

Inquiry Evidence
Equality of Opportunity Committee
Age Discrimination in Employment Inquiry
May 2009

1 Introduction

Age Concern Cymru and Help the Aged in Wales have joined together to form a single new charity dedicated to improving the lives of older people.

Age Concern Cymru and Help the Aged in Wales are pleased to respond to the Equality of Opportunity Committee's request for evidence to inform a scrutiny inquiry into discrimination against older people in employment. Tackling age discrimination is a key priority for Age Concern Cymru and Help the Aged in Wales. We believe no one should be discriminated against on the grounds of their age and we pleased that the Committee has decided to conduct a scrutiny inquiry on older people and employment. This issue is particularly important during the current economic climate as all evidence indicates that older workers are disproportionately affected during times of recession.

The following response has been structured to firstly illustrate the theoretical basis for the discrimination experienced by older people in employment. It then discusses current age equality legislation and our campaigning in relation to this and moves on to cover proposed legislation. The response concludes with a section on our recommendations.

2 Stereotyping – The Foundation for Age Discrimination in Employment

Recent research by the Chartered Institute of Personnel Development (CIPD), Eversheds and Cranfield School of Management has indicated that age discrimination remains rife in the workplace. Human Resources and senior managers frequently still see older workers in terms of ageist stereotypes, and employment policies and practices often discriminate on age grounds.

It is our view that recruitment, selection, advertising, promotion and retirement are the key areas of risk for employers in complying with age legislation. It would therefore be advisable for the Assembly to examine all employment policies and practices to ensure that explicit and implicit age bars which might amount to unlawful age discrimination are identified and removed.

The evidence here would seem to correlate strongly with specific commitments made in the Welsh Assembly Government's Strategy for Older People in Wales (Phase Two 2008-2013). The following sections are of particular relevance:

- 2.9 Promoting a more positive image of older people
- 2.15 Counteracting age discrimination
- 3.1 – 3.17 The economic status and contribution of older people

We have gathered some evidence on the prevalence of age discrimination in employment in Wales through enquiries and contact that we and local Age Concern organisations have with older people. These have enabled us to conclude that age discrimination in employment is both widespread and a significant concern for older people in Wales, however we feel that the true extent of the problem is unknown. We are pleased to note that Prime Cymru have been included on the temporary stakeholder reference group that has been established for this inquiry as we are aware of the extensive statistical information that they will be contributing.

As a consequence of the nature of age discrimination and misunderstanding on the part of both employers and employees regarding the current legislation, we feel that a Welsh prevalence study may be necessary and beneficial. One thing for certain is that there is massive under reporting of this issue and, on occasions, discrimination can be exacerbated by acceptance and acquiescence on the part of older people.

Evidence from outside of Wales indicates that age discrimination is one of the most prevalent and in built forms of discrimination. For example, in the Republic of Ireland age accounted for 22 per cent of all discrimination claims in 2004, and age is the third most common ground for claims, after gender and race. A common reason for claims against employers in the Republic of Ireland on the grounds of age discrimination is employers' stereotypical ageist assumptions. Similarly, in the USA, age discrimination claims are now more common than sex discrimination claims and a recent London School of Economics and Political Science study identified age discrimination as 'more socially acceptable' than other types of discrimination and 'a poor relation in the diversity debate'.

3 The National Default Retirement Age (Mandatory Retirement Age)

The Employment Equality (Age) Regulations 2006 outlawed age discrimination in employment and vocational training for the first time in England, Scotland, Wales and Northern Ireland. The legislation introduced penalties for employers and their employees who discriminate against potential and actual employees on the grounds of age in a similar way to cases of sex, race, disability, faith and sexual orientation discrimination. Penalties can include significant and unlimited financial compensation to the victim of discrimination

The Regulations offered the promise that people would not be discriminated against on the basis of their age in employment and occupation. However, Regulation 30 introduced a national default retirement age (also known as a mandatory retirement age) as an exception to the general principle of non-discrimination on grounds of age. This regulation allows employers to operate a mandatory retirement age of 65 or over, allowing them to terminate the employment of a member of staff purely on the grounds of age. Employers can also refuse to recruit people aged over 64 and six months.

Under the Regulations an employer must notify an employee of their intention to force them to retire on a specific date or age 12 months in advance. Failure to notify an employee within the prescribed timescale may result in the retirement being deemed automatic unfair dismissal. An employee may ask to stay on after the proposed retirement date and the employer should consider this request and make a decision which the employee may appeal against. The employer is again required to consider the appeal however they are not obliged to agree to the request and do not have to justify refusal.

4 Challenging the MRA

Before the 2006 law came into force, Age Concern argued that the UK Government had improperly implemented the EU directive upon which they were based and sought judicial review of the regulations in the public interest. The case stated that the regulations are unlawful both by introducing a national default retirement age and by giving employers too much scope to introduce other age-based rules in the workplace. The case was referred to the European Court of Justice (ECJ) in 2007. The final ruling of the ECJ, given on 5th March 2009 stated that the UK's retirement laws will only comply with the EU Directive if they have a legitimate aim related to employment and social policy, rather than simply to reduce costs for individual employers. The court went on to emphasise that the UK Government will have to meet a high standard of proof in demonstrating that its policy aim is legitimate. The case is adjourned awaiting a date at the High Court. Hundreds of older people have had their cases frozen at Employment Tribunals awaiting the outcome of this legal challenge.

A policy of allowing employers to force people to retire at 65 is completely at odds with the aim of extending working lives and promoting a positive vision for our ageing society. A default retirement age creates a barrier to opportunities for selection, promotion, training and job mobility for people in their late 50s and early 60s. A 'fixed' point at which individuals can be asked to retire, inevitably influences employer decisions about their personal development and opportunities in the years leading up to it. Older workers who do leave their jobs are far less likely than other age groups to find employment subsequently.

