

# The Effects of Anti-age Discrimination Legislation: A Comparative Analysis

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*The central aim of this article is to evaluate, compare, and contrast the perceptions of key stakeholders with regard to the likely effects of anti-discrimination legislation on employment relations practice in a liberal market economy, that of the United Kingdom. It is based on a series of in-depth interviews conducted around the time of the implementation of the legislation, compared and contrasted with a similar panel of interviews conducted in New Zealand. In that country, which has similar legal traditions to the United Kingdom and many similarities in terms of employment relations, anti-age discrimination legislation has been in place for some years, so the comparison provides useful insights.*

## 1. INTRODUCTION

The central aim of this article is to evaluate, compare, and contrast the perceptions of key stakeholders with regard to the likely effects of anti-discrimination legislation on actual employment relations practice within a liberal market economy, that of the United Kingdom. On the one hand, it could be assumed that firms are automatically bound to follow legislation, and that any new law strengthening employee rights will immediately impact on employment relations practice. On the other hand, legislation may have uneven or limited effects, given the relative weakness of individual employees vis-à-vis their employer, the need to accumulate supportive case law, and/or sectoral, regional, and organizational specific dynamics. This is particularly the case in developed liberal market economies, all of which share common law legal systems. These systems privilege property over employment rights, while the heavy reliance on litigation to interpret and enforce employment rights will generally tend to favour the stronger partner in the employment relationship.<sup>1</sup>

This study builds on the findings of earlier survey research in the United Kingdom, which highlighted a high incidence of age-related discrimination,<sup>2</sup> and existing work on the effects of age discrimination legislation in other national contexts. It is based on a series of in-depth interviews conducted around the time of the implementation of the legislation,

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<sup>1</sup> J. Botero et al., 'The Regulation of Labor', *The Quarterly Journal of Economics* 119 (2004): 1339–1382.

<sup>2</sup> Pinsent Masons, 'Age Discrimination Rife in the UK', *Out-Law*, 26 Oct. 2005, <[www.theregister.co.uk/2005/10/26/age\\_discrimination/print.html](http://www.theregister.co.uk/2005/10/26/age_discrimination/print.html)>, 28 Sep. 2010.

which compared and contrasted with a similar panel of interviews conducted in New Zealand, where anti-age discrimination legislation has been in place for some years. New Zealand has similar legal traditions to the United Kingdom and many similarities in terms of its employment relations system.

There is little doubt that age discrimination is extremely widespread. Not only are older workers generally more likely to get laid off, but they are also very much less likely to find other work, should this happen.<sup>3</sup> Moreover, the scale of the problem may be masked by employees opting for 'early retirement' to escape the stigma of being forcibly dismissed. Most respondents to a 1992 EU-wide survey revealed that older workers were systematically discriminated with regard to access to training, recruitment, promotion, and tenure.<sup>4</sup> Moreover, older workers tended to be concentrated both in sunset industries and the public sector and, more generally speaking, in heavily unionized workplaces, where individual employees were in a stronger position to enforce their employment rights.<sup>5</sup> In England, some 30% of the workforce aged between 50 and the statutory pension age are unemployed or otherwise economically inactive (10% more than those aged 25 to 49); many older workers hold the view that they are the 'last choice' of employers.<sup>6</sup>

## 2. PERSPECTIVES ON AGE DISCRIMINATION

### 2.1. NEOLIBERAL ACCOUNTS

Neoliberal approaches have suggested that age discrimination reflects unrealistically high wage expectations on the part of older workers; automatic wage progressions have resulted in older workers' wages being inflated to such an extent that, in many cases, they have simply priced themselves out of the market.<sup>7</sup> In short, age discrimination would be 'solved' should older workers be willing to accept lower paid work that accurately reflects the cost to the firm of greater risks such of health and, in manual occupations, a decline in physical strength. Such approaches, of course, neglect the value of organization-specific skills and wisdom, and the extent to which greater security regarding tenure and the terms and conditions of employment is likely to encourage the deepening of firm-specific skills and general human capital development.<sup>8</sup> Again, it can be argued that firms

<sup>3</sup> J. Macnicol, *Age Discrimination: A Historical and Contemporary Discussion* (Cambridge: Cambridge University Press, 2006).

<sup>4</sup> A. Walker, *Age and Attitudes* (Brussels: European Commission, 1993), 26.

<sup>5</sup> B. Kersley et al., *Inside the Workplace: Findings from the 2004 Employment Relations Survey* (London: Routledge, 2006).

<sup>6</sup> B. Newton et al., 'Training Participation by Age among Unemployed and Inactive People, Department for Work and Pensions Research Report 291' (Norwich: DWP, 2005), 13.

<sup>7</sup> L. Kotlikoff & J. Gokhale 'Calculating a Firm's Age-Productivity Profile Using the Present Value of Workers' Earnings', *Quarterly Journal of Economics* 107, no. 4 (1992): 1215–1242.

<sup>8</sup> C. Duncan & W. Loretto, 'Never the Right Age: Gender and Age-Based Discrimination in Employment', *Gender, Work and Organisation* 11, no. 1 (2004): 96; G. Wood, M. Harcourt & S. Harcourt, 'The Effects of Age Discrimination Legislation on Workplace Practice', *Industrial Relations Journal* 35, no. 4 (2004): 359–371; I. Roberts, 'Taking Age out of the Workplace: Putting Older Workers Back In?', *Work, Employment and Society* 20, no. 1 (2006): 67–86.

are often able to attract younger workers with low pay on the premise of future pay advancement.<sup>9</sup>

Other neoliberal accounts have suggested that inferior terms and conditions of employment among older workers represent a 'lifestyle choice'. Older workers often choose more flexible employment, in order to enjoy more leisure time,<sup>10</sup> and may be encouraged to do so by overgenerous pensions.<sup>11</sup> Poor wages and job security may also reflect a failure to take responsibility for upgrading their skills or recognizing that some occupations may become obsolete.<sup>12</sup> Such accounts ignore the fact that in low-value-added areas of the service sector, firms may seek out the cheapest and most vulnerable categories of labour, with older workers being forced back into the job market by pension shortfalls and dismissals; accepting poor pay and job security may reflect poverty and desperation rather than an active choice.

