the courts as an acceptable business practice. Alex Walt argues that high unemployment rates among younger people have in part contributed to the court’s decision in this area (Walt 2004).

## **Housing Law**

Access to housing is an important consideration for older people. South African law provides guidelines against discriminatory housing practices, especially against the denial of access to older people to certain residences. The Rental Housing Act (1998) is the primary law on discrimination in housing.

Under the terms of this Act, it is the responsibility of government to promote a progressive market that produces appropriate and affordable housing for all people especially those presently or historically disadvantaged by discrimination and inequality, such as the poor, the elderly and disadvantaged racial groups. The government must accomplish this through partnership with the private sector; by improving market conditions that encourage development for the disadvantaged, as well as providing suitable infrastructure (such as adequate public transport). The government is further responsible for determining and enforcing adequate housing standards. A landlord may not discriminate against a tenant on a variety of grounds including age in advertising a lease, or in the duration of that lease. Unfair treatment concerning housing may be presented to a Housing Tribunal. The Tribunal will be responsible for mediating a settlement between parties, including determining financial penalty.

## **Future Policy Trends**

South African legislation generally focuses on the promotion of the rights of older people, particularly the right to equal access. Eliminating discriminatory barriers is crucial to ensuring that older people have access to services and opportunities to participate.

The centrality of affirmative action strategies for disadvantaged groups plays an important role in South African legislation on discrimination. The preamble to the Constitution states the principle objective “to heal the divisions of the past.” Various disadvantaged groups (which may include older people) may be given special protection in light of the country’s past (Walt 2004). However, the legal challenge on the affirmative action such as the definitions of older persons, and a growing number of court cases on mandatory retirement demonstrates the difficulties of balancing affirmative action with equality.

## **9. United Kingdom**

The United Kingdom has the most recently enacted age discrimination legislation of the countries included in this report. On October 1, 2006, the Employment Equality (Age) Regulations became law. These Regulations were a fulfillment of the United Kingdom's commitments under the European Union's Framework Equality in Employment Directive of 2000 requiring member-states to introduce legislation outlawing age discrimination in the workplace. In doing so, the "last form of legal discrimination"; so identified by Age Concern England in 2004, was legally prohibited in the United Kingdom (BBC News 2004). The Employment Equality Regulations outlaw both direct and indirect forms of discrimination in employment (and higher education) against people of all ages, as well as harassment. Unjustified mandatory retirement is prohibited under the age of 65.

### **Historical Origins of Legislation**

The introduction of legislation came at a time of increasing recognition of the influence that a rapidly ageing population in the United Kingdom would have on the economy. The Office for National Statistics recently calculated that by 2020, over one third of Britain's labour force would be over 50 in age. This reality suggested that encouraging and supporting older people to work is necessary for maintaining the workforce (Department for Business Enterprise & Regulatory Reform 2006).

Debate on appropriate government response on age discrimination began in the 1990s. Throughout this decade, several back-bench Members of Parliament (MPs) in the British Parliament introduced bills to outlaw age discrimination. The MPs were unsuccessful in their efforts, although the MPs were most interested in raising awareness of the issue (O'Dempsey, Jolly, & Harrop 2006). British governments traditionally rejected introducing laws on age discrimination, as many politicians felt uncomfortable legislating business practices upon employers in this area (Sargeant 2006).

The now-governing Labour Party initially maintained this laissez-faire position regarding regulations in the employment sector, however their position changed in the election platform in 1997. At the outset there was not consensus within the party on the appropriate form of legislation (Sargeant 2006).

The change in government position on this issue reflected growing realization that age discrimination in employment was a problem (Sargeant 2006). There was a growing body of evidence demonstrating that many older workers were facing discrimination in the workforce. Research from government consultations, the work of NGOs and reports in the media highlighted several key barriers facing older workers, including re-entry to the workforce in older age, pressures to leave the workforce at an early age, and discriminatory job advertisements.

From 1998 onward, the government published several reports on the status of discrimination in the workforce. Notable among these reports was the Code of Practice for Age Diversity in Employment in 1999. This was a non-binding strategy encouraging age-friendly practices among British employers. None of the government documents were legally binding, and the Code of Practice is particularly representative of the position of not enacting strict regulations on employment that persisted in government (Sargeant 2006). However, the final catalyst for action on the continuum toward legislation came from the European Union, through the European Union's Employment Framework Directive of 2000

### **The European Union's Framework Equality in Employment Directive**

The European Union's (EU) Employment Framework Directive (2000) was the first EU legislation designed to extend the principles of equality to individuals regardless of age, disability, or sexual orientation in employment and the workplace, as well as to vocational assistance and membership in employment-related organizations. (The federal government adopted measures to meet the disability and sexual orientation requirements separately). While European institutions had long-standing legislation against discrimination on other forms such as gender, extending European legislation to cover forms of unequal treatment on issues like age and disability was first considered in the mid-nineties.

