

Conditions of Work and Employment Programme

*Age discrimination and older workers:  
Theory and legislation in comparative context*

**Naj Ghosheh**

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## Preface

In recent years, the growth in the numbers and proportion of older people in many countries around the world has led to growing concerns regarding whether or not existing social policies can still equitably address the needs of all age groups in society. In particular, pressures on social security and retirement pension systems have compelled policy-makers to re-examine how long workers must remain in paid employment before retirement. Most of the policy debate up to now has centred on extending the working lives of older workers by raising the eligibility age to collect retirement pension. The prevalent policy approach assumes that extending work life of older workers simply means an extension of their status quo. This, however, is not necessarily the case, and further consideration needs to be given to policy tools that address the concerns of older workers and provide them with a real and viable menu of choices to inform their decision as to whether or not to remain in paid employment.

One policy tool that has begun to receive growing attention in many parts of the world is age discrimination legislation (ADL). ADL can help address a number of concerns of both policy-makers and older workers. Its primary function is to ensure access of older workers to employment and hiring opportunities in conditions of equality with other age groups and protect the employment status and training/career development opportunities of those already employed. In addition, ADL compels employers to take into account the actual skills and ability to perform a particular job of older workers rather than using their age (or age group) as a proxy for determining whether they are suitable for the job. With regard to older workers, for whom income security can be a decisive factor in their decision to work, ADL can guarantee that existing conditions of work and employment are protected. At the same time, ADL balances older workers' needs with employers' concerns by providing the latter with discretion in hiring or retaining older workers so long as they can demonstrate that a legitimate business reason exists for such a decision. Thus, if ADL is properly developed and implemented, it can provide equitable solutions for all concerned.

While ADL may seem to be a viable policy option to address a variety of societal and labour market concerns, little comparative research has been conducted on existing national ADLs, what are its component parts, or what parts of the law are important in order to access these social rights. This timely paper seeks to fill this intellectual and policy gap. It begins with an exploration of the theoretical underpinnings of ADL, with a focus on how "ageing" and "age discrimination" are defined in labour markets and society. These considerations help explain the significance of ADL as a policy tool and its relevance for policy-makers, employers, older workers and the labour market in general. The paper then examines the different types of ADL that have been developed, both at the international and national levels, in order to discern between the assorted issues covered by ADL in different countries. The section explores ADL in over 40 countries around the world and how their provisions can impact on the rights and responsibilities of older workers, employers and governments.

The paper seeks to remind policy-makers that, whatever policies might be chosen to address ageing in society and the labour market, they should never come at the expense of decent conditions of work and employment for older workers.

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Chief,  
Conditions of Work and Employment Programme,  
Social Protection Sector



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## 1. Introduction

The growth in older age groups in national populations around the world has been well documented.<sup>1</sup> In most instances, this growth has been welcomed as a sign of economic and social progress in society. Yet, at the same time, it has raised a series of unintended consequences that require reconsideration of traditional relationships, particularly in employment and the workplace. While a disproportionate amount of attention has been placed on how to extend working life, whether through raising retirement pension age or individual efforts in workplaces, little attention has been given to the policies that will extend opportunities for older workers to make informed choices about their future. Given that financial security is of primary importance, particularly after retirement from paid employment, consideration needs to be given as to what labour market policies can help older workers make these choices in a way the benefits them and society.

Ageism and its manifestation in the workplace — age discrimination — often create artificial limitations with consequences for all. Artificial barriers can limit the effectiveness of older workers and cause employers not to consider or hire them. For older workers, the obvious negative consequences can influence their recruitment, hiring, training, working conditions and career development. For employers, who have unfounded biases against older workers, there is a loss of experience and efficiency in the workplace. In societal terms, old stereotypes regarding ageing remain and economic costs on other age segments of society may go up. Regardless of these factors, it is also important for a society to have a well-functioning social security system so that older workers have a viable choice between work and a decent retirement. In order to encourage and enable those older workers willing and able to work beyond traditional pension retirement ages, labour market policies must include mechanisms for these workers to maintain and, where needed, enhance the appropriate employment protection and rights.

The aim of this study is to highlight the theoretical underpinnings of age discrimination in employment and examine how it is addressed in current labour law around the world. It will begin with an examination of the theoretical considerations associated with ageism, age discrimination and the importance of equality of opportunity. In order for older workers to obtain equality of opportunity in the labour market, the paper will introduce the capability theory to explain why age discrimination legislation (ADL)<sup>2</sup> is an important tool to allow older workers to maximize their employment capabilities. In addition, it will address the important, but often neglected, issue of retirement age versus pension age, and the impact of age discrimination on the labour market for older workers. The study will then explore what has taken place regarding age discrimination around the world. It will examine existing international and supranational standards to identify what has been done to inform national policy-makers regarding ADL. The study will then examine on the current international experience with ADL, focusing particularly on the variety of rights and responsibilities found in these laws. The paper will conclude with observations on what has already been done in this area and what should be considered in the future.

<sup>1</sup> See, for example, N.S. Ghosheh Jr., S. Lee and D. McCann: *Conditions of work and employment for older workers in industrialized countries: Understanding the issues*, Conditions of Work and Employment Series No. 15 (Geneva, ILO, 2006); OECD: *Extending social policy: How active social policy can benefit us all* (Paris, 2005).

<sup>2</sup> Hereinafter, age discrimination legislation will be referred to as ADL.



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## 2. Ageism, age discrimination and capability theory: Theoretical foundations of age discrimination legislation

When considering the factors that influence ADL, the two most important are ageism and age discrimination. Distinguishing these terms is important, because they are not the same, though they have been used interchangeably in different policy and academic forums. Clarification of the subtle differences in definition between these terms helps not only to explain the importance of the problems that ADL is meant to address, but also the reasons for the provisions that make up this form of legislation.

Ageism is based on social relations and attitudes in society. However, it is not surprising that many would confuse the definition and usage of ageism. There are a number of variations that have been used to define the term though, if considered carefully, they all share negative characteristics. Butler has suggested that ageism can manifest itself in “stereotypes and myths, outright disdain and dislike, or simply avoidance of contact ... At times ageism becomes an expedient method in which society promotes viewpoints about the aged in order to relieve itself from responsibility towards them”.<sup>3</sup> MacNicol has recently added that ageism is basically the application of assumed age-based group characteristics to an individual, regardless of the individual’s actual characteristics.<sup>4</sup> The substantive problem, he notes, is that ageism is embedded in patterns of thinking, which manifests itself in subtle as well as overt ways that lead general acceptance of age-related decline as inevitable.<sup>5</sup> In other words, the result of ageism in practice is that age becomes a proxy for the capability (or lack thereof) of any member of an age group rather than considering the individual capability of a person who happens to be a certain age.

The consequences of ageism in the labour market can be profound. Although mental and physical decline can take place during the course of human ageing, the manner in which it happens varies quite considerably from individual to individual and can be influenced by a variety of factors. These include changes in socio-economic conditions that take place over the course of life as well as employment-related factors, such as conditions of work, employment and the workplace. In fact, employment-related factors can be quite important determinants of mental and physical well-being later in life. Perversely, in the workplace these factors may make employers more susceptible to the concept of ageism. By looking only to the negative consequences of ageing and linking it with everyone in an age cohort rather than considering individual differences, they continue to perpetuate a stereotype that might be correct with regard to some older workers, but not others. Also, employers may not be the only ones with such views, as other workers and society at large may share them. The result is a systemic form of discrimination against older workers as members of this group, rather than considering the individual abilities and capabilities of each older worker.

When ageism takes a systemic form in employment and the labour market, it turns into age discrimination in employment. MacNicol suggests that age discrimination in employment refers to the use of “crude proxies” in personnel decisions, relating to hiring,

<sup>3</sup> R.N. Butler: “Ageism”, in G.L. Maddox (ed.): *The encyclopedia of aging* (New York, Springer, 1995).

<sup>4</sup> J. MacNicol: *Age discrimination: An historical and contemporary analysis* (Cambridge, Cambridge University Press, 2006), p. 6.

<sup>5</sup> *ibid.*, p. 9.

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promotion, retraining, firing and mandatory retirement.<sup>6</sup> Whether the perceptions are based on employer and worker perceptions of ageing or societal views, the result is not in dispute. The negative consequences of age discrimination in employment can include barriers to recruitment and hiring, diminished conditions of work and employment, limited career development and, in the absence of legislation, diminished employment protections and rights.

Understanding these terms may play a part in the development of policies and legislation to diminish and counter age discrimination in employment, namely ADL. Evidence of this can be found in a number of industrialized countries, notably in Europe, where older segments of the population have grown, but there has been a traditional absence of age discrimination legislation to rely on for protection. A recent study in all the Member States of the European Union, including Bulgaria and Romania, illustrates this point. When asked about the extent to which age discrimination exists in their country, 46 per cent of citizens in EU countries, 51 per cent of Bulgarians and 46 per cent of Romanians stated that age discrimination was widespread.<sup>7</sup> This is an increase over the responses given to the same question in a similar survey five years ago, in which 35 per cent of EU citizens and 41 per cent of Romanians perceived widespread age discrimination in their country.<sup>8</sup> Yet the ingrained nature of ageism in society that leads to age discrimination in the labour market can be problematic. Thus, to the question of whether people over the age of 50 are capable of working efficiently, 57 per cent of EU citizens, 79 per cent of Bulgarians and 71 per cent of Romanians gave a negative response.<sup>9</sup> Paradoxically, therefore, while age discrimination is acknowledged and awareness of it continues to grow, people still rely on historically negative views of the relationship between ageing and employment.

The responses illustrate two important points regarding ageism and age discrimination generally. First is that they both remain strongly embedded in societies and labour markets, even though perceptions about whether this is acceptable may be changing. Secondly, changes in views may not happen organically within society, but may require policy mechanisms in the labour market that provide solutions that enable greater consideration of an individual older worker's ability, rather than considering anyone that is of a certain age as part of a group that has limited or no ability. It is in this way that ADL can play an important role in employment.

## **Age discrimination: Its place in the pantheon of employment discrimination**

It would seem clear what age discrimination is, but until recently it has perhaps not been acknowledged as much as other forms of discrimination. This lack of recognition may also relate to the fact that the issues surrounding age discrimination are not as clearly understood as other forms of discrimination in employment. For example, most forms of discrimination in employment are based on historical bigotry or biases against a particular

<sup>6</sup> *ibid.*, p. 6. See also B. Hepple: "Age discrimination in employment: Implementing the Framework Directive 2000/78/EC", in S. Fredman and S. Spencer (eds.): *Age as an equality issue: Legal and policy perspectives* (Oxford, Hart Publishers, 2003).

<sup>7</sup> European Commission: "Discrimination in the European Union", in *Eurobarometer* (Brussels), No. 263, January 2007.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

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identifiable group (e.g. women, ethnic minorities, etc.), whereas age does not define a fixed or identifiable group.<sup>10</sup> Rather, age is a continuum along which distinctions between individuals (or individual employees) are often subtle and relative.<sup>11</sup> Furthermore, whereas race or sex discrimination may be based upon questionable assumptions about the ability of a worker to perform a work task or job, not all distinctions regarding age discrimination may be discriminatory. Mental and physical abilities can diminish over time, though not at the same rate or in the same way for every individual. The mental and physical differences between older workers and the work they may be asked to perform means that some may be capable to continue in employment or do a job, but others may not. Thus, because the differences between older workers may be subtle, this form of discrimination may be less apparent than other forms of discrimination. Regardless of the basis, if working lives are to be adjusted, mechanisms such as age discrimination legislation will be important to ensure that an equitable equilibrium between older workers, employers and society can be developed or maintained.

### **Societal need for age discrimination legislation**

Employers in many societies still maintain the ageist views that older workers are expensive to employ and not as productive as other workers. Moreover, the costs of hiring, training and employing older workers are not shared between all firms, but borne by those firms staffing older workers. This view is logical, though based on the flawed assumption that all older workers are categorically the same with no individual differences. The corrosive result is that age discrimination in employment becomes more pervasive and accepted in the labour market.

In spite of this perception, age discrimination does have societal and individual costs. As Deakin has suggested with other forms of discrimination, there may be an overall loss to society in terms of efficiency, because resources are misallocated and underutilized.<sup>12</sup> Thus, if no legal protection is available, then older workers will not expect to seek employment or career development through training in employment. While such views tend to occur at pension or retirement age, norms and conventions can be developed that may continually depress the age at which older workers might expect to be hired or trained, consequently making them less useful and productive at younger ages. This, in turn, would allow firms to dismiss them without subsequent damage to the firm's reputation. In extreme circumstances, older workers may no longer be able to find work or even seek employment. It is at this point where the costs of age discrimination are carried by individual older workers and their family most profoundly.<sup>13</sup>

Age discrimination legislation is therefore important, not only to redress the inequities of the costs associated with discrimination, but perhaps more importantly to distinguish individual older workers' capabilities. When referring to "capabilities" in this

<sup>10</sup> S. Fredman: "Age of equality", in Fredman and Spencer, op. cit. In other words, discrimination based on race is based on a fixed quality (i.e. a person's race) which cannot change and does not inherently impact on the ability of the individual, but ageing is an ongoing process of change that can affect the ability of one individual more than another individual.

<sup>11</sup> D. O'Meara: *Protecting the growing number of older workers: The Age Discrimination in Employment Act* (Philadelphia, 1989), p. 4.

<sup>12</sup> S. Deakin: *Renewing labour market institutions*, ILO Social Policy Lectures (Geneva, Institute for Labour Studies, 2004).

<sup>13</sup> Fredman, op. cit.

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context, the term is based on Sen's conception of "capability" in which individuals' well-being is related to their function or what they value doing. The function may vary from one person to another, but what is needed is the "capability" or freedom to achieve alternative functional combinations.<sup>14</sup> It may thus be possible for older workers to continue working exclusively, to continue working partially and collect a pension, or to retire altogether based on the choices available.

Deakin extends Sen's "capability" theory to suggest that social rights legislation can play an integral role in helping individuals make their choices. Deakin posits that, in addition to remedying the injustice of discrimination, a law on discrimination can alter labour market incentive structures in a positive manner.<sup>15</sup> In the case of older workers, incentives would include the options of seeking employment or skills training, and of employers investing in hiring and training the ever larger number of older workers in the labour market. Moreover, the demonstration effect of sanctions against employers may over time level the situation in which the norm of dismissal, based on age, is replaced by a reconsideration of how to hire and retain older workers. Employers observing the norm in greater numbers as a matter of course can then turn the norm into a self-enforcing mechanism that functions independently from the law.<sup>16</sup> This in practice could take place through human resource policies or workplace practices.

### **Important components of age discrimination legislation**

Based on what has been presented, ADL in practice must address five different, but related, dimensions of employing older workers. The first dimension regards access to employment. Provisions that limit or impede hiring of older workers would be discriminatory. The second dimension is based on the principle of employment protection, which not only means that an older worker should not be dismissed based on age alone, but the protection must extend to anything impeding skills development and career opportunities. Thirdly, the legislation should encourage organizations to develop workplace or organizational policies that address age discrimination before, rather than after, it takes place. As a number of commentators have noted, merely enacting legislation does not necessarily mean employment practices will change by themselves.<sup>17</sup>

The fourth dimension to be addressed relates to who can access age discrimination legislation. Generally speaking, statistical services and social security ministries define categories of individuals rather than what is in fact an "older worker". In the case of social security, pension age often determines when a worker's worklife is officially at an end. However, for age discrimination to be truly useful, it must have an expansive definition. Artificial limitations to periods just before retirement would neglect the true importance of the legislation. As will be demonstrated later, access to age discrimination legislation can function best in either of two ways. First, a lower limit for access can be determined, such as in the American Age and Discrimination in Employment Act (ADEA), which sets the lower limit at 40 years of age.<sup>18</sup> In this case, workers aged 40 and older can make claims of age discrimination based on rights outlined by the ADEA. As it applies mainly to

<sup>14</sup> A. Sen: *Development as freedom* (Oxford, Oxford University Press, 1999), p. 75.

<sup>15</sup> Deakin, *op. cit.*, p. 48.

<sup>16</sup> *ibid.*

<sup>17</sup> Hepple, *op. cit.*; Fredman, *op. cit.*

<sup>18</sup> United States, Age Discrimination in Employment Act, Paragraph 1625.2.

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workers over 40, it specifically applies to what would be considered an “older worker”. An alternative to this method is to legislate that it is illegal to discriminate against workers on the basis of age, regardless of what age they may be. This method has been used in the European Union Directive where age discrimination at any age may be illegal if the only reason for the discriminatory action is age.<sup>19</sup> The advantage in this case is that, in some professions, age discrimination against what might be loosely termed an “older worker” can be applied rather than relying strictly on a specific age before rights and protections can be accessed.<sup>20</sup> While both are imperfect options they do share the positive quality of elasticity so that the protections offered by ADL are available to the widest possible group of older workers in the labour market.

The fifth dimension of ADL should include several operational components to clearly establish the rights and responsibilities of the parties in the workplace. This legislation should in some way address the following: unlawful, direct and indirect age discrimination; harassment, victimization and instructions to discriminate; who is liable for violations (e.g. employers, co-workers, customers, etc.); who is covered (e.g. in addition to age levels, it should address what types of workers are covered, such as contractors, etc.); protection against unfair dismissal or redundancy based on age; business or operational reasons to allow employers to discriminate in some circumstances based on age; who has the burden of proof in age discrimination cases; what are the remedies and sanctions that take place if unlawful age discrimination is determined; and what specialized bodies in government are available to provide information, assistance or render judgements in cases of age discrimination.

These important components cover a wider variety of issues, and the remainder of the paper will focus on how existing age discrimination legislation, from the international to the national level, addresses these issues in countries around the world.

<sup>19</sup> European Union Directive 2000/78/EC only prohibits “age discrimination” (among other forms of discrimination), but does not define age.

<sup>20</sup> Thus, if an office discriminates in hiring or retaining secretaries older than 30 years of age, simply because of their age, the EU Directive could render such discriminatory behaviour illegal.



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### 3. Reconsidering the obvious: Is there a nexus between mandatory retirement, pension age and age discrimination legislation?

At first glance, there would appear to be no relationship between retirement and age discrimination. After all, age discrimination is about older workers' rights in the labour market and employment, while retirement is about when that working life ends and what comes after it. Such assumptions, however, neglect the importance of policies meant to address these issues, how they relate or interact with each other as well as the profound implications this can have for older workers, their employers and society as a whole. Before proceeding, it is therefore important in this context to distinguish between different forms of retirement age in order to understand what different endpoints to working life mean and what their relation is to ADL.

The first form of retirement age is mandatory retirement. Mandatory retirement takes place when a worker reaches an age where they are obligated to retire. This method can be imposed by the state, an employer, in a collective agreement, or negotiated with a worker. It is most often introduced in an employee contract, but can also be used in a collective bargaining agreement. The use of mandatory retirement is not without controversy. Mandatory retirement does not allow the older worker, or in some cases the employer, choices regarding retirement. According to some, it is a face-saving device for those who can no longer perform their work tasks at an acceptable level.<sup>21</sup> As it is applied to older workers, the stigma of identifying their inability to perform the job effectively is negated, and it further allows employers to plan ahead and remove workers whose productivity is not matched by the costs of employing them.<sup>22</sup> In contrast, some suggest that mandatory retirement is one of the most blatant forms of age discrimination in employment.<sup>23</sup> Other research examining mandatory retirement has indicated that it can lead to distortions in the labour market, causing gross injustices in the distribution of secure employment, and wasting individual human capital.<sup>24</sup> It may also be responsible for creating downward pressure on the retirement age of older workers, as they may decide to take early retirement when it is available rather than extend working life for marginal increases in retirement pensions at mandatory retirement age. This has taken place in a number of industries and in countries such as Germany and France until very recently.<sup>25</sup>

<sup>21</sup> E. Lazear: "Why is there mandatory retirement", in *Journal of Political Economy*, Vol. 87, No. 61, December 1979, p. 1261.

<sup>22</sup> S. Issachoff and E. Harris: "Is age discrimination really age discrimination? The ADEA's unnatural solution", in *New York University Law Review*, Vol. 72, No. 4, October 1997, pp. 780-840.

<sup>23</sup> MacNicol, op. cit., p. 32.

