

Implementation of Legislative Provisions to  
Deal with Age Discrimination in Employment in  
New South Wales, Australia and New Zealand

Research and Library Services Division  
Legislative Council Secretariat  
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## Introduction

The Administration set up the Working Group on Age Discrimination in Employment at the end of 1995. The Working Group has examined administrative and legislative provisions relating to age discrimination in some overseas countries and considered the legislative provisions of New South Wales in Australia and New Zealand most relevant to the Hong Kong situation. As part of its exercise to study the question of age discrimination, the Working Group organised a fact-finding visit to the two places to obtain first-hand information on how legislative measures work in these jurisdictions. The visit took place between 22 January 1996 and 27 January 1996 and the itinerary is at Appendix I.

2. Two Legislative Councillors Hon LEE Cheuk-yan and Hon Mrs Elizabeth WONG CHIEN Chi-lien joined the Administration's delegation. They were accompanied by a research officer of the Research and Library Services Division of the Legislative Council Secretariat.

3. This report, based on information gathered from the visit, aims to describe the background leading to the introduction of legislative provisions to deal with age discrimination in employment in the two places and to examine their experience since the legislation was enacted.

## New South Wales

### Background for legislation

#### *Discrimination faced by different age groups*

4. Discrimination against young people on the ground of age is widespread in Australia<sup>1</sup>. In the field of employment, young people under 21 face different treatment and are paid "junior" wages.

5. Discrimination in employment also affects mature workers and there has been a growing concern since the mid 1980s. Working men over 45 and working women over 35 are considered "old" in the work place. If they are out of work, it will take them, on average, two years to find another job<sup>2</sup>.

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<sup>1</sup> Page 10, Age Discrimination - Options for New South Wales : A Discussion Paper

<sup>2</sup> Business Review Weekly, 19 July 1991.

6. Workers aged 55 or above also face difficulties in getting work. 64 per cent of those aged 55 or above report their age as the main difficulty in finding a job<sup>3</sup>. The labour force participation rate for those between 55 to 59 was 91.3 per cent in 1971. The rate fell to 75.5 per cent in 1989. Some of those within this age group may leave the work force for early retirement and others for redundancy or resignation<sup>4</sup>. Many of these people would have to rely on social security for their living if they are not covered by retirement schemes or could not find another job.

### *Human Rights Concerns*

7. Age discrimination is also an important human rights issue. Interest groups such as the New South Wales Council for the Ageing, Australian Retired Persons Association and New South Wales Youth Advisory Council consider it unfair to classify people by stereotyped notions of capability of a certain age group and limit their opportunities. They have advocated the introduction of legislation to protect the rights of those who are discriminated.

### Development of the legislation

8. Legislation against discrimination was first proposed in New South Wales in 1976. The Anti-Discrimination Bill 1976 originally included provisions against discrimination on the ground of age. The section was however removed during debate in the Parliament as there was disagreement on how the section was to operate. There was also pressure from the employer groups<sup>5</sup>.

9. In 1989, the New South Wales Premier, the Hon N F Greiner, MP, announced the government's decision to abolish compulsory retirement in a staged manner. However, on the broader issue of age discrimination, it was decided that a legislative option would not be pursued at that time.

10. Compulsory retirement was prohibited for the public sector in 1991, for local government in 1992 and for the rest of employees in New South Wales in 1993. The only people employed in New South Wales who can still be compulsorily retired are:

- people employed under a federal award that specifically states the compulsory retirement age
- judges and magistrates
- police officers
- people employed for a fixed term

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<sup>3</sup> Australian Bureau of Statistics, Labour Force Projections Australia 1995-2011, July 1994

<sup>4</sup> Page 8, Age Discrimination - Options for New South Wales : A Discussion Paper

<sup>5</sup> Business Review Weekly, 19 July 1991

11. In May 1992, the Attorney General's Department of New South Wales issued the Green Paper entitled "Age Discrimination - Options for New South Wales: A Discussion Paper" seeking public views on the form and content of legislation to deal with age discrimination in the following areas:

- employment
- provision of goods and service
- accommodation
- membership of registered clubs
- education

12. All but two of the 59 submissions supported the introduction of legislation to deal with age discrimination. The Chamber of Manufacturers of New South Wales and the Retail Traders Association of New South Wales opposed to the introduction of legislative measures.