## 2.2. POLITICAL ECONOMY APPROACHES

The political economy literature has pointed to the relationship between structural changes in global economy and changes in the nature of age discrimination. Both in Britain and the United States, there has been a decline in the participation of older male workers since the 1970s,<sup>13</sup> reflecting the decline of traditional manufacturing. Again, the recession has greatly strengthened the bargaining hand of employers, enabling them to cut wage costs by thinning out older workers, even if the short-term benefits may entail a long-term cost. Many firms have taken the opportunity to abrogate their pension liabilities, with the resultant straitened circumstances of affected employees being blamed on employee dependence and profligacy, rather than the violation of an implicit contract by the employer.<sup>14</sup> This would reflect the nature of the shareholder-dominant paradigm in liberal market economies, which privileges short-term shareholder value over longer term sustainability and stakeholder well-being.<sup>15</sup> Within liberal markets, owner rights are prioritized, whereas in more stakeholder-orientated varieties of capitalism, a greater degree of countervailing power is accorded to other interests in society.<sup>16</sup> In addition, as indicated elsewhere, liberal

<sup>9</sup> D. Neumark, 'Age Discrimination Legislation in the United States', *Contemporary Economic Policy* 21, no. 3 (2003): 307; E. Lazear, 'Age, Experience, and Wage Growth', *American Economic Review* 66, no. 4 (1976): 548–558.

<sup>10</sup> K.-L. Chou & N. Chow, 'To Retire or Not to Retire: Is There an Option for Older Workers in Hong Kong?', *Social Policy and Administration* 39, no. 3 (2005): 243.

<sup>11</sup> See C. McVittie, A. McKinley & S. Widdicombe, 'Committed to (Un)Equal Opportunities: "New Ageism" and the Older Worker', *British Journal of Social Psychology* 42 (2003): 596.

<sup>12</sup> G. Shen & B. Kleiner, 'Age Discrimination in Hiring', *Equal Opportunities International* 20, no. 8 (2001): 25.

<sup>13</sup> D. Engleman & B. Kleiner, 'Age Discrimination in the Workplace', *Equal Opportunities International* 17, nos 3–5 (1998): 5; F. McDonald & M. Potton, 'The Nascent European Policy towards Older Workers', *Personnel Review* 26, no. 4 (1997): 293–306.

<sup>14</sup> See T. Garstka, M. Hummert & N. Branscombe, 'Perceiving Age Discrimination in Response to Intergenerational Inequity', *Journal of Social Issues* 61, no. 2 (2005): 336.

<sup>15</sup> M. Harcourt & G. Wood, 'The Importance of Employment Protection for Skill Development in Coordinated Market Economies', *EJIR* 13, no. 2 (2007): 141–159; P. Hall & D. Soskice, 'An Introduction to the Varieties of Capitalism', in *Varieties of Capitalism: The Institutional Basis of Competitive Advantage*, ed. P. Hall & D. Soskice (Oxford: Oxford University Press, 2001).

<sup>16</sup> P. Hall & D. Soskice, 'An Introduction to the Varieties of Capitalism', in *Varieties of Capitalism: The Institutional Basis of Competitive Advantage*, ed. P. Hall & D. Soskice (Oxford: Oxford University Press, 2001).

market economies in the developed world have common law legal systems, which tend to favour owner over employee interests.<sup>17</sup> More broadly speaking, in liberal market economies, the welfare state has been cut back, with the responsibility for retirement incomes being delegated to individual employees.<sup>18</sup>

### 3. ANTI-AGE DISCRIMINATION LEGISLATION AND PRACTICE IN THE UNITED KINGDOM AND NEW ZEALAND

Hence, within liberal market/common law countries such as the United Kingdom and New Zealand, the rights of owners and shareholders are relatively strong; in contrast, those of employees are relatively weak.<sup>19</sup> This would reflect the fact that labour legislation in common law countries tends to be of the ‘broad brushstroke’ variety, with the details being fleshed out through case law.<sup>20</sup> This will, in many instances, force many plaintiffs to seek redress through litigation.<sup>21</sup> However, not only are employers likely to have greater legal resources at their disposal but also for employees, resorting to litigation is a high-risk strategy that is likely to undermine the future nature of the employment relationship.<sup>22</sup> This means that employers have considerable latitude, especially when legislation has been relatively recently enacted, and the body of supportive case law in the process of being fleshed out.

However, an important difference between the two countries concerns the effects of electoral reform, as New Zealand has moved away from the traditional Westminster system to the Mixed Member Proportional (MMP) or compensatory system. This system is more likely to encourage coalition building at a range of levels, which is, in turn, likely to dilute the power of owners vis-à-vis other stakeholders in the firm, and encourage the passage and enforcement of legislation that seeks to reconcile the demands of different groupings in society.<sup>23</sup> In contrast, in the traditional first-past-the-post system encountered in the United Kingdom, the incentives for coalition building are less, and a package of (carefully selected) interests of a relative small body of swing voters is prioritized, making for legislation that primarily serves the interests of property-owning elites.<sup>24</sup>

#### 3.1. NEW ZEALAND LEGISLATION AND COMPLIANCE

Age discrimination is prohibited in New Zealand under the 1993 Human Rights Act and the 2000 Employment Relations Act. The latter only covers those in employment

<sup>17</sup> J. Botero et al., ‘The Regulation of Labor’, *The Quarterly Journal of Economics* 119 (2004): 1339–1382.

<sup>18</sup> A. Walker, ‘Towards an International Political Economy of Ageing’, *Ageing and Society* 25 (2005): 833.

<sup>19</sup> S. Djankov et al., ‘The New Comparative Economics’, *Journal of Comparative Economics* 31 (2003): 595–619.

<sup>20</sup> M. Berry, ‘Countdown to Ageism Laws’, *Personnel Today*, 18 Oct. 2005.

<sup>21</sup> M. Berry, ‘Age Laws Prompt Fear of Tribunals “Oldrush”’, *Personnel Today*, 14 Mar. 2006, <[www.personneltoday.com](http://www.personneltoday.com)>.

<sup>22</sup> G. Wood, M. Harcourt & S. Harcourt, ‘The Effects of Age Discrimination Legislation on Workplace Practice’, *Industrial Relations Journal* 35, no. 4 (2004): 359–371.