<sup>24</sup> P. Taylor and A. Walker: *Too old at 50? Age discrimination and social security* (London, 1991), p. i; W. Grabner: *A history of retirement: The meaning and function of an American institution, 1885-1979* (New Haven, CN, 1980), p. 250; M. Sargeant *Age discrimination in employment* (London, 1999), p. 3; Fredman, op. cit.

<sup>25</sup> When early retirement was still possible, the average exit age from the labour force in France in 2001 was 58.1 years of age; in Germany, it was 60.6 years of age. By 2004, when early retirement was made more difficult, the ages went up to 58.9 and 61.3 respectively. EU Labour Force Survey, at Eurostat Online (10 November 2007), <http://epp.eurostat.ec.europa.eu>.

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An alternative form of retirement age is what might be called pensionable age. It determines when an older worker can access their state-provided, employer-provided or other form of retirement pension. This is also an age that can be used by employers, workers or in collective agreements to determine retirement age for an older worker. Theoretically, pension age can act as a form of mandatory retirement and the policies in some countries use it as such. The critical element of pension age with regard to retirement is that it is based on a guaranteed form of income that will continue to be available to an older person when they are no longer personally able or legally able to continue in paid employment. Because of issues associated with how retirement systems are funded and eligibility requirements, pension age has received the bulk of attention in policy debate, even though this is only part of the picture regarding the labour market for older workers.

So what then is the relationship between these two forms of retirement and age discrimination? As it turns out, this relationship may be greater than expected or than has been considered previously. First and foremost, there is the legal dimension. These types of retirement age are influenced by very different bodies of law. Mandatory retirement provisions, whether in labour contracts or collective agreements, are mainly a part of labour law, whereas pension age, though used in these same agreements as a reference point, is part of social security law. Ironically, the use of mandatory retirement in the employment relationship can actually undermine the protection afforded by employment law by rendering the body of law inapplicable, including protection against age discrimination, once a worker reaches mandatory retirement age. In other words, once an older worker reaches mandatory retirement age, there is no need for further labour law protection because the older person is not allowed to work after retirement. Pension law does not extinguish labour rights in themselves if an older worker continues to work, since the age in question is only a reference point to access retirement pension and does not inherently prohibit an older worker from continuing to work.

This raises another salient, but perhaps neglected, point in the debates surrounding the extension of working lives and whether mandatory retirement or pension age should be used. With regard to income security, there is a profound difference between mandatory retirement age and pension retirement age. The use of pension age for retirement still ensures access to income for an older worker. Using a mandatory retirement age is strictly an endpoint for working life, extinguishing labour law rights almost by definition, without in any way guaranteeing income security for older people. While in practice retirement pension age has been used as a mandatory retirement age in some countries, there needs to be clear legal linkages between these bodies of law to ensure income security for older workers, especially if they will no longer be allowed to legally work to secure future income.

A final point is that mandatory retirement can create negative downward and upward pressures in the labour market by potentially leading older workers to retire at a younger age (as noted above) and by extinguishing employment protections that can lead to greater labour informality for older workers who continue to work. Mandatory retirement does not always ensure that older workers do, in fact, leave the labour market and, in the absence of labour law protection, it may lead to greater informal employment opportunities with poor terms and conditions. It is perhaps for this reason that certain countries which permit older workers to work while collecting retirement pension use retirement pension age as opposed to mandatory retirement as a foundation for law and policy development.

### ***Retirement in the real world***

The above points are especially important in light of the use of these age policies in countries around the world. In most countries, the age of retirement is normally between 55 and 65 years of age, but (as Table 1 demonstrates) countries show a number of variations. Twenty-three countries have a retirement age of 55 to 60 years of age, and 26

countries have a retirement age of 60 to 65 years of age. Very few have retirement ages above 65.

**Table 1: Pension and retirement ages in countries around the world**

55*	60	60*	65	65*
Bangladesh	Algeria	Armenia	Albania	Belize
Benin	Antigua and Barbuda	Azerbaijan	Andorra	Bermuda
Burkina Faso	Bahrain	Bulgaria	Argentina	Canada
Central African Republic	Belarus	Colombia	Australia	Iceland
Fiji	Cameroon	Costa Rica	Austria	Norway
Gambia	China	Cuba	Bahamas	
Guinea	Dominican Republic	Czech Republic	Barbados	
India	Egypt	Estonia	Belgium	
Indonesia	El Salvador	Guyana	Bolivia	
Kenya	Ethiopia	Hungary	Botswana	
Kuwait	France	Kazakhstan	Brazil	
Malaysia	Ghana	Kyrgyzstan	Cape Verde	
Mali	Guatemala	Latvia	Chile	
Nepal	Jordan	Lithuania	Croatia	
Nigeria	Korea, Republic of	Malta	Cyprus	
Papua New Guinea	Lao People's Democratic Republic	Moldova, Republic of	Denmark	
Senegal	Lebanon	Nicaragua	Ecuador	
Singapore	Liberia	Panama	Finland	
Sri Lanka	Madagascar	Romania	Georgia	
Thailand	Mauritania	Serbia	Germany	
Togo	Mauritius	Seychelles	Greece	
Uganda	Morocco	Slovakia	Honduras	
Zambia	Niger	Slovenia	Hong Kong	
	Pakistan	Trinidad and Tobago	Iran, Islamic Republic of	
	Paraguay	Turkmenistan	Ireland	
	Philippines	Uruguay	Israel	
	Russian Federation		Italy	
	Saudi Arabia		Jamaica	
	Syrian Arab Republic		Japan	
	Tanzania, United Republic of		Libyan Arab Jamahiriya	
	Tunisia		Luxembourg	
	Turkey		Mexico	
	Ukraine		Netherlands	
	Uzbekistan		New Zealand	
	Venezuela		Peru	
	Viet Nam		Poland	
	Yemen		Portugal	
			Spain	
			Sweden	
			Switzerland	
			United Kingdom	
			United States	

\* Approximately: grouping of countries between 55-60 and 60-65.

Source: United States Social Security Administration: *Social security programs throughout the world (Asia and the Pacific, 2004; Africa, 2005; Americas, 2005; Europe, 2006)* (Washington, DC).

Closer examination of the requirements in the countries in Table 1 reveal that 38 of the countries engage in what might be classified as mandatory retirement, as they require complete withdrawal from all employment as a condition for receiving retirement pension (see Table 2). Some of the countries which require this include Algeria, Bahrain, Benin, Honduras, India, Lebanon, Madagascar, Niger, Panama, the Philippines, Turkey and Uzbekistan. On the other hand, 26 countries may be classified as having a pension age, as there is no obligation to retire from work to collect a pension. These countries include

Belize, Costa Rica, Guyana, Latvia, the Netherlands, Norway, the Russian Federation and Venezuela. Other countries that use pension age explicitly include provisions that may permit some work while collecting pension. These provisions include continuing to work without interruption of employment once an older worker begins to collect a pension in Hungary; pensioners allowed to begin new work after retirement in Serbia; and allowing pensioners to work part time in Spain.

**Table 2: Retirement and pensions**

Retirement required to collect pension	Retirement from employment not required to collect pension	Mix
Algeria	Azerbaijan	Canada
Bahrain	Belize	Liberia
Benin	Bermuda	
Burkina Faso	Costa Rica	
Cameroon	Cuba	
Central African Republic	Dominican Republic	
Guinea	Finland	
Honduras	Guyana	
Hong Kong	Hungary	
India	Ireland	
Indonesia	Italy	
Iran, Islamic Republic of	Japan	
Kuwait	Korea, Republic of	
Lebanon	Lao People's Democratic Republic	
Libyan Arab Jamahiriya	Latvia	
Luxembourg	Mauritius	
Madagascar	Netherlands	
Mali	Norway	
Mauritania	Pakistan	
Morocco	Russian Federation	
Niger	Serbia	
Nigeria	Slovakia	
Panama	Spain	
Papua New Guinea	Trinidad and Tobago	
Philippines	Venezuela	
Portugal	Viet Nam	
Saudi Arabia		
Senegal		
Slovenia		
Sri Lanka		
Tanzania, United Republic of		
Thailand		
Togo		
Tunisia		
Turkey		
Uruguay		
Uzbekistan		
Zambia		

Source: United States Social Security Administration: *Social security programs throughout the world (Asia and the Pacific, 2004; Africa, 2005; Americas, 2005; Europe, 2006)* (Washington, DC).

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## 4. International and supranational age discrimination legislation

### ADL around the world

ADL has an important role to play in the national and international policy debates on older workers in the labour market. As noted earlier, ageism in society that manifests itself as age discrimination in the labour market can have a profound impact on older workers. In addition to employment protection for older workers to be hired, retain their jobs and have access to training in employment, ADL that is linked to retirement pension age can also ensure income security for older workers should they choose to continue working beyond retirement age. Yet research regarding international and national ADL has been limited. This section will examine international and supranational legislation before considering the national dimensions of ADL.<sup>26</sup> Rather than focusing on ADL in each country, this work will examine different components of ADL and compare how they have been addressed in national age discrimination legislation.<sup>27</sup> Understanding how these provisions are set out should help to contribute to the policy debate regarding the importance of ADL and its impact on older workers in the labour market.

### International standards: ILO and age discrimination

The growth of older segments of the population in countries around the world has not gone unnoticed at the international level, including at the United Nations and other UN agencies, such as the ILO. The effort by the UN began with the International Plan of Action on Aging, adopted at the first World Assembly on Aging in Vienna in 1982, and the United Nations principles for Older Persons 1991, which incorporate a number of human rights considerations for older people in society.<sup>28</sup> These principles provided the foundation for the Madrid International Plan of Action on Aging 2002, referred to sometimes as the Madrid Plan on Aging. This plan identified 35 objectives and made 239 detailed recommendations as guiding principles for action by national governments. These include recommendations that older persons be allowed to continue in income-generating work for as long as they want to and are able to do so. It further added that barriers related to age should be removed through the promotion of recruiting older workers and preventing the onset of disadvantages experienced by older workers in employment.<sup>29</sup> Crucially, the political declaration of the Madrid Plan on Aging was explicit with regard to

<sup>26</sup> ILO Older Workers Recommendation, 1980 (No. 162); and supranational European Union Directive 2000/78/EC.

<sup>27</sup> The work will focus on legislation and not case law. While the jurisprudence of tribunals and courts around the world is vital in interpreting legal rights and establishing procedures, the scope of such a work would be beyond this paper.

<sup>28</sup> H. Meenan: "The future of aging and the role of age discrimination in the global debate", in *Journal of International Aging, Law and Policy*, Vol. 1, Fall 2005, pp. 1-41.

<sup>29</sup> United Nations: *Report of the Second World Assembly on Aging*, document A/CONF.197/9, Madrid, 8-12 April 2002 (New York).

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age discrimination, committing the participants to attempt to eliminate all forms of age discrimination.<sup>30</sup>

There are two international standards beyond policy statements regarding age discrimination legislation which, to varying degrees, address this issue with regard to employment. The first and principal international standard that addresses discrimination in general is the ILO Convention on Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Article 1(1)(a) of Convention No. 111 requires member States of the ILO that ratify it to eliminate employment- and occupational-related discrimination on the grounds of sex, race, colour, religion, political opinion, national extraction and social origin. Age was not included in this category, but Article 1(1)(b) of the Convention permits member States to add grounds for its domestic purposes, and it has been further suggested that Article 5 of this Convention may allow for special measures or assistance to be taken for a variety of categories, including age.<sup>31</sup> The ILO has encouraged countries to take an expansive view by suggesting that member States provide discrimination protection to all who need it.<sup>32</sup>

The other ILO standard, which is perhaps more relevant when it comes to ADL, is the ILO Older Workers Recommendation, 1980 (No. 162). ILO Recommendations, unlike ILO Conventions, do not need to be ratified by member States, nor do they create legally binding obligations. What they do provide are detailed policy recommendations that can be used in the development of national policies and legislation. ILO Recommendation No. 162 does not define “older workers” as such, but it leaves ILO member States free to address how they will do so (Paragraph 2). This Recommendation stipulates that employment problems of older workers should be dealt with in a balanced manner that does not shift the problem from one generation to another group in society (Paragraph 2). Significantly, it calls on member States to take action to promote equality of opportunity and treatment as well as taking measures to prevent discrimination in employment and occupation (Paragraph 3). It further stipulates additional categories in which discrimination should be prevented, including paid educational leave, social security and welfare benefits, and occupational safety and health measures (Paragraph 5). The Recommendation also establishes that measures may be needed to improve working conditions and environments at all stages of working life, as well as special measures to enable older workers to continue in employment under satisfactory conditions (Paragraph 11). Such conditions include adapting a job and its content to workers [Paragraph 13(c)]; gradual reduction in working time for older workers who request it [Paragraph 14(b)]; measures to ensure retirement is voluntary [Paragraph 21(a)]; and making the age for qualifying for retirement to be flexible [Paragraph 21(b)]. The Recommendation does not suggest that older workers should not continue to work, but stresses the importance of addressing certain issues, including age discrimination, that can affect their ability to do so and their effectiveness when they do.

<sup>30</sup> *irib.*, Article 5.

<sup>31</sup> ILO: *Equality in employment and occupation*, International Labour Conference, 83<sup>rd</sup> Session, Report III(4B), 1996 (Geneva).

<sup>32</sup> Once a Convention is ratified, member States are required to file a report (Article 22 report) to the Committee of Experts on the Application of International Standards as to what the country has done in policy and/or law to meet the criteria outlined in the Convention. In recent years, the Committee has welcomed reports that included discussion of efforts to address age discrimination by member States in their national contexts, though they do not specifically obligate countries to take action if they have not done so already.

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## Supranational age discrimination legislation: The European Union Directive addressing older workers

ILO standards are applicable to member States around the world, but the European Union has developed legislation on age discrimination that is applicable in its 27 member countries. Traditionally, the emphasis of European Union employment law has centred on preventing sex and nationality discrimination, but in 1997 the focus changed when European Union member States ratified the Treaty of Amsterdam. Article 13 of this Treaty granted European Union institutions new powers to combat discrimination on a number of grounds, including age. Since the Treaty's entry into force in 1999, it has become the launching point in efforts to develop legislation against discrimination in employment. Council Directive 2000/78/EC established a general framework for equal treatment and occupation, which notably included age as one of its grounds. Extended windows of implementation meant that, by the end of 2006, nearly all EU member States introduced the legal principles of this Directive into their national discrimination laws, including those pertaining to labour and employment law.<sup>33</sup>

The EU Employment Equality Directive (2000/78/EC) implements the principle of equal treatment in employment, training and membership in workers' or employers' organizations.<sup>34</sup> It forbids direct and indirect discrimination [Article 2(1)]; harassment; instructions to discriminate, and victimization; and stipulates avenues for legal redress and rules regarding the burden of proof [Article 10(2)]. To balance this for employers, the Directive establishes the principle of "genuine and determining" occupational requirements that allow an employer to justify seemingly discriminatory actions or workplace policies so long as the requirements or nature of the job would not allow any other alternative.<sup>35</sup> Owing to the rapid growth of older people in the population in EU member States, this historic Directive, and the influence it will have on national employment law, will undoubtedly be the focus of a great deal of international attention and scrutiny in the future.

<sup>33</sup> At the time of writing, Sweden had not implemented measures on age discrimination in employment, though action is expected in 2008. See A. Numhauser-Henning: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Sweden* (Brussels, January 2007). The Czech Republic has a labour law bill that includes ADL, which is awaiting legislative approval that may take place in 2008. See P. Boucková: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Czech Republic* (Brussels, January 2007).

<sup>34</sup> Other categories of discrimination addressed by this Directive include religion or belief, disability and sexual orientation (Article 1).

<sup>35</sup> This provision is similar to *bona fide* occupational qualification in the United States Age Discrimination in Employment Act and others that will be noted later in this paper.



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## 5. National age discrimination legislation: International experience

Some form of age discrimination in employment legislation exists in approximately 50 countries (see Annex 1).<sup>36</sup> However, when considering the legislation and its provisions, the ADL in some countries is more developed and detailed than in others. In addition, while the development of ADL has been the result of changing demographic circumstances in some countries, in others ADL, or parts of it, have been the result of efforts to diminish discrimination in employment for all. Regardless of the rationale, the experience with ADL in many countries is so comparatively new that it paradoxically represents a “new frontier” in employment law.<sup>37</sup> The remainder of this paper will examine how different provisions of ADL have been addressed in different countries in order to combat age discrimination against older workers.

### Unlawful age discrimination

Although age is a category of unlawful employment discrimination in all of the countries identified, the way it is addressed in different countries takes a number of forms. These forms include constitutional provisions, comprehensive discrimination legislation, specific age discrimination legislation, human rights laws and what might be termed an age discrimination/employment policy approach. This will have an impact on the labour market for older workers, in the form of the conditions of work and employment available to them and in the form of protections against unjust treatment in hiring or employment. It will also have a bearing on workplace and organizational policies meant to pre-empt or address age discrimination when it takes place.

### Constitutional provisions

Constitutional guarantees based on “age equality” are mentioned in a few countries’ constitutions. Explicit reference to age equality is not a widespread phenomenon, though it is sometimes addressed in broader constitutional provisions.<sup>38</sup> Ecuador, Eritrea, Mexico and South Africa have established provisions in their constitution that address age or age equality.<sup>39</sup> The strength of having constitutional provisions on age is that protections extend to all citizens, not just those who are employed. They also provide a much firmer legal basis for establishing age discrimination in employment provisions in labour law.

<sup>36</sup> Countries include Antigua and Barbuda, Angola, Australia, Austria, Azerbaijan, Bahamas, Belgium, Benin, Brazil, Bulgaria, Canada, Chile, Cyprus, Denmark, Dominican Republic, Ecuador, Eritrea, Estonia, Finland, France, Germany, Guyana, Greece, Hungary, Ireland, Italy, Japan, the Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Mongolia, the Netherlands, New Zealand, Niger, Norway, Poland, Portugal, Singapore, Slovakia, Slovenia, Spain, South Africa, St. Lucia, Tajikistan, the United Kingdom and the United States. Romania does not currently have legislation. See footnote 33 above for the Czech Republic and Sweden.

<sup>37</sup> If ILO Convention No. 111 on discrimination (employment and occupation) is used as a proxy (no age, but other forms noted above), then 166 countries around the world have some form of employment legislation that limits these forms of discrimination in their labour market.

<sup>38</sup> For instance, it would be covered by constitutional provisions referred to as “other grounds of equality” in countries such as France (Article 1, Constitution) and Estonia (Article 11, Constitution).

<sup>39</sup> Ecuador: Article 23(3), Constitution. Eritrea: Article 14, Constitution. Mexico: Article 1, Federal Constitution. South Africa: Schedule 6, Constitution.

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This has been the basis of legal development on these issues in Mexico and South Africa.<sup>40</sup> Nevertheless, even in the absence of ADL in labour law, this is not the end of the story. Age discrimination in employment cases may be presented to courts as a violation of the constitutional-based right to equality. While the advantage of constitutional protection is that it applies to all citizens in a country, constitutional cases can be far more complex, demanding, and time-consuming than ADL cases. This can raise a number of problems for employers and older workers. Higher legal costs, legal complexities that may not be easily understood by the parties, and industrial justice delayed in the short term are a few of the problems they may face. Ideally, the existence of constitutional rights and ADL can help resolve many of the time-and cost-related issues, while making sure equality rights, including those regarding age, are available to all in society.

### ***Comprehensive discrimination legislation***

Age is one factor, among a number of others, which cannot be used as a basis for discrimination in the legislation of some countries. Based on European Union Directive 2000/78/EC and other obligations associated with EU Directive 2000/43/EC on discrimination in employment, 25 of the European Union member States have defined age as a category of unlawful discrimination, along with, *inter alia*, sex, race, nationality and disability. Other countries using this broad method of categorizing age with other factors include the Angola, Antigua and Barbuda, Azerbaijan, Bahamas, Benin, Brazil, Chile, Dominican Republic, Mexico, Mongolia, New Zealand, Niger, South Africa, St. Lucia and Tajikistan.<sup>41</sup> The advantage of this method is that all forms of discrimination can be readily identified in the same portion of the national discrimination legislation, which can help clarify and develop workplace and organizational policies to take a number of discriminatory provisions into account at one time. However, the danger of combining provisions in this way is that some forms of discrimination, notably age discrimination, might not get the attention necessary to counter its occurrence. As noted earlier, in many societies, ageism and age discrimination in employment are not viewed as being as problematic as other forms of discrimination in employment, such as sex and race. Consequently, action may be limited, particularly if monitoring or legal systems are focused on other forms of discrimination and if government resources to address all forms of discrimination in employment are limited.