The Treaty of Amsterdam of 1997 (amending the Treaty on European Union) contained the first EU provisions to establish a process for enacting age discrimination legislation. The treaty enabled the European Council, a tribunal body with the role of determining common strategies among member-states, to take action to combat age discrimination. The language on age discrimination from the Treaty of Amsterdam directly influenced the Employment Framework Directive established by the European Council in 1999. The Directive received unanimous



support from member-states by the year 2000. As a member of the European Union, the United Kingdom participated in drafting the Directive, and is also bound by its clauses.

The text of the Directive was drafted to serve as a template for legislation at the member-state level. It established minimum standards for EU members to meet through their own legislation from agreed-upon understandings of discrimination in employment. Indeed, much of the language from the EU Directive was directly transposed into the Employment Equality Regulations. The EU Directive does not qualify the term age therefore it can be applied to anyone (Age Concern England, *International Symposium on Age Discrimination*, 2005).

The framework established within the general provisions of the EU Directive covers age discrimination in employment, as this was identified as the most important area. Both direct and indirect forms of discrimination (and forms of harassment) are prohibited. Direct discrimination refers to an act of treating one group or individual less-favourably from another; indirect discrimination refers to a seemingly neutral policy or action resulting in disadvantage of one group or individual from another. The Directive establishes a provision annulling any law that runs contrary to the principles of the statement. The Directive also allows for exemptions for differential treatment in justifiable cases; the UK liberally adopted many of these exemptions (Age Concern England, *International Symposium on Age Discrimination*, 2005).

Member-states were required to implement age-equality regulations by December 2003, and could be granted a three year extension on that deadline provided that a progress report was made to the European Commission each of those additional years. The UK chose the latter alternative, passing legislation into law in 2006.

### **Guidelines on Discrimination**

The Employment Equality Regulations' general pre-ambles sets out the definition of discrimination, resembling the definitions established in the EU Framework. Both direct and indirect discrimination are prohibited, as are acts of unfavourable treatment through harassment based on age, instructing another to commit an act of discrimination, or victimization of an individual that has made a claim of discrimination.

The Employment Equality Regulations extend to employment and vocational training; there are an extensive variety of fields covered, including contract workers, partnerships, trade organizations. Specific occupations, such as advocates and the police, are given special consideration within the law.

The Employment Equality Regulations allow differential treatment among age groups for demonstrable occupational requirements, where “possessing a characteristic related to age is a genuine and determining occupational requirement” (Employment Equality Regulations 2006). Establishing an employment practice of differential treatment on the basis of age must demonstrate that the benefits of such a practice significantly outweigh the importance of prohibiting discrimination, and must be the only reasonable choice available to the employer. Some examples where age differentiation may be permissible include cases of statutory authority, national security, positive action, retirement, minimum wage, life insurance, and provision of certain benefits based on length of service.

Mandatory retirement is permissible where there are legitimate occupational requirements related to age. The default retirement age is set at 65; employers are not required to justify mandatory retirement ages at or above 65, and need to demonstrate occupational necessity to have a retirement age below 65. The mandatory retirement age clause will be reviewed in 2011 (O’Dempsey, Jolly, & Harrop 2006).

Economist Malcolm Sargeant argues that prohibitions on age discrimination are more limited than for other pieces of legislation against discrimination in the United Kingdom, such as racial discrimination. For the Age Regulations, acts of direct discrimination based on age are prohibited based only “on the grounds of an individual’s age” while text from the Racial discrimination Act reads that discrimination are prohibited “on the grounds of race” This means protection is only extended to the individual, and may exclude discrimination on the basis of someone else’s age: for example discrimination faced by association with a person of a particular age may not be covered (Sargeant 2006).

## **Administration and Enforcement**

Any action outlined as unlawful under the Employment Equality Regulations may be brought as a complaint before an employment tribunal. This employment tribunal is established by the Department for Work and Pensions. Exceptions to this procedure occur in cases of discrimination within higher educational institutions and related instances, where a claimant may bring civil proceedings in the courts.

Remedial measures from the tribunal are three-fold; first, the employment tribunal (seeing it fit to do so) issues a statement of the rights of the complainant and the respondent; second, it produces an order requiring the respondent to pay the complainant suitable compensation; and third it produces guidelines for the respondent to follow in order to avert future acts of discrimination. If the recommendations and guidelines are not followed and discrimination continues, the tribunal may increase the level of compensation.