<sup>23</sup> M. Pagano & P. Volpin, ‘The Political Economy of Corporate Governance’, *American Economic Review* 95 (2005): 1005–1030.

<sup>24</sup> *Ibid.*

(as adverse to victims of discrimination in recruitment). Under sections 22 and 23, the 1993 Act encompasses recruitment and those working in the voluntary sector. New Zealand survey evidence points to widespread non-compliance with the law, particularly in the recruitment process.<sup>25</sup> This highlights the difficulties of securing employee rights by means of individually orientated labour legislation, if mechanisms for monitoring and enforcement are relatively weak, and where plaintiffs have only limited protection.<sup>26</sup> At the same time, it is worth noting that New Zealand enacted anti-age discrimination many years before the United Kingdom.

### 3.2. UK LEGISLATION AND COMPLIANCE

A 2000 EU Directive (2000/78/EC) required Member States to introduce laws to prohibit age discrimination in recruitment and employment.<sup>27</sup> In 2006, this Directive was formally implemented in the United Kingdom as the *Employment Equality (Age) Regulations*. Age discrimination is prohibited in the areas of hiring, training, and promotion, as is 'unjustified' forced retirement below the age of 65.<sup>28</sup> It becomes unlawful both to ask employees about their age during recruitment and with regard to access to benefits.<sup>29</sup> However, employers do not have to actively monitor the age profiles of staff. Moreover, employers are not permitted to use retirement as a means of concealing unfair dismissals.<sup>30</sup> However, firms are still able to impose a retirement age of 65 and are free to exclude job applicants older than this.<sup>31</sup> Dickens<sup>32</sup> argues that such loopholes reflect the extent to which the government is prepared to water down labour legislation to support employer interests, 'allowing business arguments to justify what would otherwise be discriminatory practice'.<sup>33</sup>

Survey research sponsored by the Chartered Institute of Personnel and Development (CIPD) and the Chartered Management Institute (CMI) found that not only was age discrimination rife in the United Kingdom but also that preparation for compliance with the new legislation was low and that many managers felt that their own executive boards were not necessarily committed to ending age discrimination.<sup>34</sup> Other research evidence points to the fact that discrimination against older workers is more likely to manifest itself

<sup>25</sup> M. Harcourt, S. Harcourt & G. Wood, 'Do Unions Affect Employer Compliance with the Law?', *British Journal of Industrial Relations* 42, no. 3 (2004): 527–541.

<sup>26</sup> *Ibid.*

<sup>27</sup> A. Tariq, 'Older People, Work and Equal Opportunity', *International Social Security Review* 55, no. 1 (2002): 119.

<sup>28</sup> M. Berry, 'DTI Publishes Final Version of Age Discrimination Regulations', *Personnel Today Com*, 9 Mar. 2006, <[www.personneltoday.com](http://www.personneltoday.com)>.

<sup>29</sup> Employers Law, 'Time Is Running out', *Personnel Today Com*, 21 Feb. 2005, <[www.personneltoday.com](http://www.personneltoday.com)>.

<sup>30</sup> M. Berry, 'DTI Publishes Final Version of Age Discrimination Regulations', *Personnel Today Com*, 9 Mar. 2006 <[www.personneltoday.com](http://www.personneltoday.com)>.

<sup>31</sup> Chartered Institute of Personnel and Development (CIPD), *Age and Recruitment – State of Play: 2007* (London: CIPD, 2007).

<sup>32</sup> L. Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in the United Kingdom', *British Journal of Industrial Relations* 45, no. 3 (2007): 470.

<sup>33</sup> See M. Sargeant, 'The Employment Equality (Age) Regulations', *Industrial Law Journal* 35 (2006): 209–244.

<sup>34</sup> Pinsent Masons, 'Age Discrimination Rife in the UK', *Out-Law*, 26 Oct. 2005 <[www.theregister.co.uk/2005/10/26/age\\_discrimination](http://www.theregister.co.uk/2005/10/26/age_discrimination)> last accessed 28 Sep. 2010; cf. E. Snape & T. Redman, 'Too Old or Too Young: The Impact of Perceived Age Discrimination', *Human Resource Management Journal* 13, no. 3 (2003): 78–89.

against workers in their fifties; employers interviewed in a project funded by the Department for Work and Pensions (DWP) claimed to be sympathetic and aware of the value of workers in their sixties, but this may constitute a survivor group.<sup>35</sup> While employers claimed to be adopting a non-ageist approach to recruitment, this did not appear to be matched by increased recruitment of older workers.<sup>36</sup> A 2006 survey of the hospitality industry by Martin and Gardiner<sup>37</sup> found that 45% of employers were ignorant of the incoming legislation and most admitted that they did not know enough.

#### 4. METHODS

##### 4.1. INTERVIEWEES

Table 1 below lists the study's participant organizations, including the spokespeople representing the organizations in the interviews. Henceforth, each spokesperson is referred to by his/her organization's name or its commonly used acronym. As the research centred on a limited panel of in-depth interviews, no conclusions can be drawn as to the wider representativity of views stated. The currency of interviews is about perceptions, that is, what representatives of key stakeholders believe the effect of anti-age discrimination has been in the New Zealand (and other contexts), and what the effect in the United Kingdom is expected to be. However, it is perhaps too soon to reach definitive conclusions on the effects of age discrimination. Again, given that there are numerous existing surveys on age discrimination in the United Kingdom, which provide important supplementary information on this context,<sup>38</sup> it was decided to devote somewhat more resources to the New Zealand leg of the study, resulting in a wider panel of interviews being conducted there. Organizations were invited to participate in the study on the basis of (a) their influence on public policy, (b) their involvement in the employment relationship, and/or (c) their involvement in age-related issues, including age discrimination. For instance, in New Zealand, the HRC is heavily involved in enforcing the anti-discrimination, including anti-ageist, provisions in the Human Rights Act. Grey Power is a major lobby group representing older people. The PSA is the main civil service union and was one of the parties in the very first human rights case involving age discrimination. The HRINZ represents, advises, and teaches its members, mainly Human Resource Management (HR) professionals, about discrimination and the policies and practices designed to avoid it. Likewise, in Britain, the CBI, the CIPD, and the Employers Age Federation express employer views, the TUC worker views, and the DWP, a state perspective. The other stakeholders

<sup>35</sup> Department for Work and Pensions, *Older Workers: Statistical Information Booklet: Quarter Two – 2007* (Leeds: DWP, 2007).