### ***Specific age discrimination legislation***

Other countries have developed provisions that explicitly address unlawful age discrimination in employment, without linking them with other forms of discrimination. Perhaps relating to British common law systems, the countries that address age specifically — rather than bundling it with other forms of discrimination — include Guyana,

<sup>40</sup> Mexico: Federal Law to Prevent and Eliminate Discrimination and Federal Labour Law. South Africa: Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

<sup>41</sup> Angola: Section 3(1), General Labour Act. Antigua and Barbuda: Part I, C4(1), Labour Code. Azerbaijan: Section 16(1), Labour Code. Bahamas: Part I, Section 6, Employment Act 2001. Benin: Section 4, Labour Code. Brazil: Act No. 9799. Chile: Act No. 19,739 and Act No. 19,759. Dominican Republic: Principle VII, Labour Code. Mexico: Article 3, Federal Labour Law. Mongolia: Section 1, Employment Promotion Act. New Zealand: Section 21(i), Human Rights Act 1993; Section 105, Employment Relations Act 2000. Niger: Ordinance No. 96-039. South Africa: Chapter 8, Section 187, Amended Labour Relations Act 1995; Chapter 2, Section 6, Employment Equity Act 1998. St. Lucia: Section 3, Equality of Opportunity and Treatment in Employment and Occupation Act 2000. Tajikistan: Section 7, Labour Code.

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Singapore, the United Kingdom and the United States.<sup>42</sup> Canada does not have federal age discrimination at the national level as such, but at the provincial level, almost all Canadian provinces address age discrimination in employment.<sup>43</sup> The advantage of addressing these provisions explicitly in one anti-discrimination tool is that they can be clearly identified by employers and workers alike in order to ensure they abide by the rights and responsibilities detailed in the law. However, as research in the European Union member States has indicated, one disadvantage is that, with little experience in dealing with age discrimination legislation, there may be a need to use other forms of discrimination in employment legislation that have longer legal histories to help establish criteria for legal definitions. Legislation on sex and race discrimination in employment pre-dates age discrimination in most countries where the latter exists. Even in the United States, which has the oldest age discrimination legislation (the Age Discrimination in Employment Act of 1967), the basis for defining certain unlawful actions was based on Title VII legislation relating to racial and sex discrimination in employment.<sup>44</sup>

### **Human rights legislation**

Another form that age discrimination in employment has taken has been that of human rights law. Australia, New Zealand, South Africa and, to a lesser extent, Canada have extended human rights legislation to include age discrimination.<sup>45</sup> Age discrimination also exists in labour law in Australia, Canada and New Zealand, but is more limited in some ways than the human rights legislation. The age discrimination provisions in labour law in these countries apply to those who are in an employment relationship or have recently seen this relationship disrupted (i.e. due to unjust dismissal). The human rights law on age discrimination in Australia and New Zealand, however, extends to those who are looking for work and those in employment, and also includes a broader range of employment relationships.<sup>46</sup> In Canada, while no federal law explicitly addresses age discrimination, it is possible for a person to bring what is called a charter challenge under the Canadian Charter of Human Rights and Freedoms. Such a challenge would suggest that the age discrimination in question is a violation of equality rights under the Charter.<sup>47</sup>

The existence of ADL certainly ensures protection of older workers to some degree. However, if the provisions are unclear, particularly regarding access to these rights, this can undermine the intended protection; for example, in Antigua and Barbuda, the law is

<sup>42</sup> Guyana: Prevention of Discrimination Act 1997. Singapore: Retirement Age Act 1993. United Kingdom: Employment Equality (Age) Regulations 2006; Employment Equality (Age) Regulations (Northern Ireland) 2006. United States: Age Discrimination in Employment Act.

<sup>43</sup> M. Gunderson: "Age discrimination in employment in Canada", in *Contemporary Economic Policy*, Vol. 21, No. 3, July 2003, pp. 318-328.

<sup>44</sup> L. McCann: *Age discrimination in employment legislation: The United States experience* (Washington, DC, American Association of Retired People, 2002).

<sup>45</sup> Australia: Age Discrimination Act 2004. New Zealand: Human Rights Act 1993. South Africa: Employment Equity Act 1998. Canada: Canadian Charter of Rights and Freedoms 1982. Human rights laws in Australia and New Zealand include other forms of discrimination, such as sex and race discrimination among others.

<sup>46</sup> In New Zealand, for example, this includes the self-employed, contractors and part-time workers.

<sup>47</sup> Gunderson, op. cit., p. 322.

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explicit in making age discrimination in employment unlawful.<sup>48</sup> Yet the legislation is unclear as to who can file a case, under what conditions, what the burden of proof is, and which genuine occupational requirements allow employers to discriminate based on age and which do not. A similar lack of clarity can be found in the age discrimination laws in the Republic of Korea, though this may in part be related to the law and employment policy approach taken to age discrimination, which will be examined below.<sup>49</sup> Making age discrimination in employment unlawful is important, but if the responsibilities and expectations are not spelled out in legislation, this can make it much more difficult for employers, older workers and administrative agencies alike to set out what should be done to avoid age discrimination in advance, for example by developing workplace policies on age, or what must be done if allegation of age discrimination is made.

### ***Law and employment policy approach***

While most legislation involving age discrimination is what might be called “individual rights-based”, some countries have developed other mechanisms to address older workers and age discrimination in the labour market. Japan and, more recently, the Republic of Korea have developed an approach that might be categorized as a “law and employment policy” approach, having three basic components: active government engagement with employers and older workers; financial incentives to encourage employers to hire older workers; and assistance for older workers to remain in employment longer before retiring. The Law concerning the Stabilisation of Employment for Older Persons in Japan and recent Aged Employment Promotion Act in the Republic of Korea both appear to use this approach and, perhaps not surprisingly, contain legal provisions that are quite similar to one another.<sup>50</sup>

In broader terms, the legal/employment policy approach used in Japan and the Republic of Korea results in legislation that outlines the obligations of government agencies, employers and older workers in a form more commonly associated with employment policy, rather than a legal rights-based approach found in labour law. In this case, the laws obligate employers to choose a method of retaining or engaging older workers, and the ministries help this process through active policies and consultation with employers and older workers in order to maintain employment. Both the Japanese and Korean Ministries of Labour provide employers with counsel and assistance in recruiting, hiring and retaining older workers.<sup>51</sup> Korean employers can also get financial assistance from the government to improve working conditions for older workers.<sup>52</sup> Korean and Japanese employers can also claim tax exemptions from the government; if they do take advantage of the exemptions, they must provide the government ministries with reports on the older workers they employ.<sup>53</sup> Employers in both countries must file reports with the government ministries detailing their efforts to hire or retain older workers in order to

<sup>48</sup> Antigua and Barbuda: Part I, C4(1), Labour Code.

<sup>49</sup> Republic of Korea: Aged Employment Promotion Act.

<sup>50</sup> Japan: Law concerning the Stabilisation of Employment of Older Persons. Republic of Korea: *ibid.*

<sup>51</sup> Japan: *ibid.*, Articles 5-6 and Chapter II, Sections I and II. Republic of Korea: *ibid.*, Articles 3 and 7.

<sup>52</sup> Republic of Korea: *ibid.*, Article 8.

<sup>53</sup> Japan: *op. cit.*, Articles 49-52. Republic of Korea: *ibid.*, Article 14. Article 21-2 of the Korean Aged Employment Promotion Act also extends subsidies to employers who hire older workers.

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obtain these benefits; fines can be imposed in both countries for fraudulent or deceptive reports.<sup>54</sup> Employers also agree not to dismiss older workers, based on the incentives provided to them, without just cause, though there does not appear to be a procedure, sanction or remedy in the laws of either country if they do engage in age discrimination.

Although the approach has the benefit of active government involvement with employers and older workers to stimulate employment, the legislation in both Japan and the Republic of Korea does not explicitly address what recourse there is if the rights of an individual older worker are violated or what the remedy for violations might be. Hence, while the approach is extremely proactive generally, unlike age discrimination legislation in other countries, it is less reactive to address violations against older workers and provide an equitable remedy. A “rights-based approach”, which might mitigate some of the negative consequences in these countries, does not appear to be part of either country’s agenda at present. As research in Japan indicates, there does not appear to be any intention to change the current legislation in the near future, though the government will review circumstances periodically to see if change is needed.<sup>55</sup> In the Republic of Korea, Article 4-2 of the Aged Employment Promotion Act allows employers to discriminate against older workers so long as they can demonstrate cause and, much like in Japan, there appears to be no evidence to suggest change is imminent.<sup>56</sup> If change does occur in these countries in the future, it will likely be led by people over 60 who will continue to generate pressure as their numbers continue to grow in society and the labour market.

### ***Importance of defining “age” in law: Different approaches***

Finally, when considering the importance of determining what unlawful discrimination in employment is, it is curious that there is a lack of definition regarding terms like “older workers” and “age” in most legislation. The United States Age Discrimination in Employment Act is one of the few that does define these terms, setting its lower limit for access at 40 years of age explicitly in the legislation (Paragraph 1625.2). Japan and the Republic of Korea have also sought to establish age limits, but have taken a different approach to that of the United States. Although the retirement age is 63 in Japan and the pension age is 60 in the Republic of Korea, the laws in both countries encourage employers to set retirement age higher than the minimum retirement age when possible.<sup>57</sup> However, neither of these laws indicates that the older worker has any involvement in negotiating or determining this age. The only proviso to this is that if the employer attempts to set the retirement age lower than the national retirement age, then the Ministries of Labour in the respective countries must be notified as to the reason for this.<sup>58</sup> The Ministries of Labour in both countries also set the legal definition of “older workers”,

<sup>54</sup> Japan: *ibid.*, Articles 55-57. Republic of Korea: *ibid.*, Articles 23-24. In Japan, fines range up to ¥ 100,000; in the Republic of Korea, up to 5 million won.

<sup>55</sup> N. Yamashita: “Act concerning the Stabilisation of Employment of Older Persons”, in *Japan Labor Review*, Vol. 4, No. 3, Summer 2007, p. 92.

<sup>56</sup> This is a form of genuine occupational qualification, but the law is unclear as to what redress there is for workers who suffer age discrimination in hiring, recruitment or employment, or remedies for this form of discrimination.

<sup>57</sup> Japan: *op. cit.*, Articles 8-9. Article 8 forbids the age to be set lower than 60 years of age. Republic of Korea: *op. cit.*, Article 19.

<sup>58</sup> Japan: *ibid.*, Article 9. Republic of Korea: *ibid.*, Article 20.

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and those who are unemployed and older, but not near retirement age.<sup>59</sup> The respective laws in Japan and the Republic of Korea are therefore unique when compared with the legislation in the other countries in this study, as the government ministries actually define the category of older workers. Consequently, if one is categorized as an older worker in these countries, the ensuing laws and policies are applicable without the need to consider eligibility within the law or through legal decisions. Thus, with the exception of the United States, Japan and the Republic of Korea, none of the other 40 plus countries examined for this study address “old age” or “older workers” explicitly.

This raises two different issues of approach to provide clarity to such a provision. One method is to fix the age at which access begins; for example, by setting it at 40 years of age as in the American ADEA, the legislation makes clear that this is the minimum boundary for ADL to apply. This can extinguish the inexact definition of “older workers” that often leaves the impression that these people are close to retirement, as well as the distorted impression given of this “group” in statistical and social pension discussions. In employment, however, this is often not the case, as those over 40 in many countries can attest to. However, such an approach does have its limitations. ADL which establishes such a limit cannot be used by those who are younger, but who may also experience age discrimination; for example, a secretary who is 35 years of age who is not hired or promoted in employment because she is considered “old” would have little recourse under this system.

An alternative approach of simply using “age” as a definition in age discrimination in employment legislation can create problems of distinction between older and younger workers. Such an approach can, in theory, provide more protection throughout the labour market, especially addressing age discrimination which can take place in different sectors at different times or in the example of the secretary noted above. However, such an approach can also have its own difficulties. One issue is what the cut-off points are between age groups. For example, in European Union countries that have recently introduced ADL, there have been difficulties in determining a comparator for age to define unlawful age discrimination.<sup>60</sup> While informal rules of application may develop in different legal systems by leaving age open to interpretation, it will be up to the tribunal or judicial systems to render a determination as to how this will be addressed in law. The legal system would need to be fairly aggressive in defining what are acceptable and unacceptable forms of age discrimination or they could be confronted with a deluge of cases that can, in turn, slow down rulings affecting older workers.<sup>61</sup> Finally, leaving the age undetermined in the legislation may not contribute any additional clarity to national policy discussions about extending working life.

<sup>59</sup> Japan: *ibid.*, Article 2. Republic of Korea: *ibid.*, Articles 2 and 15. The United States Age Discrimination in Employment Act allows workers 40 years of age and over to invoke their rights under this law, but it does not in itself define older workers. ADL in most of Europe and other parts of the world does not define or categorize this group.

<sup>60</sup> For example, age discrimination may exist in a case where an older worker is 50 years of age, but the same might not apply to an older worker at 49 years of age. This will be discussed in more detail later in this paper.

<sup>61</sup> In cases of age discrimination for elderly older workers, age itself can be a consideration in cases since delays may mean that some older workers may not live to see the conclusion of the case. In such circumstances, the legal adage “justice delayed is justice denied” becomes even more salient.

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## Unlawful direct and indirect discrimination

Age discrimination legislation should aim to achieve a concept of equality that enhances individual choice, protects individual dignity and facilitates social inclusion.<sup>62</sup> In order to effectively achieve, this it is important to distinguish between the two forms age discrimination can take: namely, direct and indirect discrimination. The general definition of direct discrimination based on age is where one person is treated less favourably than another in the past, present or future, and this would not be the case if two people the same age were compared. This form of age discrimination can be found in any number of places, from national to workplace regulations as well as in behaviour that would be apparent to the casual observer. Examples of the forms that direct discrimination can take are age-limited employment advertisements or age-related restrictions on access to training for career development to name a few. The tool used to determine direct age discrimination is often a comparator, but this can pose some difficulties. For example, in one case, two workers can be treated unequally without it constituting age discrimination, yet in another case, they may both be treated equally though the treatment for both is unjust.<sup>63</sup> Consequently, though ADL would be incomplete without it, the comparator can pose certain difficulties in practice.

Indirect age discrimination goes beyond what is directly observable to identify practices that may be discriminatory in effect or result. Indirect age discrimination in employment may appear as equal treatment to the casual observer, but it is a behaviour or practice that in real terms affects a specific age group or cohort more than others. What is pivotal is that the outcome is more important than the intent.<sup>64</sup> For example, if a job advertisement over-emphasizes physical qualities of a job that does not require them, then such an action could be considered indirect age discrimination, regardless of the intent on the part of the employer or manager.

Efforts in national legislation to address these two forms of age discrimination are for the most part consistent, though there are some variations in approach. National legislation in 30 countries explicitly forbids, prohibits or makes unlawful forms of direct and indirect age discrimination.<sup>65</sup> However, in countries such as Guyana and Singapore, which both retain legislation regarding the prevention of discrimination in employment for older workers, there does not appear to be a distinction between direct and indirect discrimination.<sup>66</sup> Such laws are effective so long as the different manifestations of direct and indirect discrimination are addressed in some way: in other parts of the legislation, in other laws, or judicial decisions in the country. The Prevention of Discrimination Act in Guyana does not require intent to establish that age discrimination took place, but merely that the act, practice or policy was indirectly or directly discriminatory [Article 4(3)]. In

<sup>62</sup> Fredman, op. cit., p. 54. For further information, see N.S. Ghosheh, S. Lee and D. McCann: *Conditions of work and employment for older workers in industrialized countries: Understanding the issues*, Conditions of Work and Employment Series No. 15 (Geneva, ILO, 2006).

<sup>63</sup> Fredman has suggested that the comparator in DAL should be based on subjecting a person to a detriment because of his or her age. Fredman, op. cit., p. 56.

<sup>64</sup> MacNicol, op. cit.

<sup>65</sup> Australia, Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, South Africa, St. Lucia, the United Kingdom and the United States.

<sup>66</sup> Guyana: Prevention of Discrimination Act. Singapore: Retirement Age Act 1993.

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Singapore, the Minister is given wide discretion to make decisions based on the report of his appointed inspector. In France, the judiciary does not determine whether the person suffers discrimination, but rather whether the action itself was discriminatory.<sup>67</sup>

As noted, definitions regarding direct and indirect age discrimination in some countries vary with regard to the terminology used. For example, member States of the European Union were legally obliged to implement Directive 2000/78/EC establishing age discrimination (among other forms) in European law. However, this has resulted in creative legislative solutions to address the Directive's requirements as countries have limited or no legal history addressing age discrimination in employment. Hence in Denmark, the distinction between indirect and direct age discrimination in employment is replaced by "unequal treatment". The Netherlands does not explicitly use the term "discrimination" for linguistic reasons and has replaced it with the term "unjustified distinction".<sup>68</sup> The unjustified distinction principle in the Dutch ADL delineates the unjustified distinction as taking place on the grounds of age or as characteristics or conduct that results in discrimination on the grounds of age.<sup>69</sup> This does not constitute a diminishment of the protection provided, but rather a variation to make it compatible with other Dutch employment laws. In a similar vein, the United States Age Discrimination in Employment Act uses the term disparate treatment instead of direct discrimination. Although the American ADEA does not explicitly address disparate impact, its term for indirect discrimination, courts have borrowed and applied the theory and guidelines for addressing it from Title VII legislation, which addresses other forms of discrimination in employment.<sup>70</sup>

However, just because the age discrimination legislation in a particular country addresses these issues does not mean that the protection will be easily accessible. The age discrimination in employment legislation in Hungary is based on the European Union Directive 2000/78/EC and yet it establishes such a high threshold for proving indirect discrimination, that some have questioned whether the level is reasonable.<sup>71</sup> The Hungarian law requires a "significantly disproportionate advantageous situation to a group or person".<sup>72</sup> In theory, there would be no need to establish such a high threshold in this provision as most discrimination laws, including those in Hungary, extend to employers a right to redress, if they can prove a genuine occupational requirement that might allow a discriminatory action or practice. This practice, which will be considered further in this study, is meant to balance employer interest with older worker protection. Setting a high

<sup>67</sup> S. Latraverse: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: France* (Brussels, January 2007).

<sup>68</sup> M. Gijzen: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: The Netherlands* (Brussels, 2005); R. Holtmaat: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: The Netherlands* (Brussels, January 2007). Holtmaat (pp. 18-19) suggests discrimination law in the Netherlands is based on unjustified distinctions that are assessed at the level of the individual rather than group membership. This may help in the application of certain dimensions of age discrimination in the Netherlands.

<sup>69</sup> Netherlands: Article 1(1), Equal Treatment in Employment (Age Discrimination) Act.

<sup>70</sup> Meenan, *op. cit.*, p. 16. Title VII is the United States federal law that addresses race and sex discrimination.

<sup>71</sup> A. Kadar: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Hungary* (Brussels, January 2007).

<sup>72</sup> Hungary: Article 9, Act CXXV on equal treatment and promotion of equal opportunities.

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threshold on these standards can also create difficulties in the application of other provisions in ADL and these will be noted as well.