13. The two organisations considered that a legislative solution was an inflexible and unnecessarily restrictive approach to a problem that could be best resolved by educational strategies. They argued that legislation would put employers to considerable expense in the re-organisation of selection processes, salary structures and contributions to superannuation schemes<sup>6</sup>.

14. The New South Wales government concluded that the cost to employers in meeting the requirements of any legislation should not outweigh the potential advantages that would result for industry and the community generally.<sup>7</sup> The government considered that the use of age as a substitute for judgements about individual performance would be both socially and economically inefficient and undesirable. The government believed that productivity would be improved with the introduction of legislation prohibiting age discrimination since inefficient management practices would be replaced by performance assessment based on merit.

15. In July 1994, the Anti-Discrimination Act was amended to include several new grounds for discrimination including age discrimination in employment.

#### Details of legislation concerning age discrimination in employment

16. Under the Anti-Discrimination Act, it is unlawful for an employer to discriminate directly or indirectly against applicants, employees, commission agents, contract workers or partners because of their age when making employment-related decisions. Employment-related decisions include offer of employment, dismissal, terms of employment, opportunities for training, promotion and transfer.

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<sup>6</sup> Page 6, White Paper: Age Discrimination Legislation for New South Wales

<sup>7</sup> Page 6, White Paper: Age Discrimination Legislation for New South Wales

17. It is also against the law for anyone to publish, broadcast, screen or publicly display a job advertisement that indicates an intention to discriminate anyone in terms of age. The person or organisation offering the job will be legally liable for the discriminatory job advertisement. Advertisers (organisations that print, broadcast or screen client's advertisements) may also be legally liable for the breach. The Anti-Discrimination Board advise advertisers to ensure that the advertisement they carry does not indicate an intention to discriminate.

18. The amended Anti-Discrimination Act covers all age groups. However, it does not provide protection to people working in small businesses where there are fewer than six employees. There are other exemptions, as given below:

- employing people under the age of 21 as "junior" and paying them at junior rates<sup>8</sup>
- genuine occupational qualification e.g. a male to model men's clothing
- employment in a private household
- superannuation schemes (provided that different treatment in contributions and benefits is based on actuarial or statistical data)

19. On establishing that there is a breach of the law, the Equal Opportunity Tribunal has the power to make an order restraining the respondent from continuing or repeating discriminatory acts. The Tribunal may require the respondent to pay to the complainant damages up to A\$ 40,000.

### Administering of the Act

20. The Act is administered by the Anti-Discrimination Board. The President of the Board has statutory responsibilities under the Act for investigation and conciliation of complaints of unlawful discrimination.

### *Complaints handling procedure*

21. All complaints made to the Anti-Discrimination Board have to be in writing. Upon receipt of a complaint, the staff of the Board will determine whether it appears to involve discrimination covered by the Anti-Discrimination Act. If this appears to be the case, the staff would attempt to conciliate the complaint by getting the parties involved to come to a settlement. Settlement may be in the form of monetary compensation, apologies or reinstatement etc.

22. If the complaint is not conciliated, it may be referred to the Equal Opportunity Tribunal for a judicial decision. However, only a few per cent of the complaints are referred to the Equal Opportunity Tribunal. The Anti-

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<sup>8</sup> This exemption will last until at least 1 July 1996 to give employers and government time to examine whether it is a good idea to change from the current age-based system of juniors to a non aged-based system of trainees.

Discrimination Board has not yet referred any case on age discrimination to the Tribunal.

23. In 1994/95, the Anti-Discrimination Board received 1,698 formal complaints and finalised 1,501 complaints. 312 cases (20 per cent) and 583 (39 per cent) were finalised within one and two to six months respectively. Of the 1,698 complaints, 85 cases (five per cent) were on age discrimination in employment. No statistics on the time taken to finalise these cases or to refer to the Equal Opportunity Tribunal are available.

### *Guidelines*

24. To prevent age discrimination from happening, the Anti-Discrimination Board provides guidelines to employers, managers, supervisors, employment agencies and advertisers on examples of lawful and unlawful behaviour.