<sup>36</sup> *Ibid.*; cf. H. Metcalf & P. Meadows, 'Survey of Employers Policies, Practices and Preferences Relating to Age, Department of Work and Pensions Research Report 325' (Leeds: DWP, 2006).

<sup>37</sup> E. Martin & K. Gardiner, 'Exploring the UK Hospitality Industry and Age Discrimination', *International Journal of Contemporary Hospitality Management* 19, no. 4 (2007): 309–318.

<sup>38</sup> See, for example, Chartered Institute of Personnel and Development (CIPD) *Age and Recruitment – State of Play: 2007* (London: CIPD, 2007).

*Table 1. Interview Participants*

<b>New Zealand</b>	
Karen Threadwell	
Vasantha Krishman	
Paul Barker	Department of Labour
Graham Stairmand	Grey Power
Eileen Brown	Council of Trade Unions (CTU)
Lloyd Woods	Association of Staff in Tertiary Education (ASTE)
Barbara Burton	Business New Zealand
Beverley Main	Human Resource Institute of New Zealand (HRINZ)
Natalie Lavery	Office for Senior Citizens
Judy McGregor	Human Rights Commission (HRC)
Richard Wagstaff	Public Service Association (PSA)
Philippa Reed	Equal Employment Opportunities (EEO) Trust
David Lowe	Employers and Manufacturers Association (EMA)
<b>United Kingdom</b>	
Lucy Anderson	Trades Union Congress (TUC)
Richard Wainer	Confederation of British Industry (CBI)
Dianah Worman	CIPD
Andrew Harrop	Age Concern (later renamed Age UK)
Sam Mercer	Employers Forum on Age (EFA)
Christine Ashdown	DWP

were age pressure groups such as Age Concern (that since the merger with Help the Aged has been renamed Age UK).

Several organizations were selected for participation in the study but were unavailable at any mutually agreeable interview time. In New Zealand, these comprised Age Concern and the Association of University Staff. In Britain, the Institute of Directors did not reply, and in New Zealand, the Business roundtable declined to participate because its views on discrimination coincided with those already expressed in New Zealand and elsewhere by Professor Richard Epstein at the University of Chicago.<sup>39</sup>

#### 4.2. DATA COLLECTION

Each of the study's participants was interviewed for an hour at his/her workplace or by telephone interview, and each interview was transcribed.

<sup>39</sup> Professor Epstein adheres to a strict, neoliberal view of contracts and so generally opposes state intervention in setting and constraining HR policies and practices (e.g., hiring, pay, redundancy).

Table 2.

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1. To what extent is age discrimination a problem in the workplace?
  2. Which HR areas are particularly prone to age discrimination?
  3. Which industries/occupations are particularly prone to age discrimination?
  4. Why do employers discriminate on the basis of age?
  5. How effective is the anti-discrimination law (likely to be) in combating age discrimination?
  6. What are the unintended consequences (likely to be) of the anti-discrimination law?
  7. What roles can (could) unions and non-government organizations play in combating age discrimination?
  8. What can the government do to improve its age discrimination policies (and laws)?
  9. What practices/policies are (can) employers adopting (adopt) to combat age discrimination?
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Table 2 outlines the questions posed to each participant. These questions cover a range of issues: the extent and nature of the age discrimination problem, the reasons for age discrimination, positive and negative (potential) effects of the age discrimination law, the roles/practices of unions, non-government organizations, and employers in combating age discrimination.

## 5. RESULTS

### 5.1. THE AGE DISCRIMINATION PROBLEM

#### 5.1.1. *New Zealand*

Among the New Zealand participants, there was general acceptance that age discrimination against workers over 50, especially men, is a problem, though some disagreement exists over its extent. For instance, HRINZ suggested that ‘a lot of people...are being overlooked because of...their age, and people don’t understand...what they have to offer’. The EEO Trust even indicated that: ‘age is a very common reason for people to approach us (for advice and support)...much more likely...than any other (discrimination) reason’. The EMA was less extreme, arguing that ‘there is age discrimination, but no more than gender discrimination or disability discrimination’. The CTU and Department of Labour were less definitive, claiming that there is insufficient evidence to make any specific claims about the nature and extent of age discrimination. The HRC suggested that the problem was difficult to gauge, because many victims of ageism escape the stigma of unemployment by rebranding themselves as part-time consultants, professional floaters, or partially ‘retired’.

This persistence of age discrimination, despite it having been formally outlawed, reveals the limitations of legislation, especially in common law countries where the general approach to legislation and the ongoing developing nature of case law means that individual employees may have to resort to litigation to enforce their rights, which is, as noted earlier, a highly risky process, given the very much greater legal resources that employers are often in a position to be able to bring to bear.

### 5.1.2. *United Kingdom*

The British participants generally agreed that age discrimination was widespread, confirming much of the existing UK research in this area<sup>40</sup> that age discrimination is deeply embedded, and, on the basis of the New Zealand experience, that it may be difficult to stamp out through 'broad brushstroke' legislation, even if this is gradually fleshed out by supportive case law. While the views could simply reflect perceived wisdom based on their own reading of existing research evidence, both employee and employer representatives felt that it was rooted in society and its values and norms and was thus not going to be easily eliminated by addressing the workplace. Union representatives pointed to the experience of sex and race discriminations and the 'slow fuse' effect of the law.

## 5.2. HR PRACTICES MOST AFFECTED BY AGE DISCRIMINATION

### 5.2.1. *New Zealand*

New Zealand participants representing both employer and employee interests felt that age discrimination primarily affects hiring. It was also acknowledged that age discrimination is an issue in redundancies, though much more in the high-unemployment years of the late 1980s and early 1990s than in the low-unemployment 2000s. The HRC suggested that hiring and redundancy discrimination were often linked: older male workers were often targeted for redundancy and then found it almost impossible to re-enter employment at the same level. The high incidence of discrimination in hiring may be explained by the fact that no employment contract yet exists: this makes it harder for unions to intervene, while the job seeker will lack access to the type of insider information that would support her/his case if s/he had been already employed within the organization. Imbalances in access in training could reflect the reluctance of firms to invest in older workers, given the shorter presumed time available to recoup their investment.<sup>41</sup>

There were contrary views. For instance, the EMA argued that unjust dismissal protection is strong and so employees cannot easily discriminate in dismissal (e.g., redundancy) situations. The CTU similarly argued that dismissal protections are reasonably robust in the heavily unionized public sector, and so employers cannot discriminate with impunity.