Other issues associated with direct and indirect age discrimination in national law can be observed upon examination and comparison. First, as identified earlier, the use of a comparator in direct discrimination legislation has created certain difficulties. European Union Member States have highlighted the problem of establishing how to compare individuals or circumstances in order to determine if the treatment or policy is equal or not. Reports from Denmark, Italy, Portugal, Slovakia and Slovenia have identified that the comparator is creating some difficulties in the application of the law.<sup>73</sup> The European Union Directive 2000/78/EC uses age generally to define age discrimination rather than a fixed minimum, such as the United States Age Discrimination in Employment Act. While, on the one hand, the advantage of this method is that all age discrimination is made unlawful, on the other hand, the “comparator” becomes a moving target which may lead to contorted rulings by tribunals or the judiciary.<sup>74</sup>

The ADL in different countries can also vary as to whether indirect discrimination can take place against one person or a group of persons. The age discrimination in employment legislation in some countries states very specifically that indirect discrimination is applicable to an individual worker’s claim to unfavourable treatment. Countries such as Estonia, Finland, Germany, Italy, Portugal and Slovakia have provisions in their laws that refer to an individual’s unfair treatment.<sup>75</sup> By contrast, the legislation in other countries would appear to define the parameters of application a bit more broadly, referring to “a person or group” or “age group” as the basis for making a claim. Variations on these broader parameters can be found in Australia, Hungary, Ireland, Malta, New Zealand, Poland and United Kingdom.<sup>76</sup> While these constructions are important in themselves, they also have a larger relevance. Expansive group definitions may provide a stronger legal premise for class action litigation against age discrimination that may have

<sup>73</sup> N.E. Hansen: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Denmark* (Brussels, January 2007); A. Simoni: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Italy* (Brussels, January 2007); M. Malheiros: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Portugal* (Brussels, January 2007); Z. Dlugosova: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Slovak Republic* (Brussels, January 2007); M. Tratar and M. Hot: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Slovenia* (Brussels, January 2007).

<sup>74</sup> The question becomes whether it is equal to compare someone 49 years of age to someone 50 years of age, or whether there is too little separating the two. This may explain why the courts in France use action as the benchmark for decision rather than relying on a comparator.

<sup>75</sup> V. Poleshchuk: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Estonia* (Brussels, January 2007); T. Makkonen: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Finland* (Brussels, January 2007); M. Mahlmann: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Germany* (Brussels, January 2007); Simoni, op. cit.; Dlugosova, op. cit.

<sup>76</sup> Australia: Section 14(b)(iii), Age Discrimination Act 2004. Hungary: Article 8, Act CXXV on equal treatment and promotion of equal opportunities. Ireland: Section 29 (if pay related) and Section 31 (if not pay related), Employment Equality Act 1998 (comparison made in either case is with other workers employed by the employer). Malta: Equal Treatment in Employment Regulations 2004. New Zealand: Section 65, Human Rights Act 1993. Poland: Article 183(b), Paragraph 4, Labour Code. United Kingdom: Regulation 3(2), Employment Equality (Age) Regulations 2006.

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involved more than one person at a time or over a period of time. This is not to suggest that individual provisions in ADL absolutely exclude class action suits, but they provide a less secure basis for it than group definitions.

As indicated earlier, it may be useful for countries with limited experience in defining indirect and direct age discrimination to consult definitions and constructs found in other forms of discrimination in employment legislation, such as provisions on race or sex. In the United States, which has the oldest legislation on these issues of the countries examined in this study, the EEOC and courts have used Title VII of the Civil Rights Act of 1964 to help define parts of the Age Discrimination in Employment Act. These parts notably include indirect discrimination, disparate impact theory, and determining how the Act is applied more generally.

## **Harassment, victimization and instructions to discriminate**

For those who are attempting to find redress in the workplace or file a case with the authorities, it is crucial that ADL has provisions to ensure that such action is protected, and to limit or prevent retaliation that may occur as a result.

Harassment, victimization and instructions to discriminate are less transparent than debating direct and indirect discrimination, but they are no less important. In the context of age discrimination legislation, harassment takes place when the older worker is compelled or made to feel as though he/she should leave the job by an employer, or in the case of layoffs or mass redundancy, by their co-workers. The action can be verbal or, in the worst cases, can become physical. It can also include unreasonable work assignments or demands. Instructions to discriminate normally emanate from an employer or manager, who will order lower managers or other workers to engage in discriminatory behaviour in order to compel the older workers to quit their job. The actions in this case are similar to harassment, though in this case, the harasser is not the owner, but a subordinate manager or co-worker. Victimization in the case of age discrimination is to harass the person making the complaint or witnesses to the complaint, usually with the aim of compelling the withdrawal of the complaint, the dismissal of the witnesses or the dismissal of older worker who made the complaint.

## **Harassment**

Explicit provisions on harassment can be found in the age discrimination legislation of 23 countries.<sup>77</sup> In most cases, harassment is defined as subjecting a person to unwanted conduct that creates an intimidating, hostile or degrading work environment. Age discrimination legislation in Austria, Bulgaria, Germany, Hungary, Luxembourg, Poland, Slovenia and the United Kingdom specifically indicates that harassing actions are those that violate “human dignity” based on the age of a person.<sup>78</sup> In France, harassment based

<sup>77</sup> Austria, Belgium, Bulgaria, Cyprus, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, South Africa and the United Kingdom.

<sup>78</sup> Austria: Article 21(1)-(2), Equal Treatment Act. Bulgaria: Article 5, Act on Protection against Discrimination. Germany: Section 3.3, Law on equal treatment. Hungary: Article 10, Paragraph 2, Act CXXV on equal treatment and promotion of equal opportunities. Luxembourg: Article 18, General Discrimination Law. Poland: Article 183a, Paragraph 5(2), Labour Code. Slovenia: Article 5, Paragraph 1, Principle of Equal Treatment Act (this is based on Articles 34-35 of the Slovenian Constitution which explicitly, and respectively, protects the right to personal dignity and safety as

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on age takes on a similar form, but with a different conclusion. Harassment based on age is an issue of moral degradation that violates the physical and psychological integrity of an older worker and, though unlawful, is not considered discriminatory.<sup>79</sup> In contrast, in Bulgaria, Finland, Malta, Slovenia, Slovakia, Spain and South Africa, harassment based on age is considered discriminatory.<sup>80</sup> The discrimination law in Italy not only includes harassment, but the ADL provision further prohibits mobbing.<sup>81</sup> These provisions emphasize that ADL can go beyond traditional definitions to address the work environment. Harassment may be dealt with in other parts of labour law in other countries, but by deliberately highlighting it in ADL, it raises awareness by employers and workers so that they can fully comprehend its negative consequences.

### ***Instructions to discriminate***

Another form that harassment can take is instructions to discriminate. In this case, it is an indirect form of harassment, as the person initiating it is not the same person who commits the act. It is normally based on power relationships within the workplace, and the person committing the act may or may not choose to follow the instructions, but in the event that they do not, they might be threatened or dismissed as well. Perhaps because of the fact that the harassment involves others who may have no choice in the matter, 27 countries have made instructions to discriminate unlawful.<sup>82</sup> Instructions to discriminate are an unlawful form of age discrimination in the discrimination legislation of Bulgaria, Greece, Latvia, Lithuania, Luxembourg, Norway, Slovenia and Spain.<sup>83</sup> The age discrimination legislation in France does not address instructions to discriminate, but it has been suggested that the provision in French law regarding “complicity to discriminate”

well as the right to privacy and personality rights). United Kingdom: Employment Equality (Age) Regulations 2006.

<sup>79</sup> France: Articles L122-46 and L122-49 (specifically), Labour Code.

<sup>80</sup> Bulgaria: Article 5, Act on Protection against Discrimination. Finland: Section 6, Non-Discrimination Act. Malta: Equal Treatment in Employment Regulations 2004. Slovakia: Section 2, Paragraph 5, Antidiscrimination Act. Slovenia: Article 5, Paragraph 1, Principle of Equal Treatment Act. South Africa: Chapter 2, Section 6(3), Employment Equity Act 1998; Section 1(xiii), Promotion of Equality and Prevention of Unfair Dismissal Act 2000.

<sup>81</sup> “Mobbing” is defined generally as ganging up on a target employee and subjecting the employee to psychological harassment. The behaviours include negative remarks, constant criticism, isolation at work, gossiping against or constant ridiculing a co-worker. According to Simoni (op. cit., p. 14), much has been done under the label of “mobbing”. This notion can still be useful in some cases that could not be precisely covered by the Decrees, since the courts have identified a ground for civil liability in some articles of the Civil Code: Article 2087, bearing on the duty of protection of the employer; Article 2103, concerning duties assigned to the employee; Article 2043, on damage compensation. Case law in the field is now abundant.

<sup>82</sup> Australia, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom.

<sup>83</sup> Bulgaria: Article 5, Act on Protection against Discrimination. Greece: Article 2, Law No. 3304/2005. Latvia: Article 29(4), Labour Law. Lithuania: Act on Equal Treatment (addressed as a form of direct discrimination). Luxembourg: General Discrimination Law 2006. Norway: Chapter 13, Section 13, Working Environment Act. Slovenia: Paragraph 4, Article 4, Act No. 2295. Spain: Article 28.2, Law No. 62/2003.

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may apply.<sup>84</sup> The proposed legislation in the Czech Republic also does not explicitly address harassment or victimization, but it does specifically address instructions to discriminate. Similarly, the Equal Employment Act 1998-2004 in Ireland, which makes harassment and victimization unlawful, goes one step further and raises the possibility of criminal sanctions for instructions to discriminate.<sup>85</sup> Although the coverage in these countries may have something to do with the EU Directive's requirements for implementation, the fact that so many have strict provisions may relate to the importance attached to this in the European legal and employment context. Outside the European Union, Australia, Guyana and New Zealand have explicit provisions addressing instructions to discriminate as part of their age discrimination legislation.<sup>86</sup>

## **Victimization**

Victimization appears to be a notable part of age discrimination legislation, with 25 countries including provisions that attempt to prevent negative consequences for a worker making a complaint or providing evidence in an age discrimination case.<sup>87</sup> There are three reasons for this. First, it is designed to protect older workers making a complaint and those giving evidence. Second, it is also about protecting the integrity of the tribunal/judicial process which could be undermined in the event that charges and witnesses are compromised. Third, because by its nature ADL is not predictive but responsive to a violation that may have taken place, having mechanisms with stringent consequences may have a dissuasive effect on those who might otherwise attempt to engage in victimization. This may be why, though almost all of these countries prohibit or make it unlawful for an employer to treat workers in this way, some countries have decided that victimization should have a cost. Hence, the ADL in Spain, for example, stipulates that dismissals as a result of victimization are automatically invalid.<sup>88</sup> Legislation in Guyana, Ireland, Italy, Latvia and the United Kingdom also prohibits victimization and further includes the possibility of damages, sanctions and compensation to be paid.<sup>89</sup>

<sup>84</sup> According to Latraverse, instructions to discriminate correspond to the notion of complicity of Articles 121-6 and 121-7 PC and general principles of liability in civil law. Latraverse, *op. cit.*, pp. 27-28.

<sup>85</sup> Ireland. Section 14, Equal Employment Act 1998.

<sup>86</sup> Australia: Section 56, Age Discrimination Act 2004. Guyana: Part VII, Section 21(2), Prevention of Discrimination Act 1997. New Zealand: Sections 22 and 66, Human Rights Act 1993; Section 104, Employment Relations Act 2000.

<sup>87</sup> Australia, Austria, Belgium, Bulgaria, Estonia, Finland, France, Germany, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Portugal, Slovakia, Slovenia, Spain, the United Kingdom and the United States.

<sup>88</sup> Spain: Article 37, Law No. 62/2003; Decree No. 5/2000 (new redaction in Article 17.2).

<sup>89</sup> Guyana: Part VIII, Section 22(1), Prevention of Discrimination Act 1997. Ireland: Section 74(2), Employment Equality Act 1998. Italy: Articles 4.5-4.6, Legislative Decree No. 216. Latvia: Article 9 and Article 29(8) (compensation rights), Labour Law. United Kingdom: Employment Equality (Age) Regulations 2006. In the United Kingdom, there is no upper limit on compensation that can be awarded for discrimination. See C. O'Conneide: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: United Kingdom* (Brussels, January 2007).

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## Redundancy and dismissal protection in age discrimination legislation

Redundancy and dismissal protections are at the core of ADL. They exist to ensure that age is not the central reason for severing the employment relationship between an older worker and the employer on an individual level (e.g. dismissal or redundancy/layoffs) or more broadly (e.g. redundancy/layoffs). This is also one of the most contentious issues, as older workers tend to have seniority rights in employment, making them costly to remove, or are already primary beneficiaries of stringent dismissal protection legislation, such as in European Union countries.

Of countries with ADL, 31 have provisions prohibiting dismissal or contract termination solely on the basis of age.<sup>90</sup> If the prohibition is not sufficient, other mechanisms can be used. For example, age discrimination legislation in Hungary increases the costs of dismissing an older worker before retirement by raising severance pay owed if the dismissal takes place within a five-year period before retirement.<sup>91</sup> Regardless of the combinations used, it is important that linkages be explicitly made in the law so that the rights and responsibilities are clear to employers and workers.

The issue of redundancy (or layoffs) in age discrimination legislation is not as clear-cut as it would appear on the surface. Redundancies usually mean that a cut in the labour force is bound to happen and the employer is looking for workers to make redundant. The age discrimination legislation in 22 countries explicitly addresses the issue of redundancy.<sup>92</sup> However, this does not mean that redundancy is completely prevented. Age discrimination legislation in Estonia, France, Greece, Latvia, Luxembourg, Slovakia and Slovenia gives preference in redundancies to older workers or to workers with seniority, while, in the Netherlands, the principle governing redundancies is “last in, first out”.<sup>93</sup> Redundancy is not always addressed in national ADL, but this does not mean that other mechanisms, such as collective bargaining agreements, cannot be used. Accordingly, in Denmark, where employment regulation is often done through collective bargaining agreements, older workers can be offered a bonus to leave, but not be dismissed. As a recent report on Denmark noted, in these situations “carrots are permitted, but sticks are

<sup>90</sup> Australia, Austria, Azerbaijan, Bahamas, Belgium, Benin, Cyprus, Estonia, Finland, Germany, Greece, Guyana, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, New Zealand, the Netherlands, Niger, Poland, Portugal, Singapore, Slovakia, Slovenia, Spain and South Africa. Legislation in the Czech Republic, which includes age discrimination legislation, is under consideration and expected to be ratified. See P. Boucková: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Czech Republic* (Brussels, January 2007).

<sup>91</sup> Hungary: Article 95, Paragraph 5, Labour Code.

<sup>92</sup> Belgium, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, the United Kingdom and the United States.

<sup>93</sup> Estonia: Article 99, Employment Contract Act 1992. France: L321-4-1 and L321-13, Labour Code. Greece: court decided [Y. Ktistakis: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Greece* (Brussels, January 2007)]. Latvia: Article 108, Labour Code. Luxembourg: F. Moyse: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Luxembourg* (Brussels, January 2007). Netherlands: Gijzen, op. cit. Slovakia: Dlugosova, op. cit. Slovenia: Article 100, Employment Relations Act.

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not”.<sup>94</sup> Regardless of the legal mechanism that is used, it is important to guarantee income continuity by requiring some form of compensation in the event of a redundancy, perhaps tax free, so that the older worker may benefit and the state does not have to prematurely provide some form of income supplement.<sup>95</sup>

One issue that is not always clearly addressed, but does impact on the dismissal/redundancy issue in age discrimination legislation, is the linkage between harassment and forced retirement. In the absence of an agreement to sever the employment relationship “voluntarily”, there can be pressures from employers or co-workers on older workers, especially in redundancy situations, to resign or prematurely retire. It is exactly for this reason that legislation in New Zealand, Singapore and the United States has made this unlawful.<sup>96</sup>

However, this does not mean that ADL always protects older workers. As noted earlier in this study, issues associated with mandatory retirement can undermine ADL and labour law protections for older workers. Thus, in Cyprus, Hungary and the United Kingdom, mandatory retirement effectively ends employment protection, including protections from ADL, dismissal and redundancy.<sup>97</sup> The result is to create a marginal pool of older workers whose conditions of work and employment are not even guaranteed. The only country with age discrimination legislation that makes it unlawful to withdraw employment protection, particularly in dismissal and redundancy protection, is Slovakia. If the debate surrounding the extension of working life is serious, then the *quid pro quo* should be that, in exchange for working longer, an older worker continues to have employment protection, including ADL protections against harassment by employers or co-workers to resign or retire prematurely.

## Scope of employer liability

The scope of liability for an employer in age discrimination legislation, in theory, should be to the employee. Yet as the labour market changes and alternative forms of working arrangements and employment relationships become more common, it is important to make sure that age discrimination legislation takes into account these new developments so that no worker can be marginalized simply on the basis of old age.

Employer liability regarding employees is explicitly addressed in the national age discrimination legislation of 28 countries.<sup>98</sup> This means that employers are liable if they engage in any unlawful age discrimination towards workers they employ. It also means

<sup>94</sup> Hansen, op. cit., p. 47.

<sup>95</sup> Consideration might also be extended to the Hungarian law which raises the amount of compensation due if the worker is less than five years from retirement, as mentioned above.

<sup>96</sup> New Zealand: Human Rights Act 1993; Singapore: Retirement Age Act 1993; United States: Age Discrimination in Employment Act.

<sup>97</sup> Cyprus: Section 4, Law on Termination of Employment (provides that right to protection is lost at pension age). Hungary: Article 90, Labour Code (does not protect rights after pension age). United Kingdom: Employment Equality (Age) Regulations 2006 (permit employers to set mandatory retirement age after the age of 65 and an older worker cannot do anything about it); see O’Cinneide, op. cit., p. 67.

<sup>98</sup> Australia, Austria, Bahamas, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Mexico, the Netherlands, Poland, Portugal, Singapore, Slovakia, Slovenia, South Africa, the United Kingdom and the United States.

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that if they do engage in age discrimination, they can be held liable financially for their actions or policies in the workplace.

A number of countries, nevertheless, have recognized the changing dimensions of working arrangements and employment relationships by extending age discrimination liability beyond the traditional employment relationship. Employer liability extends to contractors in Belgium, Guyana, Portugal and Slovenia, as well as to sub-contractors in Denmark.<sup>99</sup> Age discrimination legislation in Poland and Slovakia extends employer liability to the self-employed.<sup>100</sup> Managers and employer representatives are included in the age discrimination legislation in the Bahamas and Finland.<sup>101</sup> Employers can also be held liable for discriminatory behaviour by customers and clients in Finland, Guyana and Ireland.<sup>102</sup> Even if employers believes their own conduct should create the only legal obligation for age discrimination legislation to apply, they can be held liable for discriminatory acts by other employees towards an older worker in the same workplace in Greece, Hungary, Luxembourg, Portugal and the United Kingdom.<sup>103</sup>

It might appear on the surface that extending ADL liabilities beyond the employer-employee relationship is less than equitable to the employer. Nevertheless, consideration should be given to the fact that the relationships identified involve more than just employment relationships, but also involve working conditions and business functions. ADL would be of diminished importance if it did not require an employer to change the behaviour in the workplace or the minimum respect that any worker should receive from managers, co-workers or customers. As the employer has the sole authority to do this, it is up to this person or group of persons in larger organizations not only to honour their legal obligations, but to do so in a manner that improves and ensures decent conditions in the workplace.

## Scope of protection

The laws of 33 countries allow workers who feel they have been discriminated against because of age to file a case.<sup>104</sup> However, it has been suggested that age

<sup>99</sup> Belgium: Article 2(4), Act to combat discrimination. Denmark: Hansen, *op. cit.*, p. 34. Guyana: Part I, Article 2(d) and (j), Prevention of Discrimination Act 1997. Portugal: Article 617(2), Labour Code (includes sub-contractors). Slovenia: Article 147, Code of Obligations.

<sup>100</sup> Poland: Article 183(a)(1), Labour Code. Slovakia: Section 6, Paragraphs (1) and (2)(a)-(b), Antidiscrimination Act; Section 192, Labour Code.

<sup>101</sup> Bahamas: Part I, Section 6, Employment Act 2001. Finland: Non-Discrimination Act 2004, as amended by Section 2, Act No. 50/2006; and Occupational Health and Safety Act 2002.

<sup>102</sup> Finland: Non-Discrimination Act, as amended in 2006. Guyana: Part I, Article 2(i), Prevention of Discrimination Act 1997. Ireland: Sections 14(A) and 42, Employment Equality Act 1998.

<sup>103</sup> Greece: Law No. 3304/2005; Articles 334 and 922, Civil Code. Hungary: Article 5, Act CXXV on equal treatment and promotion of equal opportunities; Articles 348-349, Civil Code. Luxembourg: Article 1384, Civil Code. Portugal: Malheiros, *op. cit.*, p. 26. United Kingdom: Employment Equality (Age) Regulations 2006.