25. Examples of the advice in the guidelines to prevent age discrimination in employment are given below:

- not to advertise any job for people of a certain age or age group
- not to use words like "junior", "mature", or "senior" to indicate people of a particular age group
- avoid asking for a particular number of years of experience
- remove any reference to age or date of birth from job application forms
- remove any length of service or length of experience requirements from promotion or transfer conditions / decisions

### Impact of legislation

#### *Positive effect*

26. The Anti-Discrimination Board is of the view that legislation provides the basis for educational programs and training. It also considers the legislation useful in encouraging competency-based employment decisions instead of age-based. Direct benefits of the legislation include ensuring that the best person is employed for each job; the retention of skills and experience of older workers and consequent savings on training new staff; and the flexibility and creativity provided by teams composed of people of different age and life/work experiences<sup>9</sup>.

27. The Ageing and Disability Department is of the view that legislation precedes changes in behaviour. More employers are interested in employing workers retrained under the Mature Workers Program after the introduction of the legislative provisions against age discrimination.

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<sup>9</sup> Page 2, Age Discrimination : Guidelines for Employers, Managers, Supervisors, Equal Employment Opportunity Personnel and Employment Agencies

## Problems

### *Lack of evidence*

28. The Anti-Discrimination Board is of the view that it is difficult to have evidence on whether discrimination has actually occurred. The cases usually are not witnessed or documented. It is often one person's words against the other.

### *Difficulties in interpreting the law*

29. Since the legislation prohibiting age discrimination came into force on 1 July 1994, employer organisations have expressed concerns to the Anti-Discrimination Board about difficulties in interpreting the Act and requested increased clarity on lawful and unlawful practices. For example, they are uncertain if the use of length of service to determine eligibility for job, salary or benefits could be considered as discriminatory.

30. There is also a concern that the guidelines provided by the Anti-Discrimination Board has no legal force and compliance with the guidelines does not provide a legal defence for employers.

31. Added to the problem, the number of case law on discrimination is relatively small since the law is new to the legal scene. This is especially the case for the new grounds of complaint such as age discrimination in employment. It is difficult for employers to find precedents to follow. Even if there were cases, the principles set down by the courts may be too broad for many to apply to their own situation.

32. In August 1995, the Anti-Discrimination Board issued a discussion paper entitled "Implementing Law in the Workplace" soliciting views on the possible options in providing more guidance to those in the workplace to determine whether their employment policies and practices comply with the law.

33. One option is to give employers specific guidance by regulations that are very clear on employers' liability. Such example is found in the United States where the Age Discrimination in Employment Act 1967 provides for the Equal Employment Opportunity Commission to issue interpretations of the Act in the form of interpretive rules which are legally binding.

34. Another option for providing more guidance to employers is to draw up codes of practice. Although the codes are not as certain as regulations, the codes should make liability more predictable for employers. When there are proceedings concerning an alleged breach of the law, an approved code of practice is admissible as evidence.

35. The Anti-Discrimination Board is in favour of providing more guidance to employers by codes of practice which are more flexible in applying to different workplaces and specific industry. Regulations are regarded as inflexible and may constrain the law from adapting to changing workplace and community needs.

## **New Zealand**

### Background of legislation

#### *Discrimination faced by different age groups*

36. Youth unemployment has become a problem in New Zealand since the 70's. The unemployment rate is the highest in the 15-19 age group<sup>10</sup>. Similar to New South Wales, young people aged between 16 to 20 receive "junior rates" which are 60 per cent of the minimum adult rate.

37. The problem faced by those aged 45 or above is long-term unemployment. Once they are out of work, it is difficult for them to get another job. More than 60 per cent of unemployed people over the age of 45 have been out of work for six months or more<sup>11</sup>.

38. There are also anecdotal evidence that people aged 50 or above are targeted for early retirement<sup>12</sup>. These people lack access to training, transfer and development opportunities. At the same time, old people are retiring early either voluntarily or involuntarily. While the retiring age in New Zealand is 63, labour force participation rate drops dramatically to 39 per cent after the age of 60. At the same time, people are living longer. The average life expectancy was 73.1 years for males and 78.9 years for females in 1993. Many old people have to depend on social security for their living.