### 5.2.2. *United Kingdom*

Nearly all of the UK participants (with the exception of a representative of a government department) felt that age discrimination was ubiquitous across all areas of human resource

<sup>40</sup> Walker, 'Towards an International Political Economy of Ageing', *Ageing and Society* 25 (2005), 833; E. Snape & T. Redman, 'Too Old or Too Young: The Impact of Perceived Age Discrimination', *Human Resource Management Journal* 13, no. 3 (2003): 78–89.

<sup>41</sup> D. Neumark, 'Age Discrimination Legislation in the United States', *Contemporary Economic Policy* 21, no. 3 (2003): 309; P. Urwin, 'Age Discrimination: Legislation and Human Capital Accumulation', *Employee Relations* 28, no. 1 (2006): 87–97.

management. The EFA and Age Concern both felt that hiring is especially negatively affected by age discrimination, echoing the evidence from New Zealand, where age discrimination has been outlawed for some time now. Age Concern also identified redundancy as an area of great concern, especially given the considerable scope for masking discrimination through the identification of criteria that would justify 'coincidences' between age and job loss. In contrast, the CIPD viewed retirement and the age at which it occurs as a particularly major focus for age discrimination.

### 5.3. INDUSTRIES/OCCUPATIONS MOST AFFECTED BY AGE DISCRIMINATION

#### 5.3.1. *New Zealand*

Interview participants from across the spectrum candidly identified Information Technology (IT) as an industry (occupation) preferring younger workers. HRINZ referred to IT as 'a young person's industry'. For example, the EMA called it 'young and hip' and 'young at heart', more subtle variations of such themes being deployed in job advertisements to deter older applicants: 'dog whistle' approaches to discrimination that may be difficult to prove in the courts but that may be subtly discerned by job seekers when deciding to choose which vacancies to pursue.

The CTU also identified ageism (and sexism) as a problem for older women working as cleaners and cooks at wages at or just above the minimum wage, often in the residential care industry. Essentially, poor pay for older women is unfairly legitimized by both the age and gender of the workers, echoing the concern in the literature that discrimination on the grounds of age and gender often coincide.<sup>42</sup>

#### 5.3.2. *United Kingdom*

The British participants generally avoided singling out industries as the most discriminatory, but there were exceptions. As an example, Age Concern representative identified media and finance as the worst discriminators, segments of the former, like IT, having a reputation for being a 'young' industry with young people employed within it. Other participants preferred to discuss industries with the best record in preventing age discrimination. For instance, the CIPD praised the public sector and retail for their efforts to develop 'best practice'. However, it is worth noting that both the public sector and supermarkets are relatively well unionized,<sup>43</sup> which may have helped encourage positive attitudes. In addition, having active policies to recruit older persons (as several major UK retailers do) does not necessarily mean that older workers are fairly represented across all levels of the organization.

<sup>42</sup> A. Walker, 'Towards an International Political Economy of Ageing', *Ageing and Society* 25 (2005): 816.

<sup>43</sup> USDAW, 'The Official Website of the Union of Shop, Distributive and Allied Workers', <[www.usdaw.org.uk/](http://www.usdaw.org.uk/)>, 30 Sep. 2010; M. Barratt, *Trade Union Membership 2008* (London: BERR, 2008).

#### 5.4. REASONS FOR DISCRIMINATION

##### 5.4.1. *New Zealand*

The New Zealand participants expressed a variety of views about the causes of age discrimination. A CTU representative ascribed age discrimination to stereotyped employer beliefs about older workers (and sometimes older workers' beliefs about themselves), in particular that they cannot learn or master computer-based skills or perform heavy lifting or carrying work; the CTU talked about employers holding 'the attitude of (*older workers*) not being up to the job, being slower, not able to grasp the technology, and not wanting to do the full forty hours'. The EMA defended business by arguing that older workers do not always update their skills: 'I don't think it's about age discrimination, but I do think you get to a certain point where your qualifications are so long ago you can no longer trade on them'. Youth was often equated with innovation and technical competence, especially in IT, highlighting the importance of sector and sectoral dynamics in explaining age discrimination. More generally, Grey Power claimed, especially for the 1980s, that 'young was beautiful. The young knew everything'. Age discrimination was also blamed on the common practice of using a youthful workforce as a marketing device to sell youth-oriented products. Some NGO representatives linked age discrimination to intergenerational misunderstandings and incompatibilities between young recruiters (who dominate the recruitment industry) and older applicants. For instance, the EEO Trust claimed that people are 'not getting interviews or feeling often misunderstood at (the) interview stage because they are being interviewed by someone who is half their age... just not on the same wavelength... and not getting a fair hearing because of that'.

Union representatives attributed age discrimination, especially in redundancy situations in the 1980s and 1990s, to the perceived legitimacy of sacking older workers closer to retirement and so supposedly less likely to suffer from not having a job. The following comment from ASTE was typical: 'when it gets to a redundancy situation, often they will say to somebody, somebody has to go, and you're going to retire in two years, and we've got kids, you know'. In contrast, the HRC claimed that pay differentials were not a major issue in New Zealand, because younger and older workers were paid similar wages or salaries. This would serve to highlight the limitation of hard HRM views of employees as a resource providing immediate – and readily measurable – value to a firm: attributes that are not directly measurable (such as accumulated wisdom and experience) may be highly valuable to an organization but not directly quantifiable through appraisals or similar measures.

It was also felt that employers (wrongly) believed that older workers were not worth hiring, because they were not expected to be around long enough to recuperate training costs. For example, the EEO Trust attacked this assumption as a dangerous myth, arguing that 'younger people are much more likely to change jobs' and 'older workers are more reliable and more loyal', reflecting both differences in generational values and the limited alternative open to older workers given that it may be easier to discriminate in selecting candidates for a job, than in dealings with older staff.