<sup>104</sup> Antigua and Barbuda, Australia, Austria, the Bahamas, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Guyana, Ireland, Italy, Hungary, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, the United Kingdom and the United States. One noteworthy distinction is that complaints cannot be filed by non-workers or those who do not themselves

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discrimination legislation, while addressing what appear to be simple rights, is in fact complex legislation.<sup>105</sup> Owing to the recognition that age discrimination legislation can be more challenging than meets the eye, the legislation does not obligate workers to file their own case, but allows legal representatives (e.g. legal counsel, trade unions, etc.) to file a case on their behalf. Some countries require some form of written authorization that the legal representatives or trade union representatives are acting on their behalf. This limits action by those who might try to hijack the procedure by claiming age discrimination where the merits, at best, are uncertain or, at worst, do not exist.

In most countries, older workers who are currently employed or were recently dismissed can file cases based on a violation of age discrimination legislation. Some countries permit others to file suit as well. The ADL in Greece, Slovakia, St. Lucia and the United States explicitly permits job applicants to present a case arguing a violation of their rights.<sup>106</sup> The application of age discrimination legislation to job applicants is a particularly important component of the legislation, even if it is not always properly or specifically addressed. Age discrimination can be especially prevalent before an older worker even walks in the door since, at that point, the potential employer has not yet established a relationship with the worker. As Neumark and others have pointed out, employers can avoid the issue of age discrimination in employment by simply not hiring an older worker. Compounding the problem from a monitoring perspective is that the lack of information regarding age discrimination in hiring makes it difficult to assess precisely how often it takes place in a particular industry, company or workplace, and which employers might be predisposed to not hire older workers.<sup>107</sup> Nevertheless, it is crucial that older workers are given equal opportunity when being considered for employment and that this coverage should come from age discrimination legislation. In addition, mechanisms (e.g. home or workplace surveys) should also be developed by policy-makers to at least approximate what kind of age discrimination in hiring might exist in the labour market.

In a majority of countries, there are a variety of options where a case of age discrimination can be filed. Normally, labour courts or tribunals will be the forums for legal decision-making. However, in Australia and New Zealand, the type of age discrimination legislation that can be applied will depend on the employment relationship of the older worker and on where the case is filed. In New Zealand, two Acts can apply to age discrimination: the Employment Rights Act 2000 and the Human Rights Act 1993. The Employment Rights Act 2000 permits employees and those recently dismissed to file their case with the employment tribunal, which can determine remedies and compensation.<sup>108</sup> However, this legislation only applies to employees and those that were involved in a traditional employment relationship. On the other hand, the Human Rights Act 1993 allows job applicants, employed workers, independent contractors, agencies

experience age discrimination in most countries, thus limiting what can be done by NGOs, for example.

<sup>105</sup> O’Cinneide, op. cit.

<sup>106</sup> Greece: Articles 2-4, Law No. 3304/2005; Article 967, Civil Code. Slovakia: Section 6, Paragraphs 1 and 2(a)-(b), Antidiscrimination Act. St. Lucia: Equality of Opportunity and Treatment in Employment and Occupation Act 2000.

<sup>107</sup> D. Neumark and W. Stock: “Age discrimination and labour market efficiency”, in *Journal of Political Economy*, Vol. 107, No. 5, October 1999, pp. 1081-1125; S.J. Adams: “Age discrimination legislation and the employment of older workers”, in *Labour Economics*, Vol. 11, 2004, pp. 219-241.

<sup>108</sup> New Zealand: Sections 113 and 123, Employment Relations Act 2000.

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providing services, and vocational and qualifying bodies to file a case with the Human Rights Commission.<sup>109</sup> However, though the Human Rights Commission can address more types of cases, it does not have tribunal powers to apply a remedy. Thus, while one restricts access, it provides a more settled conclusion, whereas the other is more comprehensive, but lacks the concrete outcomes of an employment tribunal. The important decision involved for those considering filing an age discrimination case with either of these bodies is that, if a case is filed on the basis of one or the other law, the applicant cannot file in the other forum at the same time.<sup>110</sup> A similar system operates in Australia. The definitions used for age discrimination are similar in the Age Discrimination Act 2004 and the Workplace Industrial Relations Act 1996.<sup>111</sup> The Age Discrimination Act 2004 allows a broader group of applicants than the Workplace Industrial Relations Act 1996, which is limited to employees or former employees.<sup>112</sup> With regard to enforceable remedies, the Age Discrimination Act 2004 permits the Human Rights and Equal Opportunities Commission to establish conciliation between the parties with no enforceable remedies for violations, whereas the Workplace Industrial Relations Act 1996 has binding decisions, remedies and sanctions.<sup>113</sup>

The government in some countries plays a more active role in determining age discrimination rights, such as Singapore. The Retirement Age Act of 1993 of Singapore requires the older worker to present a case to the Minister of Labour, who then appoints an officer to investigate the claim.<sup>114</sup> The investigative officer has a broad authority and the employer has a legal obligation to comply.<sup>115</sup> The decision rendered by the officer is submitted to the Minister in a report, and the decision that the Minister makes based on this report is also legally binding. Hence, the system is based on the government using the legislation to secure rights, rather than the tribunal or court system making a ruling regarding age discrimination. The advantage of such a system may be the quickness of the procedure, from filing a case to reaching a decision, but it is also heavily dependent on government representatives whose decisions cannot be appealed.

## Working conditions and access to training

ADL is meant to address a host of factors that can affect or impede employment opportunity or career development for older workers. Provisions in ADL that address working conditions and training help to ensure this goes from possibility to reality. Working conditions provisions should, in principle, address a number of factors, including appropriate terms and conditions of employment, remuneration, working hours,

<sup>109</sup> G. Wood, M. Harcourt and S. Harcourt: "The effects of age discrimination on workplace practice: A New Zealand case study", in *Industrial Relations Journal*, Vol. 35, No. 4, 2004, p. 363. See also Section 22, Human Rights Act 1993.

<sup>110</sup> New Zealand: Section 122, Employment Relations Act 2000.

<sup>111</sup> Australia: Section 170(2)(f), Workplace Relations Act 1996; Sections 12-14, Age Discrimination Act 2004.

<sup>112</sup> Australia: Sections 18-20, Age Discrimination Act 2004; Section 642, Workplace Relations Act 1996.

<sup>113</sup> Australia: Section 53, Age Discrimination Act 2004; Sections 652-659, Workplace Relations Act 1996.

<sup>114</sup> Singapore: Sections 3 and 7, Retirement Age Act 1993.

<sup>115</sup> Singapore: Section 8, Retirement Age Act 1993.

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organizational health and safety, and access to facilities related to employment. Furthermore, provisions should also help make sure training and skills development on offer to other workers are available to older workers as well, so as not to extinguish the possibility of career advancement. Provisions recommending career guidance prior to an older worker retiring might also be useful, and could be organized in conjunction with other government policies to achieve a less costly and more efficient provision of assistance to employers and older workers.

The ADL in most countries has been designed to address the issue of working conditions. National age discrimination legislation in 33 countries explicitly prohibits age discrimination with regard to working conditions.<sup>116</sup> Most ADL provisions are intended to make certain that working conditions for older workers do not worsen once they are employed, but the ADL in some countries further ensures that working conditions are protected from the beginning of the employment relationship. This is particularly important for older workers fortunate enough to start a new job. The age discrimination legislation in Australia, the Bahamas, Greece, Guyana, Ireland, Latvia, Lithuania, the Netherlands, New Zealand, Slovakia and South Africa prohibits age discrimination in working conditions from the beginning of the employment relationship until it ends.<sup>117</sup> By including a provision of this nature, these countries signal the importance of working conditions not only for new hires, but over the entire course of a worker's employment with an organization or institution. It also reinforces the position of older workers in the event that they are themselves new hires, so that they do not lose compensation or benefits simply because they have changed employers.

It should also be noted that, with regard to the employment policy and law approach in Japan and the Republic of Korea, working conditions and training are perhaps the important variables in terms of government activity and legal protection. The methods in both Japan and the Republic of Korea appear to suggest a "carrot-and-stick" approach to entice both older workers and employers in maintaining the employment relationship. The government ministries play a very active role, perhaps more so than their counterparts in other countries, in helping the parties to establish, maintain and encourage hiring and employment of older workers. Yet nothing in either the legislation of Japan or the Republic of Korea inherently guarantees anything either; for example, rights against unjust dismissal only extend until retirement age, which can limit protection for those working beyond retirement age. Also, with regard to working conditions and explicitly wages, these laws may be most limited. According to research in Japan, it is not illegal for an employer to end an employment relationship with an older worker for failure to agree on working conditions (i.e. wages).<sup>118</sup> In the Republic of Korea, an employer is not obligated to include the previous working period necessary to calculate severance pay or consecutive

<sup>116</sup> Australia, Austria, Benin, Brazil, Bulgaria, Cyprus, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Niger, New Zealand, Poland, Slovenia, South Africa, Spain, St. Lucia and the United Kingdom. The Czech Republic has provisions which should be implemented in the near future.

<sup>117</sup> Australia: Sections 18-20, Age Discrimination Act 2004. Bahamas: Part I, Section 6(a), Employment Act 2001. Greece: Article 1, Law No. 3304/2005. Guyana: Section 5(2)(a)-(d), Prevention of Discrimination Act 1997. Ireland: Section 8, Employment Equality Act 1998. Latvia: Article 29(1), Labour Law. Lithuania: Article 95, Labour Code. Netherlands: Article 3, Equal Treatment in Employment (Age Discrimination) Act. New Zealand: Section 22, Human Rights Act 1993, or Section 104, Employment Relations Act 2000. Slovakia: Article 36, Constitution. South Africa: Unfair Discrimination Act 2000.

<sup>118</sup> N. Yamashita: "Act concerning Stabilisation of Employment of Older Persons", in *Japan Labor Review*, Vol. 4, No. 3, Summer 2007, p. 90.

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workdays to calculate holidays when considering re-employment of an older worker.<sup>119</sup> If the working conditions are such that older workers can be routinely marginalized on the basis of lacking other employment protection, it would severely undermine the prospect of decent working conditions for older workers. This may, in turn, have the unintended consequence of many workers deciding not to continue working when they retire. The approach also poses other questions, namely whether employment law and policies should solely be about continuing to work longer in any job or whether job quality and conditions of work and employment should also be more strongly associated with the extension of working life.

With regard to employment training, it might seem to be a contradiction to include age discrimination protections, but this perhaps is the issue that victimizes older workers in the labour market most. The ageism that leads to age discrimination in employment is most often expressed with the view that older workers are unable to adjust to new technologies or new systems of work. This becomes a self-fulfilling prophecy if training is not available so that older workers, as any other members of the workforce, can adapt to new workplaces. It can also be vital for career development and, depending on the age of a worker, can be an important factor in terms of workplace commitment and productivity in the workplace.<sup>120</sup> ADL is vital to counter negative stereotypes and to make sure that the opportunity to access training is not unnecessarily restricted and career development is possible. In recognition of this, the ADL in 30 countries explicitly makes it discriminatory to limit training and development opportunities based on age.<sup>121</sup> Most of this legislation resembles the provisions in Guyana and New Zealand, which do not permit age discrimination in access to training or promotion.<sup>122</sup> The Age Discrimination in Employment Act in the United States uses an elastic definition by making it unlawful to “limit, classify, or segregate employees in a way which would tend to deprive an individual of employment opportunities”.<sup>123</sup>

However, the legal obligations for the administration of training can be the overriding mechanism addressing age discrimination in skills development for older workers. Thus, in Lithuania, regulatory collective bargaining agreements address all training-related

<sup>119</sup> Republic of Korea: Article 21, Aged Employment Promotion Act.

<sup>120</sup> The United States Age Discrimination in Employment Act is limited to workers 40 years of age and older, which is often when workers start facing difficulties in workplace development or finding new work. However, because workers over this age may not be anywhere near the retirement age, it is important that working conditions and career development remain possible, for the benefit of the older workers, employers and society at large.

<sup>121</sup> Australia, Austria, the Bahamas, Belgium, Benin, Brazil, Bulgaria, Denmark, Estonia, Finland, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Niger, Poland, Spain, South Africa, St. Lucia, the United Kingdom and the United States.

<sup>122</sup> Guyana: Section 5(2)(a)-(d), Prevention of Discrimination Act 1997; New Zealand: the Human Rights Act 1993 applies to job applicants and the Employment Relations Act 2000 addresses employees, but both have provisions regarding age discrimination in working conditions and training.

<sup>123</sup> United States: Article 623(1)(2), Age Discrimination in Employment Act. This is also a negative rights provision, as it says what cannot be done, but does not prescribe what can or should be done regarding working conditions, training or career advancement.

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issues;<sup>124</sup> while in Belgium, though age discrimination is national law, age discrimination in training would be addressed by regional governments where all training-related issues are directed.<sup>125</sup> Similarly, employment training plays an important role in the employment policy approach in Japan and the Republic of Korea. The Silver Training Centres in Japan and the Employment Information Centre for the Aged in the Republic of Korea offer counselling and training opportunities to help older workers find work.<sup>126</sup> Whereas Korean older workers do not receive a stipend, Japanese older workers are provided with a government-paid stipend until they can find employment.<sup>127</sup> However, the employment on offer in Japan's Silver Training Centres is geared to help retirees find short-term or flexible work which, in practical terms, does raise concerns regarding the conditions of work and employment available to older workers.<sup>128</sup>

One aspect that is noteworthy is that, although a number of countries have age discrimination prohibitions related to working conditions and training, these are not always part of the same labour law. As identified above, a number of countries use different legal provisions to address working conditions or training. Government training policies, lower level government, industry and workplace collective bargaining are all mechanisms used to address these issues and provides guidance as to how they might be administered. Nevertheless, for these mechanisms to be effective in preventing age discrimination in relation to working conditions and training, it is crucial that they in some way refer to existing ADL in order to make sure that responsibilities and rights are incorporated in them and understood by all parties concerned.

### **Genuine occupational qualification: The employer's provision**

There are circumstances under which an employer's decision to not choose an older worker when hiring, promoting or retaining may be based on legitimate factors relating to the responsibilities of the job in question or for business-related reasons. If age discrimination legislation is meant to be equitable, there need to be provisions that recognize that, under certain circumstances which should be justified, employers are allowed to consider other options for their workforce than older workers. The justification threshold should be based on some form of genuine or *bona fide* occupational qualification in which the employer must demonstrate that the decision is based on factors reasonably necessary to the normal operation of the business or the job in question. There are circumstances where the inherent requirements of a job may mean that the costs of hiring or retaining an older worker are not as important as the health and safety concerns of other

<sup>124</sup> E. Ziobiene: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Lithuania* (Brussels, January 2007), p. 25.

<sup>125</sup> O. De Schutter: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Belgium* (Brussels, January 2007), pp. 56-57.

<sup>126</sup> Japan: Chapter VI, Articles 41-48, Law concerning Stabilisation of Employment of Older Persons (Article 8 forbids the age set lower than 60 years of age). Republic of Korea: Article 10, Aged Employment Promotion Act.

<sup>127</sup> Japan: *ibid.*, Article 26.

<sup>128</sup> Japan: *ibid.*, Articles 41-42.

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workers or the public.<sup>129</sup> This is not to suggest that this is a complete opt-out of the responsibilities created by ADL, as employers might be able to make proportional adjustments to the workplace or job requirements to achieve the business aim and still hire or retain an older worker. Most importantly, such a provision should require an employer to assess an individual older worker's capability to perform the job, rather than permit a complete rejection of all older workers as a group from employment. By doing so, ADL becomes more equitable not only for older workers, but for employers as well.

Provisions on genuine occupational qualifications<sup>130</sup> can be found in 30 countries.<sup>131</sup> These provisions generally permit employers to use age as an exception to hiring, training or employing a particular worker for a job. These qualifications can include a number of rationales to create exemptions based on health and safety concerns for co-workers, clients and customers. Strict economic factors, such as the cost of hiring or training, or the perception of lower productivity by older workers, do not necessarily qualify as a genuine occupational qualification. What is important is whether the interpretation and application of such an exemption is based on the wording of the provision in ADL, the legal interpretation given to it by labour tribunals/courts, or some combination of the two.

There are variations as to how the assessment of a genuine occupational qualification is made or what legal provisions permit in different countries. As identified earlier, European Union Directive 2000/78/EC provided the framework for how genuine occupational qualifications should be addressed in EU Member States. Article 4(1) of the Directive stipulates that "Member States may provide that the difference of treatment which is not based on a characteristic related to (age) shall not constitute discrimination where, by reason of the nature of the particular occupational activities or a genuine and determining occupational requirement, provided that the objective is legitimate and proportionate". Article 6 of the Directive further requires that justification in national law be reasonably and objectively justified, have a legitimate aim, and the means of achieving that aim must be appropriate and necessary. While almost all of the EU Member States have implemented these requirements, some have placed greater emphasis on Article 4(1) than on Article 6 of the Directive. Most Member States emphasize objectively justified, reasonable and proportional considerations when an employer tries to offer a genuine occupational defense for age discrimination.<sup>132</sup> Denmark and Germany emphasize the proportionality test, in which an employer can set an age requirement only if it is objective and reasonable, within the law, and the requirement is necessary to achieve the objectives of business.<sup>133</sup> While also providing for individual circumstances, the legislation in countries such as Luxembourg and Portugal have included provisions from Article 6 of the

<sup>129</sup> M. Even Gold: *An introduction to the law of employment discrimination* (Ithaca, Cornell University ILR Press, 1993).

<sup>130</sup> The Age Discrimination in Employment Act refers to "*bona fide* occupational retirement", which is approximately the same in theory as the criteria for genuine occupational requirement that is used for the analysis in this section.

<sup>131</sup> Australia, Austria, the Bahamas, Belgium, Benin, Brazil, Bulgaria, Denmark, Estonia, Finland, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Niger, Poland, Spain, St. Lucia, South Africa, the United Kingdom and the United States.

<sup>132</sup> Legislation in Bulgaria, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Slovakia, Slovenia and the United Kingdom all use some variation of this in their legislation.

<sup>133</sup> Denmark: Section 5a, Subsections 3-4, Labour Market Discrimination Act. Germany: Section 8, Law on equal treatment.

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Directive allowing employment policy, labour market and vocational training objectives to influence what is objectively and reasonably justified. Perhaps the most elastic of the national laws on this topic can be found in Hungary, where the “legitimate aim” is not defined in the Hungarian age discrimination legislation, and Poland, where the terms “genuine and determining” are not included in the age discrimination legislation.<sup>134</sup> At the time of writing, there have not been meaningful efforts regarding how Articles 4 and 6 of the EU Directive should be interpreted, but it has been suggested that whatever is used as justification will have to be tightly constrained in the future in order that it does not unravel all of the ADL in these countries.<sup>135</sup>

Beyond Europe in a number of English-speaking, common-law influenced countries, the emphasis of the genuine occupational requirements is quite specifically on hiring and issues that may affect the existing employment relationship (e.g. training, etc.). The Age Discrimination in Employment Act in the United States allows the employer to use age as a *bona fide* occupational qualification (its equivalent of genuine occupational qualification) if it is necessary for the performance of the job, as well as allowing a defense of age discrimination so long as it based on specified criteria.<sup>136</sup> In the legislation in Australia and South Africa, “the inherent requirements of the job” is the standard for judging if the employer qualification exists or not.<sup>137</sup> Perhaps the most specific reference is in the discrimination legislation in Guyana, “where the essential nature of the job means that for reasons of age or physiology (excluding strength and stamina) an older worker can not do the job”.<sup>138</sup> In terms of making sure that employers do have a legitimate set of reasons, legislation in Australia and New Zealand is quite specific. In the case of New Zealand, this emanates not from employment law, but human rights law. The Age Discrimination Act 2004 (Section 24) in Australia and the Human Rights Act 1993 (Section 35) in New Zealand prevent employers from organizing work, defining business or permitting discriminatory conduct in order to meet a genuine occupational qualification rationale. The Human Rights Act 1993 in New Zealand further stipulates that adjustments must be made, where possible, to accommodate older workers before a genuine occupational requirement can be made.<sup>139</sup>

One way of determining whether the genuine occupational requirement defense used by an employer is factual would be to use statistical data to determine if there is a pattern of behaviour or if the employer’s position is in fact authentic. In a real sense, statistical data can act as both a “sword and shield” for employers and older workers, depending on

<sup>134</sup> Hungary: A. Kádár and L. Farkas: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Hungary* (Brussels, 2005), p. 32. As a report in Poland noted, this gives the employer an overly large definition in dealing with an older worker. See P. Lilipek and M. Pamula: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Poland* (Brussels, 2005), p. 26.