When evidence of discrimination has been presented, burden of proof rests on the respondent to demonstrate that no discrimination was committed or that he or she is not legally responsible. In selecting comparing groups to determine whether indirect discrimination has occurred, it must be shown before the tribunal that all “relevant circumstances in the one case (the complainant) are the same, or not materially different, in the other (the comparator)”. A complainant must therefore demonstrate two things: that they suffered disadvantage, and that disadvantage did not occur for the comparator. This means a double challenge of correctly defining two discernable age groups; and how one is at a disadvantage (Sargeant 2006).

## **Discrimination Outside the Workforce**

There are a number of areas where age discrimination occurs but is not covered by Employment Equality Regulations. Age Concern England has noted several examples. These include clinical cancer trials that exclude older people, despite the fact that one third of cancers occur in adults over 75. Services in hospitals often used by older people, such as podiatry, receive low funding priority, and older people may experience longer waiting for treatment than younger people. There are instances of age discrimination in insurance; travelers over the age of 75 will find that insurance is not available when booking train tickets. Further, volunteer driver positions for charitable organizations are limited due to problems with insuring older drivers (Baker 2007).

Other areas include discriminatory advertising campaigns and access to public spaces. Counteracting these and other actions of discrimination that fall outside the fields of employment and vocational training will require amendments to expand the Equality Regulations beyond the employment sector.

### **Socio-economic Environment**

The UK was one of the last EU members to enact laws in accordance with the EU Directive, following the three year time extension. The regulations were not implemented until 2006 in keeping with broader government policy of not implementing more than two pieces of employment regulation per year (Sargeant 2006). In the Complimentary Memorandum to the Regulations (2006), the government outlined three principles upon which the clauses of the Employment Equality Regulations were based: first, a light-touch implementation that balances the rights of employees without greatly interfering with normal business practices; second, the Act was drafted to maintain reasonable consistency with legislation on other forms of discrimination; and third, the regulations were produced after extensive consultation with stakeholders.

The value of age equality and the contributions older workers make are well accepted by Britons, and considered advantageous by many in the business community. There was a growing body of evidence of cases of discrimination against older people in the workplace, and for this reason legislation became the most appropriate response to ensure older workers were properly valued in the workforce. The move to legislation received support in the business community: “One reason that Japan and Singapore are so much more focused on keeping their ageing employees on the payroll is due to government legislation and incentive programs designed to promote such activities [...]” said Jeffrey A. Joerres, Chairman and CEO of Manpower Inc (Amble, ‘Wandering into a demographic disaster’ 2007).

The coming of age discrimination law in the United Kingdom caused some trepidation in certain sectors of the business community. An annual survey of small and medium sized employers (SME) in Britain, conducted by AXA Insurance in 2005, found that up to two-thirds of Britain’s SMEs could face costly litigation if they did not review their internal policies on older employees. While government surveys in 2006 found that in general the business community was well aware and prepared for the enactment of the legislation, the AXA survey found that four in ten SMEs

were unaware of the forth-coming legislation, and of the remaining, four in ten were not altering their business practices to accommodate the requirements of the Employment Equality Legislation (Amble 'SMEs vulnerable to ageism claims' 2005). The government surveys acknowledged that smaller businesses were less prepared than other employers (Age Positive 2007).

Some concern was also expressed from within the law community, as law societies foresaw difficulties for employers. "We are concerned there is such a short lead in time for this major piece of legislation" said Kevin Martin, President of the Law Society (England and Wales) a year prior to the laws inception. Lawyers were concerned that the mechanisms of the law would not be sufficiently clear about how to process age requests, particularly in cases of those desiring to work beyond the age of 65. "I suspect that every single applicant to an employment tribunal will start to have age discrimination as a part of it" said Caroline Carter, a partner with an employment law firm in Ashurst (Amble 'Age discrimination rules are unworkable' 2005). As the legislation has only been in place for a little over one year, it is too early to reach a definite response as to the validity of such a concern.

Union groups in the UK argue that age discrimination is the most prevalent form of discrimination in the workplace (BBC News 2005). Sam Mercer, director of Employers Forum on Age (EFA) "As our research has confirmed, ageism is endemic in our society and rife in our workplaces. These attitudes need to be challenged so that they become as unacceptable as sexism or racism. [...] We all have a lot of work to do to ensure ageism becomes a thing of the past. Now that the legislation is here, both employers and individuals need to catch up fast on what it means for them and their workplace" (Management Issues 2006). Research by the Ludic Group, chaired by Professor Patrick Humphreys, Head of the Institute on Social Psychology at the London School of Economics, found that ageism is considered more acceptable than other forms of discrimination. The research suggests that legislation alone will not satisfy the problems in Britain's workplaces because people do not take age discrimination as seriously as they do prejudices based on race or religion. Thus, grass-roots cultural change is needed in attitude to compliment legislation (Amble 'Legislation 'Not the Answer to Ageism' 2005).