Finally, Grey Power also claimed that age discrimination reflects political struggles, in which younger managers deliberately exclude or marginalize older workers who challenge or threaten their power: '(s)o, basically, you have a whole lot of managers coming through who are relatively young who aren't going to employ anyone in their workforce who has more experience and background than they have' and 'if you (a younger manager) took him (an older worker) on you'd consider him a threat. You are not going to do that. Human nature won't allow you to do that'.

#### 5.4.2. *United Kingdom*

Compared to the New Zealanders, the British participants were more reticent about the causes of age discrimination. They were much more willing to discuss the considerable empirical literature documenting the extent of UK age discrimination. However, in an interview with at the DWP, it was suggested that – following on from neoliberal conventional wisdom – older workers may opt for poorly paying service sector work on account of the flexible working hours and the ease of entry and exit. However, such arguments sail close to the view that poverty and degrading work represent 'lifestyle choices' by those affected, and discount the fact that individuals may be forced into such jobs by a lack of viable alternatives. We took the opportunity to raise the 'lifestyle' choice thesis in the discussions that followed on from our interview questions in subsequent New Zealand interviews. Interestingly, even employers attacked this viewpoint as untenable, perhaps a reflection as to how much further Britain has advanced along the neoliberal road in government thinking, despite both countries being under Labour Party governments at the time of writing.

### 5.5. EFFECTIVENESS OF LEGISLATION

#### 5.5.1. *New Zealand*

In New Zealand, the overwhelming majority of the participants accepted and supported the anti-discrimination provisions in the Human Rights Act and the Employment Relations Act (with the exception of Grey Power). Several of the participants lauded the HRC and its EEO Commissioner, Judy McGregor, in particular, for having played a proactive role in trying to change ageist attitudes and beliefs. To some extent, business representatives have acquiesced to the inevitability of the legislation but claimed that it could be circumvented by applying more subtle and less overtly discriminatory procedures and practices. For instance, the EMA indicated that 'employers are now savvy enough around the Act to know how to say no and not get caught'. Only Grey Power argued that the legislation needed to be a lot more effective: '(t)he human rights commission isn't capable of making a definitive, definite declaration of an opinion, and having it enforced'.

The majority viewed the legislation as most effective in ending mandatory retirement at age 65 after 1998. Even the business representatives acknowledged that the legislation

had been virtually 100% effective in eliminating this practice. For instance, the EMA commented that: 'it (the law) had been incredibly effective in cutting off (eliminating) the 60–65 mark (maximum age) that you've got to retire'. HRINZ even acknowledged that 'no one really noticed' the end of mandatory retirement, presumably because it had occurred so quickly and so smoothly. How did this happen? Several of the participants suggested that the legal amendment radically de-legitimized the idea of 'normal' (and therefore compulsory) retirement at age 65. This highlights the extent to which anti-discriminatory legislation may become socially embedded over time, with even conservative opponents coming to terms with it. This would reflect the extent to which labour legislation protecting individual rights is not necessarily incompatible with right-wing ideologies, thus encountering less opposition than attempts to extend collective rights.

In contrast, almost all of the participants felt that the legislation was least effective in preventing hiring discrimination. HRINZ explained why: '(employers)... just find ways of asking the right questions and giving the right briefs' when doing their hiring. Grey Power agreed: 'while the employer is not allowed to, and never will say they (older workers) are rejected on the basis of age, because that would lead to some court cases, all kinds of excuses are given'. Why is this tolerated? As noted earlier, as organizational outsiders with a focus on finding work, job applicants generally do not have the awareness, access to evidence, or inclination to pursue a discrimination complaint.

### 5.5.2. *United Kingdom*

British opinions about the future effectiveness of legislation varied considerably. Age Concern was reluctant to commit to any view, stating that the new law would have to be tested first in the courts. In contrast, the employers' representatives, the CIPD and the EFA, talked about the difficulties, costs, and far-reaching impacts of legal compliance and the panic and confusion this was producing among employers: this would highlight the fact that 'broad brushstroke' approaches to labour legislation are not always beneficial to all employers, even if employees may be placed in a very much weaker position: clearer employment rights may encourage longer term cooperation and continuity within the workplace, even if this is at the expense of managerial power. The EFA cited its own research: 'half of UK employers think age legislation will have a greater impact than race and disability legislation'. Nevertheless, the CIPD felt that most employers would follow the letter rather than spirit of the law, bringing unlawful practices into compliance, at least superficially, while remaining oblivious to the business case for an age-blind HR strategy.

## 5.6. UNINTENDED CONSEQUENCES OF LEGISLATION

### 5.6.1. *New Zealand*

A few of the New Zealand union participants expressed concerns about the difficulties and sensitivities of firing infirm/unfit older workers that employers may no longer force to

retire. ASTE's views were characteristic: 'They (older workers) may have been working there for 40 years and we end up basically sacking them (for poor performance). We don't want that'. The EMA concurred that being fired for poor performance was 'not very dignified' but inevitable if 'they (older workers) are slowing down and they can't see it in themselves, and you talk to them and they won't accept it'. The EMA also expressed concerns that performance problems would be difficult to quantify, and therefore act upon, especially at the middle management level. However, such issues rather reflect problems of enforcement – as a greater propensity to fire older workers undoubtedly represents a violation of existing legalization, rather than with anti-discriminatory measures per se.

### 5.6.2. *United Kingdom*

The British participants had very different concerns, reflecting the peculiarities of British law and HR practice. Age Concern talked of employer fears that the law might eventually lead to the ending of retirement ages, not at this stage intended, with negative effects on occupational pension schemes and workforce planning: occupational pensions have come under great pressure in recent years, and this may provide employers with a further excuse to walk away from them, in violation of implicit contracts with employees. The CIPD claimed that the law would force employers to abandon, or at least modify, seniority-related pay systems (especially those rewarding more than five years seniority), with adverse repercussions for developing loyalty and retaining firm-specific skills. The EFA expressed similar concerns that 'incremental scales are indirect discrimination' even though 'well established' (and thus presumably useful).