<sup>135</sup> H. Meenan: “The future of aging and the role of age discrimination in the global debate”, in *Journal of International Aging, Law and Policy*, Vol. 1, Fall 2005, p. 27.

<sup>136</sup> United States: Article 623(f)(1) of the Age Discrimination in Employment Act sets the criteria as (i) must be applied equally; (ii) cannot in any way include age; and (iii) must be job related.

<sup>137</sup> Australia: Section 24, Age Discrimination Act 2004. South Africa: Chapter 8, Section 187(2)(a)-(b), Labour Relations Act 1995; Chapter 2, Section 6(2), Employment Equity Act 1998.

<sup>138</sup> Guyana: Section 6, Prevention of Discrimination Act 1997. The provision in Guyana would appear to reflect the capability approach outline at the beginning of this study.

<sup>139</sup> New Zealand: Section 106 of the Employment Relations Act 2000 is applicable to employed or recently dismissed workers using the same criteria.

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whether they are defending an action or making an accusation of discrimination. The data could determine current or historic patterns of discrimination in hiring or dismissal that have relied on a qualification defense. However, though this would be the ideal in real terms, these may be the most difficult statistics to compile. With regard to hiring, there is a body of research which has clearly identified that the single biggest problem with determining age discriminatory hiring practices is the lack of available data, while others have pointed out that a number of other factors may account for non-hiring or promotion based on age.<sup>140</sup> However, it has never been suggested that such data gathering is impossible, so this may be an area of future research. At present, statistical data can be legally used in age discrimination cases in Cyprus, Denmark, Finland, France, Germany, the Netherlands, Poland and Spain.<sup>141</sup>

Genuine occupational qualifications have also been used by employers as a pretext for mandatory retirement. As has been noted in this work, mandatory retirement can create a number of problems both for individual older workers and for the general labour market for older workers. It will be important in the future for judicial bodies to ensure that these provisions are constrained as much as possible in order to avoid setting precedents that would result in the undermining of ADL.

## Burden of proof and remedies

The burden of proof and remedies are two of the critical operational components in all ADL. Once a complaint is filed with the appropriate court or body, it is important to establish who has the burden of proving whether an action or policy by an employer is discriminatory. Once a decision has been reached by appropriate judicial authorities, it is then important that guidance is available regarding what remedies should be applied to provide an equitable solution for both the older worker and the employer.

With regard to the construction of the burden of proof in age discrimination cases, ADL has tended to follow the lead established by other forms of discrimination in employment legislation. The standard generally used is that once a *prima facie* case of discrimination has been established, the burden of proof falls to the employer to demonstrate why the decision, action or policy was not discriminatory or justified on the basis of genuine occupational qualification defense. The reason is threefold. First, proving discrimination in employment, whether related to age or other forms, is not always straightforward. Second, on a practical level, the limited access to the workplace to get

<sup>140</sup> D. Neumark and W. Stock: "Age discrimination and labour market efficiency", in *Journal of Political Economy*, Vol. 107, No. 5, October 1999, pp. 1081-1125; S.J. Adams: "Age discrimination legislation and the employment of older workers", in *Labour Economics*, Vol. 11, 2004, pp. 219-241; MacNicol, op. cit., pp. 240-241.

<sup>141</sup> Cyprus: N. Trimikliniotis: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Cyprus* (Brussels, January 2007), p. 28. Denmark: Hansen, op. cit., p. 29. In Denmark, age is the only form of statistical evidence permitted. Finland: Makkonen, op. cit., pp. 18-19. France: Latraverse, op. cit., p. 23. Germany: Mahlmann, op. cit., p. 20. In Germany, statistical data in such cases are presupposed. Netherlands: Holtmaat, op. cit., p. 27. Poland: M. Mazur-Rafał and M. Pająk: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Poland* (Brussels, January 2007), p. 15. In Poland, it is not expressly forbidden, but admissible. Spain: L. Cachón: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Spain* (Brussels, January 2007), p. 18. Malta is looking to international experience to determine if it will allow this form of evidence in age discrimination proceedings: T. Ellul: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Malta* (Brussels, January 2007), p. 10.

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information demonstrating an employer's discriminatory behaviour would make proving cases beyond this standard exceptionally difficult to virtually impossible in certain instances. Third, on the personal level, there may also be financial pressures, especially if the person filing the complaint has been unjustly dismissed. Structuring the burden of proof to require that employers prove their actions were not discriminatory is meant to relieve at least some of these burdens for someone filing a complaint of age discrimination. Perhaps for this reason the ADL in 28 countries includes provisions reversing the burden of proof and making it an employer's responsibility to prove that the employment policies or actions were not discriminatory.<sup>142</sup>

If there is no finding for the employer once a case has been decided, then a remedy must be chosen to attempt to achieve an equitable outcome for the parties. This is a rather delicate balancing act, as the remedy must be strong enough to provide justice in the case in question as well as providing a dissuasive effect on the employer concerned and other employers. The remedy should not be so onerous that it can never lead to an equitable solution while, at the same time, it should reflect the material and personal risks taken by the person filing the complaint and the stress that it entails. At a minimum, remedies should include some form of financial settlement, but it may also be important to require compensation for other associated costs (e.g. legal fees) if these have been incurred over the course of filing the case and waiting for its resolution. Reinstatement to the same or a similar position may also be considered as a part or a complete portion of the remedy.

Guidelines for remedies exist in the ADL of 23 countries.<sup>143</sup> These provisions list available remedies based on age discrimination in hiring, employment, training or unjust dismissal, though the latter case is addressed in unjust dismissal legislation in some

<sup>142</sup> Australia: Workplace Relations Act 1996. Austria: Article 26(3), Equal Treatment Act. Belgium: Act to combat discrimination. Bulgaria: Article 9, Act on Protection against Discrimination. Cyprus: Section 11, Equal Treatment in Employment and Occupation Law. Denmark: Section 7(a), Labour Market Discrimination Act. Estonia: Article 1441, Employment Contracts Act 1992. Finland: Section 17, Non-Discrimination Act 2004. France: Article L122-45, Labour Code. Italy: Article 2729, Civil Code. Germany: Section 22, AGG. Greece: Article 14, Law No. 3304/2005. Guyana: Part IX, Section 23, Prevention of Discrimination Act 1997. Hungary: Article 19, Act CXXV on equal treatment and promotion of equal opportunities. Latvia: Article 29(3), Labour Law. Luxembourg: Article 5, General Discrimination Law. Malta: Regulation 10(3), Employment and Industrial Relations Act. New Zealand: Section 119, Employment Relations Act 2000. Poland: Paragraph 1, Article 183b, Labour Code. Portugal: Article 23(3), Labour Code; Article 35, Act No. 35/2004. Slovakia: Section 11, Paragraph 2, Antidiscrimination Act. Slovenia: Article 22, Paragraph 2, Principle of Equal Treatment Act. South Africa: Chapter 2, Section 6(11), Employment Equity Act 1998; Chapter 8, Articles 187(f) and 192(2), Labour Relations Act 1995. Spain: Article 32, Act No. 62/2003 United Kingdom: Regulations 37 and 40, Employment Equality (Age) Regulations 2006.

<sup>143</sup> Australia: Workplace Relations Act 1996. Bahamas: Employment Act 2001. Belgium: Act to combat discrimination; Article 1382, Civil Code. Bulgaria: Articles 76-82, Act on Protection against Discrimination. Cyprus: Section 15, Equal Treatment in Employment and Occupation Law 2004. Denmark: Section 7, Act on Prohibition against Discrimination. Estonia: Articles 103 and 117, Employment Contracts Act. Finland: Section 9, Non-Discrimination Act 2004. France: Articles L122-45, L122-49 and L123-1, Labour Code. Guyana: Part X, Sections 25-26, Prevention of Discrimination Act 1997. Ireland: Section 82(A), Employment Equality Act 1998. Italy: Article 4(5), Legislative Decree No. 216/2003; Article 3, Act No. 108/1990. Latvia: Article 29(8), Labour Law. Luxembourg: L.253-1, General Discrimination Law. Malta: Article 30, Employment and Industrial Relations Act. New Zealand: Sections 123 and 125-127, Employment Rights Act 2000. Poland: Articles 45.2 and 56.1, Labour Code. Portugal: Article 620, Labour Code. Slovakia: Section 9, Antidiscrimination Act. South Africa: Chapter 4, Section 20, Unfair Dismissal Act 2000. Spain: Articles 8.12-8.13, Law No. 62/2003. United Kingdom: Employment Equality (Age) Regulations 2006; United States: Age Discrimination in Employment Act.

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countries. The available remedies would appear to fall into four different categories: compensation (e.g. for lost wages); reinstatement to the same or a similar post in the same workplace; both compensation and reinstatement; and fines or possible criminal prosecution in set instances, though this is by far the least-likely remedy. The applicable remedy in each circumstance of age discrimination may be clearly stated, but guidance as to how remedies are applied may be based on judicial experience applying remedies to other forms of discrimination, such as sex discrimination. Unjust dismissal legislation, where it links with ADL, may also provide some guidance as to the appropriate remedy. The ADL in Finland, Malta, Slovakia and the United Kingdom emphasizes compensation; whereas in Latvia and Portugal, reinstatement is the focus of attention.<sup>144</sup> The legislation in the Bahamas, Belgium, Cyprus, Estonia, France, Guyana, Ireland, Italy, Poland, Singapore, South Africa, Spain and the United States permit compensation, reinstatement, or some combination of the two.<sup>145</sup>

Although the emphasis of remedies in the ADL in most countries is meant to address what happens as a result of discrimination against older workers in the course of their employment or age-related unjust dismissal, the legislation in others extends remedies for other forms of age discrimination in the labour market. The ADL in some countries also includes remedies of those denied an interview or job opportunity. The Age Discrimination in Employment Act in the United States is one of the few that not only permits back pay and reinstatement as remedies, but also allows for the possibility of reinstatement to a job and “front pay”, or compensation based on the pay the person would have received if he or she had been hired for the job in the first place.<sup>146</sup> The ADL in Ireland also has form of this, with a financial remedy for a discriminatory interview.<sup>147</sup> In Australia, job applicants who may have faced some form of age discrimination in the interview or hiring process can file a case, though if a remedy is applicable, it can only be applied by an industrial tribunal after having been referred to the tribunal by the Human Rights Commission.<sup>148</sup> Perhaps the most creative application of age discrimination remedies can be found in Spain: once any appeals of an employment tribunal’s decisions for any form of age discrimination are exhausted, not only is the remedy of compensation and/or reinstatement

<sup>144</sup> Finland: Section 9, Non-Discrimination Act 2004. Latvia: Article 29(8), Labour Law. Malta: Article 30, Employment and Industrial Relations Act. Portugal: Article 620, Labour Code. Slovakia: Section 9, Paragraph 3, Antidiscrimination Act. United Kingdom: Employment Equality (Age) Regulations 2006; see also O’Cinneide, *op. cit.*

<sup>145</sup> Bahamas: Section 37, Employment Act 2001. Belgium: Act to combat discrimination. Cyprus: Law No. 42(I)/2004 and Law No. 58(I)/2004. Estonia: Article 117, Employment Contracts Act. France: Articles L122-45, L122-49 and L132-1, Labour Code. Guyana: Part X, Sections 25-26, Prevention of Discrimination Act 1997. Ireland: Section 82, Employment Equality Act 1998. Italy: Article 4(5), Legislative Decree No. 216/2003; Article 3, Act No. 108/1990. Latvia: Article 29(8), Labour Law. Poland: Articles 45.2 and 56.1, Labour Code. Singapore: Section 7, Retirement Age Act 1998. South Africa: Chapter 4, Section 20, Promotion of Equality and Prevention of Unfair Dismissal Act 2000. Spain: Articles 8.12-8.13, Law No. 62/2003. United States: McCann, *op. cit.*, pp. 1-11.

<sup>146</sup> McCann, *ibid.*, p. 10.

<sup>147</sup> Ireland: Section 82(4), Employment Equality Act 1998-2004.

<sup>148</sup> A case could be filed with the Human Rights Commission in Australia, who may then turn it over to an industrial tribunal for decision and remedy determination. The legislation underpinning the authority of the Human Rights Commissions in Australia do not extend the ability to determine remedies in the same way as employment law does for tribunals.

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possible, but any award made in the case is made public.<sup>149</sup> Such a mechanism can have a dissuasive effect for organizations that are especially concerned about their public image.

Sanctions that go beyond compensation exist in the ADL and discrimination-related laws in Bulgaria, Cyprus, Greece, Ireland, Luxembourg, Singapore, Slovakia and Spain.<sup>150</sup> In these countries, the possibility of fines or even criminal sanctions exists in cases where employer action or inaction violated laws associated with discrimination legislation. Although the Employment Equality Law 1998-2004 in Ireland does not include penal violations generally, victimization that leads to a dismissal or giving a false statement to Equality Authority inquiry can result in a criminal offence.<sup>151</sup> Sanctions or fines can be imposed by different government or legal bodies as well. Fines can be imposed in Greece and Slovakia by the national labour inspectorates or by national authorities in Spain.<sup>152</sup> The ADL in Singapore is primarily concerned with unjust dismissal, and the labour inspector appointed by the Minister of Labour can recommend fines be applied if the employer impedes the investigation of the inspector.<sup>153</sup> In this case, the employer is not sanctioned based on a finding of discrimination, but for impeding the investigations, whether discrimination took place or not.

## **Institutions and bodies to address age discrimination legislation**

There are two important roles played by the government and the legal system with regard to the application of ADL. First, government ministries or agencies are needed to monitor developments regarding ADL, much like with sex or race discrimination. They must also develop plans and policies as to how the legislation can be accessed. As has been noted, monitoring and progress reports function as a discipline on decision-making and are a means to ensure transparency.<sup>154</sup> These reports can also yield policy advice and suggestions so that age discrimination is progressively eliminated from the workplace. By developing proactive advice, the government and the legal system may be able to promote compliance from employers and inform workers in a manner that institutionalizes the prevention of age discrimination in employment.

In addition to the information and consultation dimension, it is important to make clear which institutions of government can provide assistance or resolution in the event of non-compliance with age discrimination legislation. Challenging policies that may be discriminatory can be a daunting experience for an older worker, which can be made worse if the means and process for resolving the issues are not transparent or are overly

<sup>149</sup> This is not common, but it does create a “shaming” mechanism that can be very dissuasive to those who might otherwise not consider age discrimination in their workplace policies.

<sup>150</sup> Bulgaria: Articles 76-82, Act on Protection against Discrimination. Cyprus: Trimikliniotis, *op. cit.*, p. 90. Greece: Law No. 3304/2005. Ireland: Employment Equality Act 1998. Luxembourg: General Discrimination Law. Singapore: Retirement Age Act 1993. Slovakia: Dlugosova, *op. cit.*, pp. 51-52. Spain: Law No. 62/2003.

<sup>151</sup> Ireland: Sections 14 and 60(3), Employment Equality Act 1998.

<sup>152</sup> Greece: Article 17, Law No. 3304/2005; Slovakia: Dlugosova, *op. cit.*, pp. 51-52. Spain: Law No. 62/2003.

<sup>153</sup> Singapore: Articles 7-8, Retirement Age Act 1993.

<sup>154</sup> Fredman, *op. cit.*, p. 69.

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burdensome (e.g. costly, time-consuming, administratively taxing, etc.). Institutions can vary by country, but the government institutions most often used for the conflict resolution dimension required by ADL include labour courts, ombudspersons, labour inspectorates, general human rights-related bodies, or the court system.

Commissions or ombudspersons in 19 countries can provide information, investigate or prosecute cases of age discrimination.<sup>155</sup> Agencies in Germany and Luxembourg, such as the Federal Anti-Discrimination Agency and the Centre for Equality of Treatment respectively, are charged with providing advice and guidance to victims of age discrimination in employment.<sup>156</sup> These bodies can give support, but do not themselves render decisions in disputes regarding age discrimination. Alternatively, in the Netherlands, the Dutch Equal Treatment Commission handles age and other discrimination cases and can provide non-binding legal opinions.<sup>157</sup> Similarly, the Human Rights Commission and the Equal Opportunities Commission in Australia and the Human Rights Commission in New Zealand can provide information and issue opinions which can be used in the event a case goes to court.<sup>158</sup> The experience in Denmark is a bit different, as age discrimination cases go to the Common Complaints Board for Equal Treatment for resolution: there is no way for such cases to go to the labour court unless they involve a collective bargaining agreement.<sup>159</sup> However, one difficulty faced by some bodies in countries such as Germany, Luxembourg, the Netherlands, Slovenia, Slovakia and Spain is that commissions do not have the legal standing to bring cases to court, which can place added pressure on an older worker making a complaint. By contrast, in the United States, the Equal Employment Opportunities Commission is the forum for filing an age discrimination case or must legally be notified if a case goes to court. The Commission's decision is legally binding.<sup>160</sup>

Other than labour tribunals or courts, labour inspectorates may in some circumstances be able to act as a legal arbiter. Greece, Guyana, Hungary, Poland, Singapore, Slovakia and Spain all have labour inspectorates with broad authority to investigate and fine violators of the law.<sup>161</sup> The main strength of labour inspectorates regarding age discrimination is that they can investigate and address unlawful workplace or

<sup>155</sup> Austria, Belgium, Bulgaria, Cyprus, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Portugal, Slovenia, Slovakia, Spain, the United Kingdom and the United States.

<sup>156</sup> Germany: created by Section 25, Law on equal treatment. Luxembourg: created by the General Discrimination Law.

<sup>157</sup> Netherlands: Articles 12-15, 20 and 33, Equal Treatment in Employment (Age Discrimination) Act.

<sup>158</sup> Australia: Age Discrimination Act 2004. New Zealand: Human Rights Act 1993.

<sup>159</sup> In Denmark, the labour courts can only address issues in collective bargaining agreements and do not have authority to address age discrimination cases. Hansen, *op. cit.*, p. 51.

<sup>160</sup> United States: Article 626(d), Age Discrimination in Employment Act.

<sup>161</sup> Greece: Article 19, Paragraph 3, Law No. 3304/2005. Guyana: Part XI, Prevention of Discrimination Act 1997. Hungary: Article 3, Paragraph 1(d), Act LXXV on labour inspection. Labour inspectorates and equality authority have authority in age discrimination cases, but it is up to a worker to choose which mechanism he/she would prefer to sue under the circumstances. Kadar, *op. cit.*, pp. 59-60. Poland: Chapter 2, Section 10, Act on National Labour Inspectorate. Singapore: Sections 3 and 8, Retirement Age Act 1993. Slovakia: Dlugosova, *op. cit.*, p. 55. Spain: Cachón, *op. cit.*, pp. 45-46.

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organizational practices at the source. By doing so, labour inspectorates can take action where the discrimination takes place which, in turn, may limit the cases that might ultimately end up in the tribunal or court system for resolution. However, among the countries examined in this study, Singapore is unique: it relies solely on the labour inspectorate and, ultimately, the Minister of Labour to address age discrimination without the benefit of having the courts make the final ruling. As described earlier, ADL in Singapore requires that cases be filed with the Minister of Labour, who then appoints a labour inspector to investigate the claim. The labour inspector then has wide access to the worker, the employer and the workplace on which to base the report submitted to the Minister for final judgement. The court system does not play a role in this type of case, which in real terms enhances the responsibilities of both the labour inspector who investigates and the Minister of Labour who renders the decision.<sup>162</sup>

One of the main concerns regarding ADL in countries where age and other forms of discrimination are addressed by the same legal instrument is that these institutions, whose budgets are not exhaustive, must address all the different forms of discrimination. This can obscure the attention given to some forms of discrimination, namely age discrimination. As ADL in most countries has been developed and implemented relatively recently, it is critical that proper attention and resources be devoted to developing advisory and monitoring practices and, ultimately, rendering legal decisions on age discrimination. An absence or slow pace of growth in this area can have profound consequences not only for older workers who bear the brunt of this discrimination, but also for employers who may want to hire older workers but may need legal advice on how to do this without violating the law. Funding the implementation of ADL is a vital issue that must be addressed if it is the aim of policy-makers to encourage older workers to remain in work or seek employment, to encourage employers to hire them, or to avoid potential age-based abuses in the workplace and in the labour market.