## **Future Policy Trends**

The future of the Employment Equality Regulations as a separate piece of legislation may not be a long-term outcome. The government is already in consultation toward the introduction of a Single Equality Bill, designed to unify the nine existing discrimination Acts (this includes Acts on racial and gender discrimination) into one. The government hopes such a move will simplify the system and be far more effective in eliminating discrimination of all kinds (Age Positive 2007). However, a new law would not necessarily expand coverage on age discrimination. No timetable has been announced for the Single Equality Bill, though the 2005 Labour Party Manifesto committed to moving forward toward a single equality bill within the lifetime of that parliament (O'Dempsey, Jolly, and Harrop 2006). Changes or expansions to age discrimination legislation could also come from the European Commission.

## **10. The United States of America**

The United States of America (United States) was the first of the countries included in this study to introduce legislation on age discrimination. There are two central pieces of legislation at the federal level that offer guidelines and recourse on age discrimination. The first central piece of legislation enacted at the federal level was the Age Discrimination in Employment Act (ADEA) of 1967, covering employment. The second major initiative was the Age Discrimination Act (ADA) of 1975, covering the provision of services by agencies that receive federal funding. Additionally, the Older Americans Act (OAA - 1965) also offers legal assistance to older people in cases of age discrimination.

The ADEA was amended several times through corresponding pieces of legislation. This includes the Age Discrimination Claims Assistance Act of 1988, the Older Workers Benefit Protection Act of 1990, and the Workforce Investment Act of 1998. These amending Acts offer legal guidelines that reinforce clauses of the ADEA, for example by simplifying procedures.

The principles of non-discrimination for older people were first expressed in the Older Americans Act. The OAA is a broad policy document that outlines the principles of non-discrimination without providing specific legislative measures in this area. The principles of this Act were incorporated into the framework of the ADEA. More recently, an amendment to the Civil Rights Act of 1964 (1991) further emphasize the principles of equality and non-discrimination for older people. However, neither the ADA nor the ADEA contains specific guidelines or provisions of enforcement in cases of age discrimination.

Outside employment and the funding of organizations, certain other government sectors consider discrimination in broad terms. For example, the federal Department of Housing and Urban Development prohibits discrimination of all forms in renting or buying living space, though age is not specifically identified. Furthermore, each of the fifty States has discrimination legislation for their own jurisdiction, with understandable variety. The legal processes in each State are independent of federal regulations, and are administered by state authorities.

### **Age Discrimination in Employment Act (ADEA)**

The stated purpose of the ADEA is “to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment”. Originally the ADEA only covered programs and activities that received federal financial assistance (Age Concern England, DaneAge Association, et al. 2004). Amendments to date have extended regulation to cover all private employers with 20 or more employees that operate for 20 or more weeks per year, as well as all government installations (Neumark 1997). The various entities that are subject to the Act are employers, employment agencies, and labour organizations.

The ADEA does not provide full prohibition against all differential treatment based on age in the workplace (Age Concern England, DaneAge Association, et al. 2004). For example, employment seniority systems are permissible. The ADEA only covers the employed, aged 40 and above (Sargeant 2006) Amendments in 1986 eliminated previous upper age limits, and with it, mandatory retirement (except in some limited exceptions) (Neumark 1997).

The Older Workers Benefit Protection Act of 1990 amended the ADEA by strengthening worker-benefit frameworks. One important initiative of the Older Workers Benefit Protection Act was to ensure that benefit retirement packages be offered to all people over a certain age. In effect, this clause removes the incentive for employers to pressure early retirement packages upon people who have not reached pension age of 65 (Neumark 1997).

### **Age Discrimination Act (ADA)**

The ADA of 1975 prohibits discrimination on the basis of age by agencies that undertake programs and activities that receive federal monies, including state and local authorities (United States Department of Education 2007). Covered under this Act are government departments, agencies and other instruments of government, as well as corporations, partnerships and organizations involved in providing primary services such as education, health care, housing, social service, parks and recreation. Programs that provide direct assistance (direct money transfers) such as the provision of social security, are not covered by this Act (Age Concern England, DaneAge Association, et al. 2004).