## 5.7. ROLE OF UNIONS AND NON-GOVERNMENTAL ORGANIZATIONS IN FIGHTING AGEISM

### 5.7.1. *New Zealand*

Several New Zealand union and NGO participants praised Grey Power for lobbying hard against ageist policies and the EEO Trust for its public relations campaigns against ageist attitudes.<sup>44</sup> At the same time, most NGOs admitted to not having the staff, resources, or time to dedicate to ageism issues. The CTU, in particular, acknowledged that other, more pressing matters (e.g., trades training) took priority, given limited funds. The PSA expressed similar sentiments, specifically mentioning the resource demands of recruiting new union members.

Grey Power heavily criticized other NGOs for not taking ageism seriously and the government for showing little or no concern for ageism issues. The following comment

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<sup>44</sup> Despite the high praise for Grey Power, some still saw it as too sectarian or extreme.

was typical: 'neither of the two main political parties have (sic) any interest whatsoever in the elderly'.

### 5.7.2. *United Kingdom*

The British participants were generally positive about the role unions and NGOs can play in promoting, informing, and advising employers and employees about the age discrimination legislation. In particular, the CIPD foresaw unions re-negotiating terms and conditions to bring them into legal compliance but balanced with preserving business efficiency. However, the EFA was more doubtful about a positive union role, pointing out that unions had traditionally fought for ageist pay and redundancy policies.

## 5.8. POLICY CHANGES

### 5.8.1. *New Zealand*

New Zealand participants from across the spectrum were reluctant to suggest major changes to New Zealand's anti-discrimination policies. Business groups expressed doubts about the efficacy of a legislative approach and opposed any attempts to bolster enforcement. Others were generally supportive of the present legislation but felt it was sufficient to the task. Grey Power was a clear exception to other groups in supporting much more aggressive enforcement of existing anti-ageist legislation. Nevertheless, several union participants did recommend minor alterations to current policy. For instance, the PSA argued for greater clarity (and certainty) in defining and explaining discrimination to alleviate employer fears of punishment and encourage voluntary compliance. The EMA and CTU agreed that government-supported vocational skills training (e.g., modern apprenticeships) needs to be better designed for, and marketed to, older workers. The HRC, ASTE, and EEO Trust wanted legislative amendments (or greater clarity in the case law) to legalize reverse discrimination, thereby permitting firms to openly favour older workers in their recruitment and selection policies, including their job advertisements. The EEO Trust, the PSA, and HRINZ argued for a greater public relations effort to change ageist beliefs and values. Specifically, HRINZ recommended promoting anti-ageist HR practices with an annual awards ceremony to help make such practices 'very acceptable, very trendy', much as family-friendly policies have recently become. In a similar vein, the EEO Trust and PSA cited the recent successful advertising campaign to combat discrimination against people with mental illness as evidence for the potential effectiveness of a public relations approach.<sup>45</sup> Consistent with this more educational focus, the EMA and CTU both supported a stronger role for mediation in persuading and coaxing, rather than forcing, legislative compliance.

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<sup>45</sup> The EEO Trust was more enthusiastic about a public relations campaign. The PSA, though supportive, had more reservations about the difficulties of convincing sceptics.

### 5.8.2. *United Kingdom*

The British participants were less happy about their age discrimination law, though the CIPD was quick to concede that ‘we’ve gone for what is possible under European Directives and not beyond them’. However, most objections were not ones of principle. Criticisms instead focused on the practicalities of compliance, given the complexities and vagaries of the law.<sup>46</sup> Calls for reform typically focused on bringing about greater simplicity and clarity. For instance, the EFA suggested that the government copy Ireland by consolidating its anti-discrimination laws into one statute, with coverage of harassment issues as well. It also attacked the government’s hypocrisy in enacting age discrimination legislation, while cynically maintaining the ageist statutory redundancy scheme: ‘Is it right that two people with twenty years service each should get different rates of compensation because one is 39 and the other is 42?’ Age Concern also favoured a single law policy, one that would cover not just employment and training but goods and services as well.

Age Concern strongly supported the creation of a Commission of Equality and Human Rights (CEHR). ‘This body would give older people somewhere to go if they have been treated unfairly on the grounds of age’; it would also have ‘a major role to play in changing the attitudes and practices of service providers who think they can get away with second class provisions for older citizens’. Age Concern also argued that there should be ‘a duty on public bodies to promote age equality. This duty would require public bodies and organizations in receipt of government funding to ensure that their policies and practices are (sic) not ageist’.

Age Concern also argued for abolishing mandatory retirement ages: ‘this (having a mandatory retirement age) is bad for them (older employees), bad for business, bad for the economy, and bad for government’. In a similar vein, it favoured extending age discrimination protection to those over 65. However, given that employers generally benefit from the ‘broad brushstroke’ approaches to labour law generally encountered in common law countries,<sup>47</sup> it appears unlikely that there will be a sustained legislative effort to make anti-ageism legislation more explicit, unless with the clear aim of curtailing worker rights.

## 5.9. EMPLOYER INITIATIVES

### 5.9.1. *New Zealand*

Several of the New Zealand NGO participants talked about ‘best practices’ rather than ‘best practice’ employers.<sup>48</sup> For instance, the HRC mentioned more active management of work-retirement transitions, better succession planning, and more flexible working time

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<sup>46</sup> The many exceptions and the ambiguous language in the Act frequently reflect the government’s attempts to appease employer demands.

<sup>47</sup> Djankov et al., ‘The New Comparative Economics’, *Journal of Comparative Economics* 31 (2003): 595–619.

<sup>48</sup> The EEO Trust was the only participant willing to discuss a number of ‘best practice’ employers, including Fisher and Paykel, Methanex, and IBM.

as highly desirable ‘best practices’ for an aging workforce. HRINZ had similar views of flexibility, especially around the potential for more job-sharing and shift sharing. The EEO Trust and the EMA had similar views on managing work-retirement transitions and succession planning.

The Department of Labour talked about ‘best practices’ in terms of modifying plant and equipment, using agricultural examples, to suit non-traditional (e.g., older) workers. Once plant and equipment had changed, HR policies and practices (e.g., hiring) could be similarly adapted to the characteristics of non-traditional workers (e.g., focusing more on some job-related criteria than others).

HRINZ, ASTE, and the EEO Trust also talked about the advantages of using older people more creatively in ‘new’ roles as, for example, mentors and coaches, where their wealth of industry- or firm-specific knowledge might be most useful. The EEO Trust had this to say: ‘so they (older workers) are like an internal consultant and advisor. . .but they can move around and work on different projects and they also have a mentoring role’. The EEO Trust suggested that employers make more effort to create special, part-time emeritus positions as advisors and mentors, with remote access through videoconferencing and internet-based communication tools.