<sup>162</sup> Singapore: Section 7(5), Retirement Age Act 1993.

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## 6. Conclusions

This paper has identified many of the important issues concerning efforts to address age discrimination through legislation in countries around the world. Ageism, age discrimination and age discrimination in employment exist in many societies. Yet consideration of these issues has only become more common in recent years as a result of the growth of older segments of the population. It will no longer be adequate to consider extending working life, however, without considering how the labour market should address the needs and concerns of older workers, as it is highly unlikely that the market will fill this gap.

As noted in this study, the growth in the number of countries implementing ADL into their national labour law is a welcome development to ensure the rights and responsibilities of employers and older workers. There is no one-size-fits-all regarding how ADL is addressed, but this study indicates that there are certain elements that are critically important to achieving a balance between rights and responsibilities. International standards, such as ILO Convention No. 111 and Recommendation No. 162, provide many of the guidelines for how this can be adequately achieved. While the emphasis of this study has been on the key components of ADL, this does not suggest that jurisprudence of the legal systems in these countries is not important. Court interpretations and rulings will be vital to give life to the ADL in these countries; in some, a well-developed body of rulings has already been compiled. Research on this dimension of ADL is beyond the scope of this paper, but would prove fertile ground for future research.

One of the issues of concern regarding ADL is not its applicability, but when the protections afforded by ADL and other labour laws might end. The study outlined some of the problems associated with mandatory retirement and its co-existence with labour law. Ending the protection of labour law, including the protections in ADL, once a worker reaches a certain age is a recipe for marginalization of older workers in the labour market. This is especially the case for older workers seeking a new job and who are most vulnerable in labour markets that may already have a bias against them or their abilities. In the absence of legal protection, older workers are more likely to be subjected to diminished working conditions and the likelihood of dismissal if they object. There has been little, if any, consideration of the quality of jobs and working conditions in policy discussions and the debate surrounding extending working life. The issue of job quality and its relationship to decent working conditions should be an integral part of this process. Thus, the *quid pro quo* in any future policy debate regarding the extension of working lives of older workers must include extending the protections found in labour law, and especially ADL, until an older worker officially withdraws from the labour market.



## Annex 1: Legislation

Country	Legislation
Angola	Lei Geral do Trabalho [General Labour Act], Act No. 2, dated 15 December 1999 ( <i>Diário da República</i> , 2000), as amended up to Decree No. 11, dated 11 March 2003 ( <i>Diário da República</i> , No. 19, 11 March 2003, pp. 428-434).
Antigua and Barbuda	Antigua and Barbuda Labour Code, Act No. 14, dated 19 September 1975 ( <i>Official Gazette</i> , 1975), as amended up to Act No. 7, dated 8 October 2007 ( <i>Official Gazette</i> , Vol. XXVII, No. 73, 25 October 2007).
Australia	Age Discrimination Act 2004, Act No. 68, dated 22 June 2004 ( <i>Official Gazette</i> , No. 68, 22 June 2004, pp. 1-55), as amended up to Act No. 21, dated 15 March 2007 ( <i>Official Gazette</i> , 2007). Workplace Relations Act 1996, as amended up to Act No. 8, dated 30 March 2008.
Austria	Equal Treatment Act, Act No. 65, dated June 2004 ( <i>Bundesgesetzblatt</i> , 23 June 2004).
Azerbaijan	Labour Code of the Republic of Azerbaijan, dated 1 February 1999, as amended up to Regulations of 9 February 2000.
Bahamas	Employment Act 2001, Act No. 27, dated 31 December 2001 ( <i>Official Gazette</i> , No. 27, 31 December 2001, pp. 1-45).
Belgium	Act to combat discrimination and modify the act of 15 February 1993 creating a Centre for Equal Opportunities and to fight Racism, dated 25 February 2003 ( <i>Moniteur belge</i> , No. 89, 17 March 2003, pp. 12,844-12,851). Collective agreement no. 38 relating to the recruitment and selection of workers, dated 6 December 1983, as amended up to 14 July 1999, Article 2bis. Civil Code.
Benin	Labour Code, Act No. 98-004, dated 27 January 1998 ( <i>Journal officiel</i> , 1998).
Brazil	Consolidated Labour Act 1943, Decree-Law No. 5452, dated 1 May 1943, as amended up to Act No. 9799, dated 26 May 1999 ( <i>Diário Oficial</i> , No. 100, 27 May 1999, p. 1).
Bulgaria	Act on protection against discrimination, dated 24 September 2003 ( <i>D'rzhaven Vestnik</i> , No. 86, 30 September 2003, pp. 2-11).
Canada	Canadian Charter of Rights and Freedoms 1982, as amended and consolidated up to 31 December 1992. Age discrimination law at provincial level in Canada.
Chile	Labour Code, Legislative Decree No. 1, dated 31 July 2002 ( <i>Diario Oficial</i> , No. 37,460, 16 January 2003, pp. 5-45), as amended up to Act No. 20,271, dated 18 July 2008 ( <i>Diario Oficial</i> , No. 39,111, 12 July 2008, p. 4). See especially these amendments to the Labour Code: Act No. 19,739, dated 26 June 2001; and Act No. 19,759, dated 27 September 2001.

Country	Legislation
Cyprus	<p>Law No. 42(1) implementing Directive 2000/43/EC of 29 June 2000 to combat racial and other kinds of discrimination, dated 19 March 2004 (<i>Episimi Ephimerida tis Dimokratias</i>, No. 3811, Supplement 1(1), 19 March 2004, pp. 421-510).</p> <p>Equal Treatment in Employment and Occupation Law, Law No. 58(1), dated 31 March 2004.</p> <p>Termination of Employment Law 1967, Act No. 24, dated 27 May 1967 (<i>Episimos Efemeris</i>, First Supplement, 27 May 1967), as amended up to Act No. 28(1), dated 9 March 2001 (<i>Epissimos ephimeris tis Dimocratias</i>, Part 1, No. 3480, 9 March 2001, pp. 57-59)..</p>
Denmark	<p>Act No. 756 respecting prohibition against discrimination in the labour market, dated 30 June 2004 (<i>Lovtidende A</i>, Vol. 117, No. 756, 17 July 2004, pp. 4343-4347), as amended up to Act No. 1417, dated 22 December 2004 (<i>Lovtidende A</i>, Vol. 202, No. 1417, 27 December 2004, pp. 9783-9793).</p> <p>Act No. 31 to prohibit discrimination in the labour market, dated 12 January 2005 (<i>Lovtidende A</i>, Vol. 7, No. 31, 25 January 2005, pp. 175-187), as amended up to Act No. 1543, dated 20 December 2006 (<i>Lovtidende A</i>, No. 1542, 2006).</p>
Dominican Republic	<p>Labour Code (Principle VII), Act No. 16-92, dated 29 May 1992 (<i>Gaceta Oficial</i>, No. 9836, 31 May 1992, pp. 3-153), as amended up to Act No. 103-99, dated 6 October 1999 (<i>Gaceta Oficial</i>, 1999).</p>
Ecuador	<p>Political Constitution of the Republic of Ecuador [Article 23(3)], dated 5 June 1998.</p>
Eritrea	<p>Constitution (Article 14), dated 23 May 1997.</p>
Estonia	<p>Employment Contracts Act 1992, dated 15 April 1992 (<i>Riigi Teataja</i>, Nos. 15/16, 1992), as amended up to 8 December 2004.</p>
Finland	<p>Constitutional Act of Finland, Act No. 731, dated 11 June 1999 (<i>Finlands Författningssamling</i>, No. 731, 17 June 1999, pp. 1633-1654).</p> <p>Non-Discrimination Act, Act No. 21, dated 20 January 2004 (<i>Finlands Författningssamling</i>, No. 21, 23 January 2004, pp. 49-53), as amended up to Act No. 50, dated 20 January 2006 (<i>Finlands Författningssamling</i>, No. 50, 26 January 2004, p. 213).</p> <p>Penal Code of Finland 1889 (Chapter 47, Section 3), as amended up to Act No.743, dated 25 August 2006 (<i>Finlands Författningssamling</i>, Nos. 743-748, 31 August 2006, pp. 2249-2250).</p> <p>Employment Contracts Act, Act No. 55, dated 1 January 2001 (<i>Finlands Författningssamling</i>, No. 55, 2 February 2001), as amended up to Act No. 533, dated 29 June 2006 (<i>Finlands Författningssamling</i>, No. 533, 30 June 2006, pp. 1585-1586).</p> <p>Occupational Safety and Health Act (Labour Protection Act), Act No. 738, dated 23 August 2002 (<i>Finlands Författningssamling</i>, No. 738, 30 August 2002, pp. 3695-3711), as amended up to Act No. 53, dated 20 January 2006 (<i>Finlands Författningssamling</i>, No. 53, 26 January 2006, p. 218).</p>

Country	Legislation
France	<p>Constitution (Article 1), dated 4 October 1958 (<i>Journal officiel</i>, 1958), as amended up to Act No. 2008-724, dated 23 July 2008 (<i>Journal officiel</i>, No. 171, 24 July 2008, p. 11,890).</p> <p>Act No. 2001-1066 combating discrimination, dated 16 November 2001 (<i>Journal officiel</i>, No. 267, 17 November 2001, pp. 18,311-18,313), as amended up to Act No. 2004-1486, dated 30 December 2004 (<i>Journal officiel</i>, No. 304, 31 December 2006).</p> <p>Act No. 2002-73 respecting social modernisation, dated 17 January 2002 (<i>Journal officiel</i>, No. 15, 18 January 2007, pp. 1008-1052).</p> <p>Labour Code 1910, as amended up to Decree No. 2008-244, dated 7 March 2008 (<i>Journal officiel</i>, No. 61, 12 March 2008, p. 4482).</p> <p>Act No. 846 allowing the government to take emergency measures in respect of employment, dated 26 July 2005 (<i>Journal Officiel</i>, No. 173, 27 July 2005).</p>
Germany	<p>Basic Law, dated 23 May 1949, as amended up to Act, dated 26 November 2001 (<i>Bundesgesetzblatt</i>, Part I, No. 61, 29 November 2001, p. 3219).</p> <p>Law to implement the European Directive on the realization of the principle of equal treatment, dated 14 August 2006 (<i>Bundesgesetzblatt</i>, Part I, No. 39, 17 August 2006, p. 1897).</p> <p>Works Constitution Act, dated 15 January 1972 (<i>Bundesgesetzblatt</i>, Part I, 18 January 1972), as amended up to Ordinance, dated 16 January 1995 (<i>Bundesgesetzblatt</i>, No. 3, 24 January 1995, p. 43).</p> <p>Legal Framework Law governing Civil Servants, dated 31 March 1999 (<i>Bundesgesetzblatt</i>, Part I, No. 18, 14 April 1999, pp. 654-674), as amended up to Decree, dated 11 November 2004 (<i>Bundesgesetzblatt</i>, Part 1, No. 59, 17 November 2004, p. 2836).</p> <p>Federal Act to protect against unlawful dismissal, dated 26 February 1993 (<i>Bundesgesetzblatt</i>, 1993).</p> <p>Act on part-time and temporary work, dated 21 December 2000 (<i>Bundesgesetzblatt</i>, Part I, No. 59, 28 December 2000, pp. 1966-1970).</p> <p>Book VI of the Social Code (SGB VI), dated 29 February 2002 (<i>Bundesgesetzblatt</i>, Part I, No. 12, 26 February 2002, pp. 754-921), as amended up to 19 November 2004 (<i>Bundesgesetzblatt</i>, Part I, No. 61, 26 November 2004, pp. 2902-2906).</p>
Greece	<p>Law No. 3304 on the application of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation, dated 27 January 2005 (<i>Official Journal</i>, No. 16, 2005).</p> <p>Greek Civil Code, 1940, as amended.</p>
Guyana	<p>Prevention of Discrimination Act 1997, Act No. 26, dated 13 October 1997 (<i>Official Gazette</i>, 1997, p. 27).</p>

Country	Legislation
Hungary	<p>Constitution, Act No. XX of 1949, as amended up to Act No. 61, dated 17 December 2002 (<i>Magyar Közlöny</i>, No. 161, 23 December 2002, pp. 9330-9332).</p> <p>Act No. CXXV on equal treatment and promotion of equal opportunities, dated 22 December 2003 (<i>Magyar Közlöny</i>, No. 157, 28 December 2003, pp. 13,044-13,054), as amended up to Act No. 104, dated 27 November 2006 (<i>Magyar Közlöny</i>, No. 149, 6 December 2006, pp. 11,694-11,698).</p> <p>Labour Code, Act No. 22, dated 30 March 1992 (<i>Magyar Közlöny</i>, No. 45, 4 May 1992, pp. 1613-1642), as amended up to Act No. 73, dated 18 June 2007 (<i>Magyar Közlöny</i>, No. 80, 26 June 2007, pp. 5593-5596).</p> <p>Act No. LXXV on labour inspection, 1992, as amended up to Act No. CLV, dated 13 December 2005 (<i>Magyar Közlönyi</i>, Vol. 1, No. 168, 25 December 2005, pp. 10,978-10,982).</p> <p>Government Decree No. 218 respecting certain offences, dated 29 December 1999.</p> <p>Civil Code, Act No. IV, dated 1 January 1959, as amended.</p>
Ireland	<p>Employment Equality Act 1998, Act No. 21, dated 18 June 1998 (<i>Official Gazette</i>, 1998), as amended up to Act No. 24, dated 18 July 2004 (<i>Official Gazette</i>, 2004).</p> <p>Equal Status Act 2000, Act No. 8, dated 26 April 2000 (<i>Official Gazette: Acts</i>, No. 8, 26 April 2000, pp. 1-40), as amended up to Act No. 14, dated 8 July 2005 (<i>Official Gazette</i>, 2005).</p> <p>Redundancy Payments Act 1967, Act No. 21, dated 18 December 1967 (<i>Official Gazette</i>, 1967), as amended up to Act No. 27, dated 8 May 2007 (<i>Official Gazette</i>, 2007).</p> <p>Unfair Dismissals Act 1977, Act No. 10, dated 6 April 1977 (<i>Official Gazette</i>, 1977), as amended up to Act No. Act No. 27, dated 8 May 2007 (<i>Official Gazette</i>, 2007).</p> <p>Pensions Act 1990, Act No. 25, dated 24 July 1990 (<i>Acts of the Oireachtas</i>, 1990, pp. 1-58), as amended up to Act No. 8, dated 30 March 2007 (<i>Acts of the Oireachtas</i>, 2007, pp. 1-51).</p>
Italy	<p>Workers' Act, Act No. 300, dated 20 May 1970 (<i>Gazzetta Ufficiale</i>, 27 May 1970), as amended up to Decree No. 312, dated 28 July 1995 (<i>Gazzetta Ufficiale</i>, No. 176, 29 July 1995, p. 5).</p> <p>Legislative Decree No. 216, dated 9 July 2003 (<i>Gazzetta Ufficiale</i>, No. 187, 13 August 2003, pp. 4-9; <i>Gazzetta Ufficiale</i>, No. 244, 16 October 2004, pp. 4-6).</p> <p>Civil Code (Article 2729), Decree No. 262, dated 16 March 1942 (<i>Gazzetta Ufficiale</i>, 1942), as amended up to Act No. 55, dated 14 February 2006 (<i>Gazzetta Ufficiale</i>, No. 50, 1 March 2006).</p> <p>Act No. 604 respecting individual dismissal, dated 15 July 1966 (<i>Gazzetta Ufficiale</i>, No. 195, 1966, p. 3986), as amended up to Act No. 108, dated 11 May 1990 (<i>Gazzetta Ufficiale</i>, No. 108, 11 May 1990, pp. 18-20).</p>
Japan	<p>Law No. 68 concerning stabilization of employment of older persons, dated 25 May 1971 (<i>Kampoo</i>, 1970), as amended up to Act No. 103, dated 11 June 2004 (<i>Kampo Gogai</i>, No. 124, 11 June 2004, p. 7).</p>
Korea, Republic of	<p>Aged Employment Promotion Act, Act No. 4487, dated 31 December 1994 (<i>Labor Laws of Korea</i>, 1994), as amended up to Presidential Decree No. 20143, dated 29 June 2007 (<i>Labor Laws of Korea</i>, 2007).</p>

Country	Legislation
Latvia	Labour Law, dated 1 June 2001 ( <i>Zinotajs</i> , No. 15, 9 August 2001, pp. 142-212), as amended up to 9 November 2006 ( <i>Zinotajs</i> , No. 21, 9 November 2006, pp. 6-9).
Lithuania	Act No. VIII-947 on equal opportunities for men and women, dated 1 December 1998 ( <i>Vedomosti</i> , No. 9, 31 March 1999, pp. 5-11), as amended up to Act No. IX-1433, dated 3 April 2003 ( <i>Vedomosti</i> , 2003). Act No. IX-1826 on equal treatment, dated 18 November 2003 ( <i>Vedomosti</i> , 2003). Labour Code, Act No. IX-926, dated 4 June 2002 ( <i>Vedomosti</i> , 2002), as amended up to Act No. X-458, dated 20 December 2005 ( <i>Vedomosti</i> , 2005).
Luxembourg	General Discrimination Law, dated 28 November 2006 ( <i>Mémorial A</i> , No. 207, 6 December 2006, pp. 3584-3588), as amended up to Law, dated 13 May 2008 ( <i>Mémorial A</i> , No. 70, 26 May 2008, pp. 962-968). Civil Code, dated 18 March 1803, as amended up to Act, dated 21 September 2006 ( <i>Mémorial A</i> , No. 175, 2 October 2006, p. 3150).
Malta	Employment and Industrial Relations Act, Act No. 22, dated 2 December 2002 ( <i>Government Gazette</i> , 2002), as amended up to Legal Notice No. 427 of 2007. Equal Treatment in Employment Regulations 2004, Legal Notice No. 461, dated 5 November 2004 ( <i>Government Gazette</i> , 2004), as amended up to Legal Notice No. 137 of 2008.
Mexico	Decree to implement the federal law to prevent and eliminate discrimination, dated 10 June 2003 ( <i>Diario Oficial</i> , No. 8, 11 June 2003, pp. 8-20). Federal Labour Law, dated 1 May 1970 ( <i>Diario Oficial</i> , 1 April 1970), as amended up to Decree, dated 15 December 2005 ( <i>Diario Oficial</i> , No. 12, 17 January 2006, p. 52).
Mongolia	Employment Promotion Act, dated 19 April 2001 ( <i>Turiin Medeelel</i> , No. 19, 2001, pp. 506-511).
Netherlands	Equal Treatment in Employment (Age Discrimination) Act, dated 17 December 2003 ( <i>Staatsblad</i> , No. 30, 5 February 2004, pp. 1-6). Working Conditions Act, dated 18 March 1999 ( <i>Staatsblad</i> , No. 184, 29 March 1999, pp. 1-27), as amended up to 1 January 2007. Book VI, Civil Code. Act on the prohibition of distinction on the grounds of employment duration, as cited in M. Gijzen: <i>Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: The Netherlands</i> (Brussels, 2005); R. Holtmaat: <i>Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: The Netherlands</i> (Brussels, January 2007).
New Zealand	Human Rights Act 1993, Act No. 82, dated 10 August 1993 ( <i>Statutes of New Zealand</i> , 1993), as amended up to Act No. 100, dated 8 September 1999 ( <i>Statutes of New Zealand</i> , 1999). Employment Relations Act 2000, Act No. 24, dated 19 August 2000 ( <i>Statutes of New Zealand</i> , Vol. 1, 1 January 2001, pp. 388-577), as amended up to Act No. 2, dated 6 March 2007 ( <i>Statutes of New Zealand</i> , 2007).
Niger	Ordinance No. 96-039 to promulgate a Labour Code in Niger, dated 29 June 1996 ( <i>Recueil des lois sociales</i> , 1996).