The ADA establishes general regulations and standards for the practice of non-discrimination that guide all agencies and organizations that receive funding, as well as guidelines that all federal departments must follow in awarding money to organizations. These guidelines define both prohibited and permissible forms of age differentiation (Age Concern England, DaneAge Association, et al. 2004).

### **Portfolios**

The ADEA is presently under the auspices of Equal Employment Opportunity Commission (EEOC). Prior to the Amendment of 1978, the ADEA was overseen by the Department of Labour. Neumark argues that this shift increased the reach of the ADEA, as the EEOC had greater resources to devote to cases of discrimination (Neumark 1997). The ADA is under the authority of the United States Department for Health and Human Services. The OAA is the responsibility of the Administration on Ageing.

### **Administration and Enforcement**

The EDEA contains specific regulations of redress for cases of age discrimination however, the ADA does not specify mediation requirements. Enforcing the regulations of the ADA is the responsibility of the federal justice system. There are similarities between the two Acts, as enforcement measures follow a similar two-step process. Further, the remedial procedures for claims of age discrimination begin with an attempted negotiated resolution between the concerned parties, overseen by a commission: the Equal Employment Opportunity Commission for the ADEA, or the Office for Civil Rights for the ADA. Under both Acts, if a suitable resolution is not possible through mediation, the party alleging discrimination may proceed with further action in the courts after a certain amount of time has elapsed.

There are two possible steps for resolving allegations of age discrimination covered by the ADEA. The first step is to pursue mediation through the EEOC, which “shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance [...] through methods of conciliation, conference and persuasion.” If a mediated settlement is not reached, further action may be resolved through the courts. Under the law, “any person aggrieved may bring a civil action in any court of competent jurisdiction [...] provided that the right of that person is terminated upon the commencement of an action by the EEOC to

enforce the right of such employee”. In bringing an allegation to the EEOC or the court system, the plaintive must demonstrate that she or he was treated unfairly by their employer based on their age. The onus of evidence in this case is upon the individual that feels they have been discriminated against (Sargeant 2006).

The Age Discrimination Claims Assistance Act of 1988 was enacted in response to problems surrounding unsuccessful mediation by the EEOC, where an undetermined number of individuals lost their right to legal recourse under statutes of limitations when their claims were not processed in a timely manner. The Claim’s Assistance Act refined the process of administration to be carried out by the EEOC in handling claims.

The ADA does not outline specific measures for redress. In reality, the remedial process is similar to the process of the ADEA, though perhaps slightly more complicated. To register a complaint, a plaintive must first undergo mediation through the Office for Civil Rights (OCR- which is a tool of the HHS). The OCR will refer the case to the Federal Mediation and Conciliation Service. If a resolution cannot be reached, the case is then referred back to the OCR. If the OCR either abstains from judgement, or rules in favour of the plaintive, the civil action can proceed. In this case the plaintive must wait 180 days from the first complaint to OCR. Civil action can only lead to an injunction to stop the discrimination. The time and limited potential outcome of the proceedings has been a disincentive for many to pursue civil action complaints. Complaints that are not part of federally funded entities must be pursued at the state level (Age Concern England, DaneAge Association, et al. 2004). Under the ADA, there are no age restrictions; any age group is incorporated under the Act and any person of any age can file a complaint. Under the ADEA, it is unlawful to react with a counter-lawsuit against a party that brings forward a case of age discrimination.

All other complaints of age discrimination that do not fall under the outlined jurisdictions of either the ADEA or the ADA must be pursued through the appropriate authorities at the State level (Age Concern England, DaneAge Association, et al. 2004).

### **Socio-economic Environment**

The earliest initiatives in the United States to provide legal protection from age discrimination occurred at the state level. Prior to OAA of 1965, twenty States had age discrimination

legislation in place, with the State of Colorado the earliest from 1903 (Sargeant 2006). By 1960, eight States had legislation that included statutes with enforcement measures on age discrimination as well (Neumark 1997).

State-level legislation had an influence on the development of federal legislation in this area as well as the broader political environment of the time. Federal legislation was first developed at the same time as the Civil Rights Movement of the 1960s. The Civil Rights Movement created great public and political awareness to inequalities within American society. At this time, there were many initiatives to enact legislation protecting citizen rights, most notably the Civil Rights Act of 1964. However, the United States Congress kept age out of the Civil Rights Act and Congress instead commissioned further studies on age discrimination to determine the direction for future policy. The resulting report was the Older American Worker-Age Discrimination in Employment Report of 1965. This report provided a framework for age discrimination legislation, resulting in the ADEA. (Although the first legal action at the federal level was in February 1964, when President Lyndon Johnson issued an executive order outlawing age discrimination in employment by federal contractors/sub-contractors.)

