

Questionnaire on ageing

General Assembly resolution 65/182 of December 2010

Follow up to the Second World Assembly on Ageing

Response from the New Zealand Human Rights Commission

The Commission is an independent Crown Entity which operates under the Human Rights Act 1993. As well as promoting and protecting human rights, the Commission is charged by statute with promoting Equal Employment Opportunities. The EEO Commissioner, Dr Judy McGregor, provides leadership and advice on EEO, develops guidelines, monitors and analyses progress in EEO and works with others promoting equal employment. The Human Rights Act 1993 sets out the prohibited grounds of discrimination and also outlines what constitutes discrimination in employment

As a National Human Rights Institution (NHRI) the Commission is able to provide comment on questions 1, 2, 3 and 9. This is not an exhaustive list of all programmes and policies and legislation with a focus on ageing.

Q1

Please provide information on the current situation of the human rights of older persons, including particular challenges and threats that may prevent the full realization of their rights.

Age is a prohibited ground of discrimination under the Human Rights Act, the Employment Relations Act, the Residential tenancies Act and the New Zealand Bill of Rights Act.

Complaints to the Human Rights Commission

In the three years from 2008-2010 the Human Rights Commission received 373 complaints citing the ground of age. Where possible, the Commission collects age data from complainants in the following five age categories: under 18, 18-30, 31-50, 51-65 and over 65.

Thirty per cent of complaints on the ground of age from 2008-2010 were from people aged over 65. This was the highest proportion of complaints received by any of the five age groups. A further 24% were from people in the 51-65 age group (the second highest proportion of complaints received), and another 2% were related to issues of concern to elderly or which mentioned 'elderly' or 'older' people, but the specific age of the complainant was not recorded.

The most common complaint brought to the Commission by people in the two older age groups in the last three years was being declined employment, interviews or other opportunities to find employment due to their age. In some cases the complainant was told explicitly that they were 'too old', while in other cases the complainant perceived their age as the reason for their difficulty in finding employment, although there may not have been an explicit indicator of this. These complaints accounted for 18% of complaints by older people in the last three years.

The second most common complaint related to Accident Compensation Corporation (ACC) compensation ceasing at age 65, accounting for 15% of complaints by the two older age groups. Another frequent issue of complaint is from employed people being encouraged to retire, resign or having their employment terminated as they get older.

These three topics were each the subject of at least 30 complaints in the last three years. Other issues brought to the Commission had significantly fewer numbers of complaints, all with fewer than 10 complaints in the last three years, each accounting for 4% or less of the overall complaints from older people.

Other issues with 5-10 complaints in the last three years included:

- People asked for their age or date of birth in pre-employment situations
- Problems obtaining insurance, including higher costs for older people, or difficulties in receiving payouts
- Difficulties in obtaining loans and mortgages
- ACC funding for Tai Chi classes applied differently for Māori or Pacific Islanders based on age: classes free for all people aged over 65 or 55 if they are Māori or Pacific Islanders
- Access to funding by government agencies, including several relating ACC funding for injuries being declined due to age
- NZ Superannuation (replaced the old-age pension) abatement against overseas pensions
- Older people not able to join Kiwisaver (an employer and government subsidised retirement saving scheme.)
- Access to education and treatment of older people in education.

Age Discrimination related to driving licences

“Since 1999, drivers licence holders have been required to relicense at the age of 75 years, and again at age 80, 82, 84 and so on. When relicensing, these drivers incur additional costs because of additional requirements and more frequent licensing (for example they are required to present a medical certificate from age 75 years, and renew for periods of less than 10 years).

Because these additional costs are likely to present a barrier to an older driver’s decision to relicense, with likely consequences for their mobility, independent and quality of life in the community, government has provided a subsidy of \$1.445 million a year since 2001 for renewal and test fees in recognition of their limited incomes and more frequent renewal.

Following a comprehensive review of the older driver relicensing system, an amendment was made to the Rule which abolished the Mandatory Older Driver Test. Since December 2006 only older drivers who are referred by a medical practitioner for an On-Road Safety Test are required to pass the driving test. This change produced

two results: significantly fewer on-road tests and an increase in the rate of driver licence renewal from age 80 on".¹

Q2

Please provide information on existing legislation, policies and programmes to protect and promote the human rights of older persons.

The rights of older persons in employment

New Zealand has a high rate of labour force participation of older citizens. Of the population aged 65 and over, 17.8 percent are employed, according to the Household Labour Force Survey, December 2010 quarter figures provided by Statistics New Zealand. The participation rate for older men is 23.5% and for women, 12.9%.

Laws promoting equal employment opportunities and banning age discrimination are acknowledged as an important means of accelerating the pace of change in policy, practice and behaviour. New Zealand has had age discrimination legislation since 1992 which has clearly influenced attitudes to compulsory retirement.

Since 1992 it has been unlawful to retire an employee compulsorily because of the employee's age. An amendment in 2001 to the Human Rights Act saw that prohibition extend to the public sector from 1 January 2002. Other forms of discrimination with particular relevance to age and employment are discriminatory advertising, specifically situations vacant material.

Unlawful discrimination occurs when a person is treated differently from another person in the same or similar circumstance. Discrimination can be either direct or indirect. Direct discrimination includes not being given an employment opportunity, being treated less favourably and being subject to a detriment. For example, missing out on a job simply because of age, not being chosen for a training opportunity because of maturity or not receiving financial rewards that others in similar circumstances receive because of age could all constitute discrimination.