Country	Legislation
Norway	<p>Discrimination Act, Act No. 33, dated 3 June 2005 (<i>Norsk Lovtidend</i>, Part 1, Vol. 7, No. 33, 24 June 2005, pp. 912-927; Part 1, Vol. 9, No. 608, 5 August 2005, p. 1371), as amended up to Act No. 69, dated 15 December 2006 (<i>Norsk Lovtidend</i>, Part 1, Vol. 15, No. 69, 2006, pp. 1859-1861).</p> <p>Working Environment Act, Act No. 62, dated 17 June 2005 (<i>Norsk Lovtidend</i>, Part 1, Vol. 8, No. 62, pp. 1112-1143; Part 1, Vol. 9, No. 609, 5 August 2005, p. 1371), as amended up to Act No. 10, dated 23 February 2007 (<i>Norsk Lovtidend</i>, 2007).</p> <p>Penal Code, Act No. 28, dated 20 May 2005 (<i>Norsk Lovtidend</i>, Part 1, Vol. 6, No. 28, 15 June 2005, pp. 751-772).</p>
Poland	<p>Labour Code, dated 26 June 1974 (<i>Dziennik Ustaw</i>, 1974), as amended up to Act, dated 13 April 2007 (<i>Dziennik Ustaw</i>, 21 May 2007).</p> <p>Act No. 1001 on employment promotion and labour market institutions, dated 20 April 2004 (<i>Dziennik Ustaw</i>, No. 99, Item 1001, 2004), as amended up to Act, dated 13 April 2007 (<i>Dziennik Ustaw</i>, 21 May 2007).</p> <p>Act on National Labour Inspectorate, dated 13 April 2007 (<i>Dziennik Ustaw</i>, 21 May 2007).</p>
Portugal	<p>Labour Code, Act No. 99, dated 27 August 2003 (<i>Diário da República</i>, No. 197, 27 August 2003, pp. 5558-5656; No. 250, 28 October 2003, p. 7139), as amended up to Act No. 12-A, dated 27 February 2008 (<i>Diário da República</i>, No. 41, 27 February 2008, pp. 1326(2)-1326(28)).</p> <p>Act No. 35/2004, dated 29 July 2004 (<i>Diário da República</i>, No. 177, 29 July 2004, pp. 4810-4885), as amended up to Act No. 9/2006 (<i>Diário da República</i>, No. 56, 30 March 2006).</p>
Romania	<p>Labour Code, Act No. 53/2003, dated 24 January 2003 (<i>Monitorul Oficial</i>, No. 72, 5 February 2003, pp. 1-25), as amended up to Act No. 237/2007, dated 12 July 2007 (<i>Monitorul Oficial</i>, No. 497, 25 July 2007, p. 3).</p> <p>Ordinance No. 137/2000 on prevention of all forms of discrimination, dated 31 August 2000 (<i>Monitorul Oficial</i>, 2000), as amended up to Ordinance No. 77/2003 (<i>Monitorul Oficial</i>, No. 619, 30 August 2003, pp. 11-13).</p>
Singapore	<p>Retirement Age Act 1993, Act No. 14, dated 28 April 1993 (<i>Government Gazette</i>, Acts Supplement, No. 15, 21 May 1993, pp. 173-178), as amended up to Act No. 49, dated 11 December 1998 (<i>Government Gazette</i>, Subsidiary Legislation Supplement, No. 50, 31 December 1998, pp. 666-667).</p>
Slovakia	<p>Constitution of the Slovak Republic, dated 3 September 1992 (<i>Zbierka Zakanov</i>, No. 56, 13 April 2001, pp. 1538-1560), as amended up to 1999.</p> <p>Antidiscrimination Act, Act No. 365/2004, dated 20 May 2004 (<i>Zbierka Zakanov</i>, No. 153, 2005, pp. 3579-3592).</p> <p>Labour Code, Act No. 311, dated 2 July 2001 (<i>Zbierka Zakanov</i>, 2001), as amended up to Act No. 328, dated 28 June 2007 (<i>Zbierka Zakanovi</i>, 2007).</p>
Slovenia	<p>Act No. 2295 implementing the principle of equal treatment, dated 30 April 2004 (<i>Uradni List</i>, No. 50, 6 May 2004, pp. 6706-6709).</p> <p>Employment Relationships Act, Act No. 2006, dated 24 April 2002 (<i>Uradni List</i>, No. 42, 15 May 2002, pp. 4075-4105).</p> <p>Code of Obligations, dated 11 October 2001 (<i>Uradni List</i>, No. 83, 25 October 2001), as amended up to April 2004 (<i>Uradni List</i>, No. 32, 2 April 2004).</p>

Country	Legislation
South Africa	<p>Constitution of the Republic of South Africa, Act No. 108, dated 8 May 1996 (<i>Government Gazette</i>, Vol. 378, No. 17,678, 18 December 1996), as amended up to Act No. 3, dated 9 April 2003 (<i>Official Gazette</i>, Vol. 454, No. 24,744, 11 April 2003, pp. 2-8).</p> <p>Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Act No. 4, dated 9 February 2000 (<i>Government Gazette</i>, Vol. 416, No. 20,876, 9 February 2000, pp. 1-19), as amended up to Act No. 52, dated 15 January 2003 (<i>Government Gazette</i>, Vol. 451, No. 24,249, 15 January 2003, pp. 1-9).</p> <p>Labour Relations Act 1995, Act No. 66, dated 29 November 1995 (<i>Government Gazette</i>, Vol. 366, No. 16,861, 13 December 1995), as amended up to Act No. 12, dated 24 June 2002 (<i>Government Gazette</i>, Vol. 444, No. 23,540, 24 June 2002, pp. 2-61).</p> <p>Employment Equity Act 1998, Act No. 55, dated 19 October 1998 (<i>Government Gazette</i>, Vol. 400, No. 19,370, 19 October 1998), as amended up to August 2006.</p>
Spain	<p>Act No. 62/2003 on fiscal, administrative and social measures, dated 31 December 2003 (<i>Boletín Oficial del Estado</i>, No. 313, 31 December 2003, pp. 46,874-46,992).</p> <p>Royal Legislative Decree No. 2/1995 to approve the Law on Employment Procedure, dated 7 April 1995 (<i>Boletín Oficial del Estado</i>, no. 86, 11 April 1995, pp. 10,695-10,734), as amended up to Act No. 20/2007, dated 11 July 2007 (<i>Boletín Oficial del Estado</i>, No. 166, 12 July 2007, pp. 29,964-29,978).</p> <p>Royal Legislative Decree No. 5/2000 to approve the Law on Infractions and Sanctions in the Social Order, dated 4 August 2000 (<i>Boletín Oficial del Estado</i>, No. 189, 8 August 2000, p. 28,285), as amended up to Royal Decree No. 306/2007, dated 2 March 2007 (<i>Boletín Oficial del Estado</i>, No. 67, 19 March 2007, pp. 11,749-11,750).</p>
St. Lucia	<p>Equality of Opportunity and Treatment in Employment and Occupation Act 2000, Act No. 9, dated 7 March 2000 (<i>Official Gazette</i>, No. 9, 7 March 2000, pp. 77-92).</p>
Tajikistan	<p>Labour Code, Act No. 417, dated 15 May 1997 (<i>Akhbori Mazhlisi Olij</i>, 1997), as amended up to Act No. 182, dated 29 April 2006 (<i>Akhbori Mazhlisi Olij</i>, No. 4, April 2006, p. 70).</p>
United Kingdom	<p>Employment Equality (Age) Regulations 2006, Statutory Instrument No. 1031, dated 3 April 2006 (<i>Statutory Instruments</i>, No. 1031, 2006), as amended up to Statutory Instrument No. 573, dated 6 March 2008 (<i>Statutory Instruments</i>, No. 573, 2008).</p> <p>Employment Equality (Age) Regulations (Northern Ireland) 2006.</p>
United States	<p>Age Discrimination in Employment Act, Public Law 90-202, 29 U.S. Code, secs. 621-634, as amended.</p>



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## **Annex 2: Older Workers Recommendation, 1980 (No. 162)**

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-sixth Session on 4 June 1980, and

Recalling that the Discrimination (Employment and Occupation) Convention and Recommendation, 1958, do not include age among the grounds for discrimination listed therein, but provide for possible additions to the list, and

Recalling the specific provisions relating to older workers in the Employment Policy Recommendation, 1964, and in the Human Resources Development Recommendation, 1975, and

Recalling the terms of existing instruments relating to the social security of older persons, in particular the Invalidity, Old-Age and Survivors' Benefits Convention and Recommendation, 1967, and

Recalling also the provisions of article 6, paragraph (3), of the Declaration on Equality of Opportunity and Treatment for Women Workers, adopted by the International Labour Conference at its Sixtieth Session in 1975, and

Considering it desirable to supplement the existing instruments with standards on equality of opportunity and treatment for older workers, on their protection in employment and on preparation for and access to retirement, and

Having decided upon the adoption of certain proposals with regard to older workers: work and retirement, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation,

adopts this twenty-third day of June of the year one thousand nine hundred and eighty, the following Recommendation, which may be cited as the Older Workers Recommendation, 1980:

### **I. General provisions**

1.

- (1) This Recommendation applies to all workers who are liable to encounter difficulties in employment and occupation because of advancement in age.
- (2) In giving effect to this Recommendation, a more precise definition of the workers to whom it applies, with reference to specific age categories, may be adopted in each country, in a manner consistent with national laws, regulations and practice and appropriate under local conditions.
- (3) The workers to whom this Recommendation applies are referred to herein as older workers.

2. Employment problems of older workers should be dealt with in the context of an over-all and well balanced strategy for full employment and, at the level of the undertaking, of an over-all and well balanced social policy, due attention being given to all population groups, thereby ensuring that employment problems are not shifted from one group to another.

### **II. Equality of Opportunity and Treatment**

3. Each Member should, within the framework of a national policy to promote equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of

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practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers.

4. Each Member should, by methods appropriate to national conditions and practice--

- (a) make provision for the effective participation of employers' and workers' organisations in formulating the policy referred to in Paragraph 3 of this Recommendation;
- (b) make provision for the effective participation of employers' and workers' organisations in promoting the acceptance and observance of this policy;
- (c) enact such legislation and/or promote such programmes as may be calculated to secure the acceptance and observance of the policy.

5. Older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers as regards, in particular--

- (a) access to vocational guidance and placement services;
- (b) access, taking account of their personal skills, experience and qualifications, to--
  - (i) employment of their choice in both the public and private sectors: Provided that in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment;
  - (ii) vocational training facilities, in particular further training and retraining;
  - (iii) paid educational leave, in particular for the purpose of training and trade union education;
  - (iv) promotion and eligibility for distribution of tasks;
- (c) employment security, subject to national law and practice relating to termination of employment and subject to the results of the examination referred to in Paragraph 22 of this Recommendation;
- (d) remuneration for work of equal value;
- (e) social security measures and welfare benefits;
- (f) conditions of work, including occupational safety and health measures;
- (g) access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

6. Each Member should examine relevant statutory provisions and administrative regulations and practices in order to adapt them to the policy referred to in Paragraph 3 of this Recommendation.

7. Each Member should, by methods appropriate to national conditions and practice--

- (a) ensure as far as possible the observance of the policy referred to in Paragraph 3 of this Recommendation in all activities under the direction or control of a public authority;
- (b) promote the observance of that policy in all other activities, in co-operation with employers' and workers' organisations and any other bodies concerned.

8. Older workers and trade union organisations as well as employers and their organisations should have access to bodies empowered to examine and investigate complaints regarding equality of opportunity and treatment, with a view to securing the correction of any practices regarded as in conflict with the policy.

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9. All appropriate measures should be taken to ensure that guidance, training and placement services provide older workers with the facilities, advice and assistance they may need to enable them to take full advantage of equality of opportunity and treatment.

10. Application of the policy referred to in Paragraph 3 of this Recommendation should not adversely affect such special protection or assistance for older workers as is recognised to be necessary.

### III. Protection

11. Within the framework of a national policy to improve working conditions and the working environment at all stages of working life, measures appropriate to national conditions and practice designed to enable older workers to continue in employment under satisfactory conditions should be devised, with the participation of the representative organisations of employers and workers.

12.

(1) Studies should be undertaken, with the participation of employers' and workers' organisations, in order to identify the types of activity likely to hasten the ageing process or in which older workers encounter difficulties in adapting to the demands of their work, to determine the reasons, and to devise appropriate solutions.

(2) These studies may be part of a general system for evaluating jobs and corresponding skills.

(3) The results of the studies should be widely disseminated, in particular to employers' and workers' organisations, and, as the case may be, through them to the older workers concerned.

13. Where the reasons for the difficulties in adaptation encountered by older workers are mainly related to advancement in age, measures in respect of the type of activity in question should to the extent practicable be applied so as to--

(a) remedy those conditions of work and of the working environment that are likely to hasten the ageing process;

(b) modify the forms of work organisation and working time which lead to stress or to an excessive pace of work in relation to the possibilities of the workers concerned, in particular by limiting overtime;

(c) adapt the job and its content to the worker by recourse to all available technical means and, in particular, to ergonomic principles, so as to preserve health, prevent accidents and maintain working capacity;

(d) provide for a more systematic supervision of the workers' state of health;

(e) provide for such supervision on the job as is appropriate for preserving the workers' safety and health.

14. Among the measures to give effect to Paragraph 13, clause (b), of this Recommendation, the following might be taken at the level of the undertaking, after consulting the workers' representatives or with the participation of their representative organisations, or through collective bargaining, according to the practice prevailing in each country:

(a) reducing the normal daily and weekly hours of work of older workers employed on arduous, hazardous or unhealthy work;

(b) promoting the gradual reduction of hours of work, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, of all older workers who request such reduction;

(c) increasing annual holidays with pay on the basis of length of service or of age;

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- (d) enabling older workers to organise their work time and leisure to suit their convenience, particularly by facilitating their part-time employment and providing for flexible working hours;
  - (e) facilitating the assignment of older workers to jobs performed during normal day-time working hours after a certain number of years of assignment to continuous or semi-continuous shift work.

15. Every effort should be made to meet the difficulties encountered by older workers through guidance and training measures such as those provided for in Paragraph 50 of the Human Resources Development Recommendation, 1975.

16.

(1) With the participation of the representative organisations of employers and workers, measures should be taken with a view to applying to older workers, wherever possible, systems of remuneration adapted to their needs.

(2) These measures might include--

- (a) use of systems of remuneration that take account not only of speed of performance but also of know-how and experience;
- (b) the transfer of older workers from work paid by results to work paid by time.

17. Measures might also be taken to make available to older workers if they so desire other employment opportunities in their own or in another occupation in which they can make use of their talents and experience, as far as possible without loss of earnings.

18. In cases of reduction of the workforce, particularly in declining industries, special efforts should be made to take account of the specific needs of older workers, for instance by facilitating retraining for other industries, by providing assistance in securing new employment or by providing adequate income protection or adequate financial compensation.

19. Special efforts should be made to facilitate the entry or re-entry into employment of older persons seeking work after having been out of employment due to their family responsibilities.

#### IV. Preparation for and Access to Retirement

20. For the purposes of this Part of this Recommendation--

- (a) the term *prescribed* means determined by or in virtue of one of the means of action referred to in Paragraph 31 of this Recommendation;
- (b) the term *old-age benefit* means a benefit provided in the case of survival beyond a prescribed age;
- (c) the term *retirement benefit* means old-age benefit the award of which is subject to the cessation of any gainful activity;
- (d) the expression *age normally qualifying workers for an old-age benefit* means the prescribed age for award of old-age benefit with reference to which such an award can be either advanced or postponed;
- (e) the term *long-service benefit* means a benefit the grant of which depends only upon the completion of a long qualifying period, irrespective of age;
- (f) the term *qualifying period* means a period of contribution, or a period of employment, or a period of residence, or any combination thereof, as may be prescribed.

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21. Wherever possible, measures should be taken with a view to--

- (a) ensuring that, in a framework allowing for a gradual transition from working life to freedom of activity, retirement is voluntary;
- (b) making the age qualifying for an old-age pension flexible.

22. Legislative and other provisions making mandatory the termination of employment at a specified age should be examined in the light of the preceding Paragraph and Paragraph 3 of this Recommendation.

23.

- (1) Subject to its policy regarding special benefits, each Member should endeavour to ensure that older workers whose hours of work are gradually reduced and reach a prescribed level, or who start to work on a part-time basis, receive, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, a special benefit in partial or full compensation for the reduction in their remuneration.
- (2) The amount and conditions of the special benefit referred to in subparagraph (1) of this Paragraph should be prescribed; where appropriate, the special benefit should be treated as earnings for the purpose of calculating old-age benefit and the period during which it is paid should be taken into account in such calculation.

24.

- (1) Older workers who are unemployed during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit should, where an unemployment benefit scheme exists, continue until such date to receive unemployment benefit or adequate income maintenance.
- (2) Alternatively, older workers who have been unemployed for at least one year should be eligible for an early retirement benefit during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit; the grant of early retirement benefit should not be made dependent upon a qualifying period longer than that required at the age normally qualifying workers for an old-age benefit and its amount, corresponding to that of the benefit the worker concerned would have received at that age, should not be reduced to offset the probable longer duration of payment, but, for the purpose of calculating this amount, the period separating the actual age from the age normally qualifying workers for an old-age benefit need not be included in the qualifying period.

25.

(1) Older workers who--

- (a) have been engaged in occupations that are deemed arduous or unhealthy, for the purpose of old-age benefit, by national laws or regulations or national practice, or
- (b) are recognised as being unfit for work to a degree prescribed, should be eligible, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, for an early retirement benefit the grant of which may be made dependent upon a prescribed qualifying period; the amount of the benefit, corresponding to that of the benefit the worker concerned would have received at the age normally qualifying workers to an old-age benefit, should not be reduced to offset the probable longer duration of payment, but, for the purpose of calculating this amount, the period separating the actual age from the age normally qualifying workers for an old-age benefit need not be included in the qualifying period.

(2) The provisions of subparagraph (1) of this Paragraph do not apply to--

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- (a) persons in receipt of an invalidity or other pension on grounds of incapacity for work corresponding to a degree of invalidity or incapacity at least equal to that required to qualify for an early retirement benefit;
  - (b) persons for whom adequate provision is made through occupational pension schemes or other social security benefits.

26. Older workers to whom Paragraphs 24 and 25 do not apply should be eligible for an early old-age benefit during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, subject to such reductions as may be made in the amount of any periodical old-age benefit they would have received at that age.

27. Under schemes in which the grant of an old-age benefit depends on the payment of contributions or on a period of occupational activity, older workers who have completed a prescribed qualifying period should be entitled to receive a long-service benefit.

28. The provisions of Paragraphs 26 and 27 of this Recommendation need not be applied by schemes in which workers can qualify for an old-age benefit at the age of sixty-five or earlier.

29. Older workers who are fit for work should be able to defer their claim to an old-age benefit beyond the age normally qualifying workers for such a benefit, for example either for the purpose of satisfying all qualifying conditions for benefit or with a view to receiving benefit at a higher rate taking account of the later age at which the benefit is taken and, as the case may be, of the additional work or contributions.

30.

- (1) Retirement preparation programmes should be implemented during the years preceding the end of working life with the participation or representative organisations of employers and workers and other bodies concerned. In this connection, account should be taken of the Paid Educational Leave Convention, 1974.
- (2) Such programmes should, in particular, enable the persons concerned to make plans for their retirement and to adapt to the new situation by providing them with information on--
  - (a) income and, in particular, the old-age benefit they can expect to receive, their tax status as pensioners, and the related advantages available to them such as medical care, social services and any reduction in the cost of certain public services;
  - (b) the opportunities and conditions for continuing an occupational activity, particularly on a part-time basis, and on the possibility of establishing themselves as self-employed;
  - (c) the ageing process and measures to attenuate it such as medical examinations, physical exercise and appropriate diet;
  - (d) how to use leisure time;
  - (e) the availability of facilities for the education of adults, whether for coping with the particular problems of retirement or for maintaining or developing interests and skills.

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## V. Implementation

31. Effect may be given to this Recommendation, by stages as necessary, through laws or regulations or collective agreements or in any other manner consistent with national practice and taking account of national economic and social conditions.

32. Appropriate measures should be taken with a view to informing the public and, more particularly, those responsible for guidance, training, placement and the social services concerned, as well as employers, workers and their respective organisations, of the problems which older workers may encounter in respect, in particular, of the matters dealt with in Paragraph 5 of this Recommendation and of the desirability of helping them to overcome such problems.

33. Measures should be taken to ensure that older workers are fully informed of their rights and opportunities and encouraged to avail themselves of them.