The findings of the Discrimination in Employment Report concluded that many employers were using specific age limits (notably set retirement ages) and these limits were negatively influencing the employment situations of older people. Arbitrary age limits both deprived the nation of many potential assets in the labour force, and increasingly stressed social security measures. Evidence suggested that age barriers also had a negative effect on the psychological state of older people. The Discrimination in Employment Report concluded that instances of discrimination were not typically intentionally mean-spirited in the same way of racial discrimination, they nonetheless carried significant consequences for the discriminated individual (Sargeant 2006).

The Older Americans Act of 1965 was the first piece of legislation to outline the objectives that future legislation would meet, though this Act provided no binding measures on discrimination. Notwithstanding this, the Act outlined the 10 principles of a quality of life for older people, among them that it is the responsibility of the government to assist older people to have an “opportunity for employment with no discriminatory personal practices because of age”. This principle directly influenced the ADEA. It is important to note that later amendments extended the mandate of the Administration on Ageing (AoA) to provide legal support to older people in

cases of age discrimination. Presently, the AoA provides over one thousand legal service advisors nationwide, performing over one million hours of service per year (Omar 2008).

The United States government justifies the necessity of the ADEA as a matter of sound economic practice. The text of the Act states that “older people find themselves disadvantaged in retaining employment” and that “arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.” Despite being grounded in the language of economics, age discrimination legislation shares many threads with civil rights legislation beyond the timing of its inception. This relationship was augmented with the 1978 transfer of responsibility for the ADEA from the Department of Labour to the EEOC, a federal entity established in 1964 to enforce the Civil Rights Act (ref).

### **Future Policy Trends**

With its early inception, the United States has often served as a model for other countries in establishing their own legislation. Laurie McCann, Senior Attorney at AARP, in reflecting on the lessons from the United States cases suggests that good laws alone will not eliminate age discrimination. “After 40 years of legislation and many amendments, age discrimination still occurs far too often” (McCann 2003). McCann proposes that age discrimination is still understood more from an economic perspective than as a human rights issue, and therefore does not generate the same level of public outrage. She argues that changes must also come from within civil society to partner with the laws to ensure effectiveness (McCann 2003). Certainly the pervasiveness of age discrimination continues. In the fiscal year of 2006, the EEOC handled more than 16 000 cases of age discrimination, with over 14 000 resolved and over 50 million dollars going to various aggrieved parties (EEOC 2008).

## 11. Conclusion

Responding to the needs of their oldest citizens has developed into a greater political priority for many countries over recent decades in recognition of the demographic reality of an ageing population, with growing recognition of the potential consequences such a population shift will have upon the economy, upon health and social services, potential tax and voting blocs, and other areas within each country. In this vein, age discrimination has come to the fore relatively recently within the political discourse of many countries around the world as understanding of its economic and social impact grows.

The United States initially introduced legislation in the 1960s, many governments have done so within the last decade, and many others have not enacted legislation. Presently there are no international standards for governments, therefore, legislative frameworks are uniquely developed responding to the internal situation of each country (though it should be acknowledged that Europe has set regional standards through the European Union's Framework Equality in Employment Directive of 2000). Nevertheless, this report reveals several general trends across the selected countries. This concluding analysis will briefly review three such trends: first, the parallel justifications of human rights and economic imperative for enacting legislation; second, the primacy of age discrimination legislation covering the workforce; and finally third, the relationship between age discrimination and mandatory retirement reasonable exemptions and lawful age differentiation. Finally, a brief consideration of future trends for legislation on age discrimination, and what role NGOs can contribute to this issue will be discussed.

Central to this analysis will be the Madrid International Action Plan on Ageing (hereafter MIPAA), the primary international agreement guiding thinking and action on older people throughout the world, and a document to which all countries reviewed in this study are signatories.

### **The MIPAA and Age Discrimination**

The MIPAA is the first international agreement that recognizes both the importance of the contributions of older people in their communities and the moral and political imperative for governments to include ageing within broader social and economic development strategies. The

MIPAA emphasizes that it is a human right and fundamental freedom of all people to be able to participate economically, socially, culturally, and politically within their communities. The MIPAA identifies three central priorities (with associated issues and objectives) as areas for development: (I) Older persons and development; (II) Advancing health and well-being into old age; (III) Ensuring enabling and supportive environments (United Nations 2002).