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<sup>10</sup> Issues Paper for the New Zealand Prime Ministerial Task Force on Employment, 1994

<sup>11</sup> Page 14, Issues Paper for the New Zealand Prime Ministerial Task Force on Employment, 1994

<sup>12</sup> New Zealand Equal Employment Opportunities Trust expressed the view during a meeting with the Hong Kong delegation to study age discrimination legislation.

### Development of legislation

39. The Human Rights Commission Act 1977 was amended to make it unlawful to discriminate against a person in employment because of their age since 1 April 1992.

40. The Human Rights Act 1993 was subsequently enacted to replace the Human Rights Commission Act and the Race Relation Act. It includes both the new and old grounds of unlawful discrimination, and took effect from 1 February 1994.

### Details of the legislation on age discrimination in employment

41. Under the Human Rights Act, it is unlawful for an employer to discriminate directly or indirectly against applicants, employees, voluntary workers and contract workers because of their age in employment-related decisions. Employers are also liable for unlawful discrimination by their employees or agents.

42. It is also unlawful for anyone to publish or display any job advertisement or notice that could reasonably be understood as indicating an intention to discriminate anyone on the ground of age. Liability for unlawful advertising rests with both the person or organisation placing the advertisement, and the person or organisation publishing or displaying the advertisement. Advertisers are advised by the Human Rights Commission to avoid carrying discriminatory advertisement.

43. The Human Rights Act covers those between the school leaving age at 16 and those old enough to enjoy national superannuation. The upper age limit for protection is 63 at the moment. Employees can still be required to retire at the age of entitlement to national superannuation. However, the Human Rights Act prohibits compulsory retirement after 1 February 1999. From that date, the upper limit for protection under the Human Rights Act would also be removed.

44. The following areas are exempted from the Act:

- paying employees between the ages of 16 to 20 youth rates
- domestic work in a private home
- employment involving national security
- genuine occupation qualification e.g. bar staff must be over 20 years of age in order to serve in licensed premises
- superannuation schemes (provided that different treatment in contributions and benefits is based on actuarial or statistical data)

45. On establishing that a breach has been committed, the Complaints Review Tribunal may award one or more of a number of remedies including a declaration, an order restraining the employer from continuing or repeating the breach and an award of damages up to NZ \$200,000.

#### Administering of the Act

46. The Human Rights Commission is responsible for administering the Act. The main functions of the Commission are to investigate and resolve complaints of unlawful discrimination prohibited by the Act.

#### *Complaints handling procedure*

47. On receipt of a complaint, a complaints officer in the Commission would investigate by gathering information and interviewing parties concerned to decide whether there is enough evidence to establish that discrimination has occurred. If the opinion is that the complaint has substance then the Commission would try to settle the matter. If not, the Commission would take no further action. However, the complainant can still take the case to the Complaints Review Tribunal.

48. Alternatively, the Commission would try its best to settle the matter without investigating the complaint if both parties agree. The Commission puts relatively strong emphasis on this approach since conciliation usually results in a speedier outcome and avoids the need for a disruptive or protracted investigation. If the settlement attempts are unsuccessful during conciliation, the complainant may ask the Commission to start a formal investigation.

49. Settlement can take a variety of forms including apologies, assurances against repeating the behaviour complained of, monetary compensation, reinstatement and transfers etc.

50. In the year ending 30 June 1995, the Commission received 257 complaints on various kinds of discrimination. Among them, 17 cases (6.6 per cent) were on age discrimination in employment. Of the 268 complaints handled (including some carried forward from the previous year) during the year, 73 cases (27 per cent) were conciliated or investigated within 12 weeks while 112 cases (42 per cent) took the Commission more than six months.

#### *Guidelines*

51. The Human Rights Commission prepares and publishes guidelines to help employers and advertisers avoid acts or practices that may be inconsistent with or contrary to the provisions of the Human Rights Act. These include Advertising Guidelines, Pre-employment Guidelines and Superannuation Guidelines which are drawn up after extensive consultation with relevant

business and industry associations. The guidelines do not have legal force and in case of discrepancy between the Act and the guidelines, the Act will prevail.

52. Examples of advice given to employers are as follows:

- avoid asking job applicants their age or date of birth; applicants can be asked if they have reached minimum school leaving age
- avoid asking applicants to specify dates of school attendance; applicants can be asked to provide evidence of qualifications relevant to the job
- avoid using terms such as "senior", "junior", "mature" that could be assumed to indicate an intention to discriminate. Alternatives may include "responsible", "capable", "possessing initiative", "with good judgement".