It is particularly important during a recession that the skills and abilities of older workers – including those who leave employment – are maintained and renewed as the economy will depend on those people to boost both labour supply and consumer demand when it recovers. In the early 1990s, the male 50+ employment rate fell 7 points and did not recover for nearly 10 years. Labour supply in the subsequent upturn was suppressed by the premature exit of more than 300,000 older workers. There is considerable support for the removal of the national default retirement age, from the general public, the media, some business leaders and unions. In an ICM Research opinion poll commissioned by Age Concern Cymru and Help the Aged in Wales in February 2009, 79% of people of all ages in Wales stated they believe that employers should support and encourage people who want to continue to work past the age of 65.

In the Pensions White Paper (May 2006) the UK Government announced its intention to raise the State Pension Age from sixty five to sixty eight by 2050. We would expect this development to be replicated for MRA but if this were removed individuals would not be forced to leave the labour market on the basis of age but could still claim their pensions.

5 An Age Equality Duty

The announcement by Harriet Harman last summer that an 'age equality duty' would be included in the UK Government's Equality Bill was warmly welcomed as this has been a longstanding campaigning issue for the age lobby. For many years progress on the elimination of age discrimination has been hampered by the fact that age has occupied the position of the 'Cinderella' equality strand when compared to race, gender and disability. Work on the eradication of all of these areas of discrimination has been assisted by primary legislation placing statutory duties on public authorities. The Equality Bill will introduce a new Public Sector Duty and the inclusion of age as a 'relevant protected characteristic' is a significant move in the right direction.

However, we have concerns regarding timescales for implementation as the precise detail of the specific duties of the Bill are reliant upon secondary legislation. Current estimates would seem to indicate that we may have to wait until 2011 before these details are finalised. It is the specific duties contained within current equality laws that place the statutory duties on public authorities to monitor employment practices and in some cases adopt positive action initiatives. Delay in this area combined with concerns regarding whether the Bill will in fact reach the statute books in the lifetime of the current UK Government relegates the Bill to the position of worthy declaratory intent as opposed to a tangible positive outcome for older people.

We were also disappointed to note that under schedule 9 of the Bill the aforementioned Regulation 30 of the 2006 age legislation has been reintroduced. In a Bill that seeks to secure stronger age equality rights, it is contradictory that Schedule 9 allows people to be forced to retire against their will. Worryingly in a recession, according to research conducted by the CIPD, almost one in five employers said that they are going to enforce retirement more vigorously.

There is however one extremely positive aspect of the Equality Bill from a Welsh equality perspective. Clause 147 of the Bill gives powers to Welsh Ministers to impose specific duties on relevant Welsh authorities. We will propose how this can assist older people in the next and final section of our submission.

6 Recommendations

a) Countering stereotypes through age proofing

In the Foreword to the Strategy for Older People in Wales 2008-2015, the Deputy Minister for Social Services, states:

"the next phase of the Strategy for Older People will focus on the 'mainstreaming' of ageing as well as the economic status and the well-being and independence of older people, but with their engagement continuing at its heart."

Mainstreaming is indeed all about placing people at the heart of policy development and it is vital that the Welsh Assembly Government meets the commitments contained within the Strategy for Older People by 'age proofing' all of its policies and procedures. Equality Impact Assessment (EIA) has become inextricably linked to the achievement of the mainstreaming

process and the Committee will be familiar with Inclusive Policy Making, the Welsh Assembly Government's own EIA model.

For the reasons mentioned at the outset of this response, human resource functions have been selected by many public sector organisations as the first service area to undergo EIA as this is often perceived to be the area most susceptible to non-compliance with existing equality legislation.

Given the concerns we have expressed regarding the potential scope of older people's experience of discrimination in employment we would ask that the Welsh Assembly Government works in partnership with organisations such as Age Concern Cymru and Help the Aged in Wales to incorporate age proofing tools into the Inclusive Policy Making model. It is crucial that the Welsh Assembly Government's work on age proofing is looked upon as an example of good practice, as we argued during the development of the Single Equality Scheme, and we are keen to work in partnership with the National Assembly for Wales and the Welsh Assembly Government on this.

b) Removal of the Mandatory Retirement Age

Age Concern and Help the Aged will continue to campaign for the removal of the MRA. We maintain that this is still the only piece of equality legislation that actively endorses discriminatory practice and the current economic climate will undoubtedly have a disproportionate effect upon older people. We fear that these effects will be magnified in Wales. We would like to see the National Assembly for Wales explore the possibilities for ending this legalised discrimination through legislative powers, or alternatively through making strong representations to the UK Government.

c) The Use of Assembly Powers to Eliminate Age Discrimination in Employment

On the 13th May 2009 Age Concern Cymru and Help the Aged in Wales were extremely fortunate to be able to launch our Older Lesbian Gay and Bisexual and Transgender Network Report with the sponsorship of a member of the Equality of Opportunity Committee. The Deputy Minister for Social Services was in attendance at the event and reminded all present that the Government of Wales Act 1998 places statutory responsibility on the Welsh Assembly Government to promote equality of opportunity. We would urge the National Assembly for Wales and the Welsh Assembly Government to utilise existing powers and those that are forthcoming as part of Clause 147 of the Equality Bill to ensure that age discrimination in employment is eradicated.

7 Further Comments

We hope that the information in this briefing paper is of use to the Committee in conducting its scrutiny inquiry. We would be happy to provide any further information to support this response and would be willing to give oral evidence to the Committee if required. We would be particularly keen to work in partnership with key stakeholders on a scoping exercise to establish the true extent of older people's experience of discrimination in employment in Wales.