The MIPAA identifies age discrimination as a barrier to the developing a society for all ages. Eliminating discrimination based on age is crucial to ensuring the rights and dignity of older people, as well as ensuring that development goals of full participation are met. Specific attention to discrimination within the MIPAA falls primarily under Priority direction I on development, while specific reference to discrimination in access and to health services and medicine is discussed under Priority direction II on health and well-being. The MIPAA recommends the implementation of human rights instruments to achieve these outcomes, and enacting legislation is considered the central method to accomplishing this goal.

### **Trends in Legislation**

#### **Motivation for Enacting Legislation**

Legislation around age discrimination is justified as necessary for one or both of two primary reasons: as a matter of human rights, and as a matter of sound economic planning. Many countries emphasize one justification over another. The MIPAA calls for mainstreaming ageing into broader social, economic and human rights frameworks. South Africa is an example of a country where laws on discrimination broadly incorporate multiple variants of discrimination into human-rights oriented laws, notably the Equality and Prevention of Unfair Discrimination Act (2000). In other countries however, such as the United Kingdom and Australia, legislation on age discrimination is considered separately from other forms of discrimination.

It should be noted that in countries such as Argentina and Canada, legislation on non-discrimination is contained within human rights frameworks. Nevertheless, the economic imperative is often given emphasis over rights-based motivations. The primary concern for law makers is ensuring systems can cope with the ageing demographic, while maintaining a diverse workforce and without burdening future generations. Permissible discrimination on the basis of age in the workforce is increasingly identified by both governments and key stakeholders as a

barrier which will place a burden upon the economy and social services by depriving the market of potential resources and depriving older people of important sources of income.

### **The Centrality of Legislation in the Workforce and Mandatory Retirement**

The imperative of supporting and encouraging older people to be active participants in the work force is strong motivation for many countries to enact legislation prohibiting age discrimination, to maintain a diverse workforce, and especially in countries such as Japan, to correspondingly address the expenses of supporting a growing number of older people in retirement. Addressing discrimination in the workforce responds to the MIPAA' first priority area of development of providing employment opportunities for those who want to work.

Discrimination in the workforce is a particularly visible and tangible variant of age discrimination that captures sufficient public attention to motivate political response. Correspondingly, several studies on age discrimination acknowledge that there is a paucity of research on age discrimination outside the workplace (Age Concern England, DaneAge, et al. 2004). In many countries such as the United Kingdom and the United States, legislation has only been extended to cover age discrimination in various sectors of the workforce. Mandatory retirement is often identified as the most important manifestation of age discrimination in the workforce by governments, campaigners, and also by older citizens polled in government studies.

### **Mandatory Retirement**

The relationship between age discrimination and uniform age limits, especially mandatory retirement, is a common theme across the countries examined in this report. In many countries mandatory retirement is central to current political discourse on age discrimination in the workplace. This is particularly exemplified by the 2007 election campaign in Japan. Further, several countries including Canada and Australia have recently experienced high-profile legal challenges on mandatory retirement ages within certain sectors, such as at Universities the airline industry.

Mandatory retirement is considered an unjust practice in cases where employment is terminated at a pre-determined age without a review of ability, and can have the immediate consequence of depriving a person of income-generating opportunities, especially where the mandatory retirement age is set below the pension age. The MIPAA states that older people should be able

to work as long as they want and are able to do so; mandatory retirement can be a barrier to this right when age limits do not permit older workers to continue working as they choose.

Despite the fact that its very existence is a challenge to the right to employment, mandatory retirement is still permitted in some form in the countries of this report, either for certain occupations (such as the military or pilots) in many countries, or for specific cases by country. For example, the United Kingdom permits reasonable exemptions when a position possesses a genuine and determining occupational requirement. Employers in the United States must demonstrate occupational necessity to impose mandatory retirement below the age of 65. In Japan, exemptions permitting mandatory retirement may be approved by the Ministry of Health, Labour and Welfare for positions deemed difficult for older people to fill. In each of these scenarios, a balanced decision between the rights of the individual employee and economic considerations (especially, whether a person is able to perform a job at the level of a younger person).

Determining permissible instances for age-differentiation in the workplace by using age as a proxy for ability is a tremendous challenge for legislators, and for arbitration bodies (such as courts and employment tribunals). Such a determination requires the measurement of the mental and physical components of a job, and balancing the actual performance level of the individual against the perceived abilities of a particular age group. In the countries reviewed, standard age requirements are often determined by the employer, whose decision will be represented unless legally challenged. In instances of a legal challenge, it is then upon the court or labour tribunal to determine whether the age requirement is merit-based on the evidence presented, and both parties are bound by the final decision.