### 5.9.2. *United Kingdom*

British participants also had little to say about ‘best practice’ employers, though the successes of DIY chain B&Q were widely acknowledged. This retailer has actively worked to dispel stereotypes about older workers, with official company statements providing infirm evidence to prove that older workers are more likely to be loyal, to possess better skill sets, and to be associated with lower levels of shrinkage of stock, and better customer service.<sup>49</sup> However, it should be noted that most of the jobs in the chain are relatively poorly paying frontline service jobs. The CIPD claimed that ‘best practice’ involves reverse discrimination, with employers proactively favouring older employees in their HR policies (e.g., hiring). The CIPD and EFA both argued that age-blind HR policies and practices needed to be predicated on a solid business case, emphasizing costs and benefits and reflecting the characteristics of the firm and its industry. By contrast, simply being ‘politically correct’ in nominally adopting a commonly used recipe of age-blind practices and policies would never produce ‘best practice’ outcomes. However, such arguments raise a broader question: does ethical conduct (including treating employees fairly and equitably) always have to be justified on economic grounds to win acceptance by firms? In addition, how is the bottom line costed? Organizational specific knowledge and wisdom may be extremely difficult to quantify, and the benefits may not necessarily be evident in the short term.

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<sup>49</sup> Age Positive (2008).

## 6. CONCLUSIONS

Many of our findings are echoed in previous research in the area: however, the comparative focus we have employed sheds further light both on the limitations that are likely to be encountered with the UK's anti-age discrimination legislation. The views of a cross-section of stakeholders suggest that, based on the New Zealand experience, British workers are likely to experience age discrimination for some time, legislative reforms notwithstanding. Our research also sheds further light on the important role unions can play in promoting fairness at work, even in terms of individually orientated issues. Again, we found evidence of somewhat 'softer' more conciliatory attitudes towards employees in New Zealand than in Britain: this could reflect electoral reforms in New Zealand, which have encouraged coalition building between a range of interests in society,<sup>50</sup> as well as differences in both political history and cultural evolution.

More specifically, in comparing and contrasting the findings of the New Zealand and British interviews, in the context of existing literature, a number of themes emerge. The first is that individual employment rights within common law countries are often likely to be tenuous. The broader nature of common law labour legislation – when compared to civil law countries – means that employees are more likely to have to resort to litigation to enforce their rights. Given the reluctance of many employees to go to court (given resource imbalances and a desire not to further weaken a relatively fragile employment relationship), it is perhaps not surprising that many stakeholders felt that anti-age discrimination law was not effectively enforced in New Zealand and that enforcement levels in the United Kingdom would also be likely to be uneven. In other words, firms are likely to have much greater legal resources at their disposal – and access to a broader range of information – than employees, and that a legal dispute is likely to permanently damage the employment relationship: this will naturally place employees at a greater disadvantage, often allowing employees to defy the law. Hence, despite legal prohibitions, interviewees felt that age discrimination in employment remains widespread in New Zealand and would be likely to be similarly resilient to legislative efforts in the United Kingdom.

Second, union influence was perceived as being likely to deter employers from engaging in discriminatory measures. In areas where unions are more powerful, employers seem considerably more reluctant to discriminate against older workers. Conversely, in the selection process – where no formal employment contract exists, and the interest of unions is likely to be less – it seems that discrimination on the basis of age is particularly likely.

Third, the research revealed that industry-specific cultural dynamics and existing divisions in the workforce may be exploited by employers, echoing earlier research in this area.<sup>51</sup> Specific industries may brand themselves as emerging or dynamic, using subtle 'dog

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<sup>50</sup> M. Pagano & P. Volpin, 'The Political Economy of Corporate Governance', *American Economic Review* 95 (2005): 1005–1030.

<sup>51</sup> M. Harcourt, S. Harcourt & G. Wood, 'Do Unions Affect Employer Compliance with the Law?', *British Journal of Industrial Relations* 42, no. 3 (2004): 527–541; F. McDonald & M. Potton, 'The Nascent European Policy Towards Older Workers', *Personnel Review* 26, no. 4 (1997): 293–306.

whistle' tactics to deter older job seekers: this may assist firms in favouring often cheaper younger workers in recruitment and may help subtly ease out older more expensive employees. In contrast, interviews confirmed the view of previous studies that older workers are more likely to be encountered in sunset industries, where rounds of down-sizing are particularly likely.<sup>52</sup> Targeting older workers in rounds of redundancies not only means that the wage bill may be effectively reduced (as older workers are more likely to have advanced onto higher points on wage scales) but may help reduce the survivor syndrome among younger workers, who would feel more 'protected' on the basis of their age. At a societal level, this would be echoed by attempts by the conservative media to shift the blame for the economic insecurity of older workers onto the shoulders of other vulnerable groupings: ethnic minorities and immigrants. Such efforts are much more widespread in Britain than in New Zealand, reflecting how much further the United Kingdom has descended on the neoliberal road. Further evidence of this was provided by the fact that all New Zealand interviewees (including one representing organized employers) – but not all their UK counterparts – rejected out of hand the suggestion that any concentration of older workers in poorer insecure work could in any manner be construed a lifestyle choice, rather than discrimination.

Finally, the interviews shed further light on the foundations of age discrimination. The organization-specific skills and wisdom of older workers may be highly beneficial to organizations but very difficult to accurately cost, particularly in contexts where a strong emphasis is placed on the 'bottom line', on the generation of shareholder value in the short term, rather than sustainable competitiveness in the medium and long terms. In short, this would suggest that the problem of age discrimination in the workplace is unlikely to be completely resolved in a shareholder-value-orientated, common law context, legislative reforms notwithstanding. While unions have an important role in helping ensure that anti-age discrimination legislation works, alleviating age discrimination may be contingent on broader systemic reforms, encouraging more representative governments, through measures such electoral reform, and a promotion of greater cooperation and compromises between the main interest groupings in society.

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<sup>52</sup> D. Engleman & B. Kleiner, 'Age Discrimination in the Workplace', *Equal Opportunities International* 17, no. 3–5 (1998): 3–7.