### Effect of legislation

#### Positive effect

53. The Human Rights Commission considers the age discrimination legislation useful in getting rid of the stereotypes towards people at different age groups. The Commission has good response from employers on the Human Rights Act and has a lot of enquiries on how to comply with the legislative provisions on age discrimination in employment.

54. The Equal Employment Opportunity Trust believes legislation would uphold the rights of employees. It considers legislation with reasonable sanctions would change the working environment.

55. Employers advertising vacancies through the employment service of New Zealand Department of Labour are advised to avoid discriminatory wordings. The department finds employers receptive towards their advice on how to comply with the Act.

56. The Auckland Employers Association is of the view that legislation changes behaviour. Age discrimination legislation focuses employers' attention on the qualities they want staff to have instead of relying on arbitrary indicators such as age. Employers would get the best person by adopting an open attitude during interviews. While legislation costs money, the Association is of the view that good management practices save money.

57. The New Zealand Council of Trade Unions (CTU) considers age discrimination legislation effective in getting rid of blatant breaches. Age discrimination legislation is also useful in encouraging people to link performance and competency with wage-fixing.

## *Criticisms*

58. The Human Rights Commission considers that there are difficulties in implementing the Act. For example, it is difficult to know why someone is refused a job. Employers would make use of loopholes in language such as describing someone as "over-qualified" for a job than saying he or she is too old.

59. Youth rights groups have criticised the Human Rights Act for allowing youth rates to prevail. The Youth Law Project described the Act as letting down young workers.

60. The Auckland Employers Association is of the view that if the complaint process is not carefully handled, it would be a form of duress to employers. To avoid publicity and the lengthy process of investigation, some employers would prefer to pay money to settle complaints.

61. The New Zealand Employers Federation considers the law inflexible. Some employers feel that they should still be able to use age as a valid criteria such as career planning.

## **Concluding remarks**

62. Both New South Wales and New Zealand have a history of anti-discrimination law but legislative provisions to deal with age discrimination were introduced only in recent years.

63. Age discrimination law concerns employers most since such discrimination mainly occurs in employment. Employer groups admit that age discrimination law could improve management practice and would enable them to judge staff by their competency rather than arbitrary criteria such as age. However, employers in New South Wales have asked for more concrete and specific guidance on their liability. Options of giving more guidance to employers by codes of practice and regulations are being contemplated by the Anti-Discrimination Board.

64. Both places rely on an independent body to administer the law by issuing guidelines and investigating and conciliating complaints. Investigation of complaints takes time and some employers consider the process harassing and some may choose to pay their way out. The experience of investigators also shows that actual evidence of discrimination is hard to find since there is often a lack of witness or documentary proof.

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## Appendix I

### Program of Fact-finding Visit to Australia and New Zealand on 22-27 January 1996

10am - 12 noon 23 January 1996	Mr Mark McCormick, Senior Policy Officer, Ageing and Disability Department; Ms Sheen Wilson, Deputy Chair, Mature Workers Advisory Committee
2pm - 3:30pm 23 January 1996	Mr Chris Pulpick, President, Anti-Discrimination Board; Ms Nancy Hennessy, Director, Legal and Policy Division, Anti-Discrimination Board
9:30am to 4:00pm 25 January 1996	Pamela Jefferies, Chief Commissioner, Human Rights Commission Staff of the Commission to introduce the Human Rights Act, the operation of the Commission, case studies, complaints handling procedure, problem areas
4:00pm to 5:00pm 25 January 1996	Panel discussion with representatives of Youth Law Project, Mature Age Employment Agency, Auckland Employers Association and Equal Employment Opportunities Trust
9:30am to 10:45am 26 January 1996	Ms Adrienne D'Ath Chief Executive, New Zealand Employers Association
11:00am to 12noon 26 January 1996	Angela Foulkes, Council of Trade Unions
12:30pm to 2:15pm 26 January 1996	Luncheon with the Parliamentary Service at Parliament House, tour of Parliamentary building
2:30pm to 4pm 26 January 1996	Mr Graham Buchanan, Chief Legal Advisor, Department of Labour