### **Future trends in age discrimination legislation**

Many countries will require several years to measure the effectiveness of their recently-implemented legislation, including the United Kingdom (2006) and Australia (2004). Other countries, such as Argentina and Jamaica, have yet to implement legislation specifically covering age discrimination. The United States, with the earliest legislation, still notes high numbers of registered cases of age discrimination, and is seeing the number of cases increase (McCann 2006). Therefore the immediate future will likely see internal reviews with corresponding



amendments to current legislation across various countries, with the possibility of more legislation introduced.

Future development for many countries may be to extend legislation to cover in greater detail other areas where discrimination can occur beyond the employment sector - for example, in the provision of goods and services, in education, in housing, in advertising and other areas. The second priority area of the MIPAA on health gives particular emphasis to the barrier of discrimination in the provision of health and medical services. Responding to discrimination in these areas is important as the consequences upon the quality of life and self worth of an individual can be no less severe. Furthermore, discrimination outside employment can directly influence employment; for example, discriminatory barriers to education and health services for older people can limit their economic contributions (Sargeant 2006).

Age discrimination may be mainstreamed into more general discrimination frameworks, as has been discussed by the British government in creating a Single Equality Act (an initiative more in line with the MIPAA). Nevertheless, while future legislation may be influenced by international efforts (as the Age Regulations in the UK were influenced by the European Union's Framework Equality in Employment Directive of 2000), legislation will likely continue to develop independently by country.

### **The Role of NGOs in advocacy**

This eight-country examination reveals both general trends and notable variations across countries in their response to age discrimination. It also notes that there is a growing but incomplete body of knowledge in this area, and that the full impact of legislation upon international development goals may not be realized for some time. This report therefore serves as part of a foundation for the important debate on the future contributions that NGOs can take for more effective advocacy.

Central to the policy development experience in many countries is the comparative lack of understanding of the issues of age discrimination from all sectors including government, the corporate sector and the general public. Several documents in this report noted the lack of preparedness among certain segments of the corporate sector for implementing new age regulations (Amble 'SMEs vulnerable to ageism claims' 2005), the 'lack of moral outrage' among

the general public (Macinol 2006), or lack of follow-up research from government and non-government sectors (Gunderson 2003) in their countries.

NGOs can contribute to the public discourse through the generation of knowledge and research, as well as through government advocacy. Certainly there needs to be greater awareness raised around this issue, and NGOs should play a major role in raising the profile among the corporate and public sectors of age discrimination as a barrier. NGOs have been effective in certain countries such as the United Kingdom in generating public awareness of age discrimination, but more work remains. Additionally, as many laws have only recently been implemented, there is a great opportunity for NGOs to contribute to knowledge on the effect that new laws have had in practice, monitoring what improvements may be occurring as a result of age legislation, and what areas are not sufficiently addressed by legislation.

Finally, this policy project recognizes the gap in resource sharing from an international perspective. Greater cooperation and knowledge sharing between NGOs on research relating to age discrimination will facilitate advocacy efforts. The IFA is committed to contributing and participating in discourse and advocacy on age discrimination.

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### 13. Appendix 1.

Country (state/province)	Legislation
Argentina	National Action Plan Against Discrimination 2005 Constitution of Argentina 1994
Australia	Age Discrimination Act 2004
(Australian Capital Territory)	ACT Discrimination Act 1991
(New South Wales)	Anti-Discrimination Act 1977
(Queensland)	Anti-Discrimination Act 1991
(South Australia)	Equal Opportunities Act 1984
(Tasmania)	Anti-Discrimination Act 1998
(Victoria)	Equal Opportunities Act 1995
(Western Australia)	Equal Opportunities Act 1984
Canada	Canadian Human Rights Act 1977 Canadian Charter of Rights and Freedoms 1982
(Ontario)	Age Discrimination in Employment Amendment Act 2005
Japan	Law to Partially Amend the Law Concerning Stabilization of Employment of Older Persons 2004
Jamaica	Charter of Rights Amendment (Constitution of Jamaica) 1999 National Policy for Senior Citizens 1997
South Africa	Labour Relations Act 1995 Bill of Rights 1997 Employment Equity Act 1998 Aged Persons Amendment Act 1998 Domestic Violence Act 1998 Rental Housing Act 1998 The Promotion of Equality and Prevention of Unfair Discrimination Bill 2000 Promotion of Administrative Justice Act 2000 Social Assistance Act 2004 Older Persons Act 2006
United Kingdom	Employment Equality (Age) Regulations 2006

United States	Older Americans Act 1965
	Age Discrimination in Employment Act 1967
	Age Discrimination Act 1975
	Age Discrimination Claims Assistance Act 1988
	Older Workers Benefit Protection Act 1990
	Workforce Investment Act 1998