The legislation is predicated on individual complaint and the mediation of complaints in the first instance as opposed to an inquisitorial or adversarial system. This makes it harder to address systemic ageism. If parties cannot agree at mediation and the Human Rights Commission has been unable to resolve their complaint, cases can be taken to the Human Rights Review Tribunal. At the tribunal, complainants may be represented by the Office of the Human Rights Proceedings an independent part of the Commission, or the complainants can pursue a case privately.

How successful has the addition of age as a prohibited ground of discrimination been in combating ageism in New Zealand workplaces? On the positive side, it had an immediate and powerful effect in eliminating age from employment advertising including situations vacant advertisements and on Internet sites carrying job vacancies. However,

¹ Background Paper Driver Licensing and Driver Testing Fees Review New Zealand Transport Agency January 2010

legislation by itself has not eliminated age-related employment discrimination as seen by recent figures (see complaints data above).

To some extent it has sent employment ageism underground. Research shows some mature job-seekers blame the recruitment industry as the gatekeepers for difficult-to-prove but none-the-less pervasive ageism.² More recent research confirmed the prejudice of some recruitment agencies³. Recruiters were more negative than employers towards applicants for nursing, human resource management and sales positions

The courts appear to be upholding the rights of employees such as airline pilots when discriminatory policies have prevented people from continuing employment beyond a certain age. *McAlister v Air New Zealand Ltd*⁴ involved a pilot who was effectively demoted by Air New Zealand when he turned 60. The demotion was because he could no longer fly as a pilot-in-command to countries that were signatories to the International Civil Aviation Organization and the United States Federal Aviation Administration rules under which commercial pilots could not operate as pilots-in-command on certain international flights once they reached 60. Captain McAlister complained under the Employment Relations Act that he had been discriminated against because of his age.

New Zealand's highest court, the Supreme Court, decided that Air New Zealand had discriminated against him because of his age. The court was satisfied that age was a genuine occupational qualification and this was a defence to the complaint. However before the defence could be relied upon it was necessary for Air New Zealand to show that any adjustment of its activities required to continue to employ Captain McAlister as a pilot-in-charge would be an unreasonable disruption of its activities. The case was remitted to the Employment Court for it to hear the evidence and decide that issue.

Equal Employment Opportunities

Statutory legislation promoting equal employment opportunities in New Zealand, which by definition encompasses older workers, is confined to the public sector through the "good employer" provisions of the State Sector Act (1988) for the core public service and the Crown Entities Act 2004 which extended the concept of the "good employer" to about 100 Crown entities.

While older workers are not a specific target group in the legislation, the "good employer" provisions require a personnel policy that complies with the principles of being a good employer and its availability to all staff plus the reporting in annual reports of the extent to which state sector organisations comply with the policy. The "impartial

² McGregor, J. And Gray, L. (2001) *Mature job-seekers in New Zealand*. Massey University Palmerston North

³ Wilson, M., Parker, P. & Kan, J. (2007) Age biases in employment: Impact of talent shortages and age on hiring. *University of Auckland Business Review*, 9 (1) pp34-41

⁴ [2009] NZSC 78, [2010] 1 NZLR 153 <http://www.nzlii.org/nz/cases/NZSC/2009/78.html> Accessed 31 March 2011

selection of suitably qualified persons for appointment” is part of being a “good employer”.

The dichotomy between the public and private sectors has meant that the public sector has traditionally taken a leadership role in the promotion and protection of equal employment opportunities in New Zealand workplaces in relation to women’s progress, the participation of Māori and other ethnic minorities and in the employment of disabled people. What happens in the public sector can then have an osmotic effect on positive workplace cultures in the private sector despite the absence of a positive duty in legislation to be a “good employer”.

The demographics of the public service provide impetus to ensuring older workers are retained, recruited and treated well while at work. Research on older workers in the New Zealand public service in 2004 showed that it had a higher proportion of older workers than the general labour force, that one department had almost four out of 10 people over 55 years and the department with the lowest number of older workers had seen its proportion double over 8 years. In the next ten years the proportion of older workers was expected to be 24%.⁵

Significantly, most departments did not have specific policies on managing an ageing workforce. For example three out of four departments did not consider the issue in their succession plans.⁶

In 2008, *Valuing Experience a practical guide to recruiting and retaining older workers*⁷ was produced. The guide was co-produced by the Retirement Commissioner, the EEO Commissioner, the Chief Executive of the EEO Trust, the Chief Executive of the Canterbury Employers’ Chamber of Commerce, the Chief Executive of Business New Zealand and the Vice President of the New Zealand Council of Trade Unions.

The *Valuing Experience* toolkit was developed for employers “who want to actively tap into the full labour market, including older workers; for employers who want to ensure their older workers can fully participate and contribute; and for employers who want to retain all valuable employees, regardless of their age.” Subsequently the Human Resource Institute of New Zealand (HRINZ) developed an outreach campaign for employers based on the toolkit. The New Zealand Council of Trade Unions also produced a pamphlet based on the tool kit, Age Okay.

Between 2008 and 2010 the Human Rights Commission held a nationwide series of engagements, to listen to employers, employees, organisations, businesses and community groups about what would make a difference to them to in order to achieve equality and fairness at work. This project was called the National Conversation About

⁵ State Services Commission (2004) *facing an Ageing Workforce: Information for Public service HR Managers* Wellington; State Services Commission

⁶ *ibid*

⁷ <http://www.neon.org.nz/eeogroups/valuingexperience/>

Work and the summary report entitled *What Next? The National Conversation About Work*⁸ included the following observations about the ageing workforce.

Almost every industry sector we spoke to, identified the ageing workforce as a looming issue, but it became apparent that little sector planning was being done to address impending skill shortages. Some strategies to retain ageing workers were being considered, like flexible work arrangements and mentoring schemes using retired or semi-retired business people. However, we saw little evidence of systemic approaches being taken in a response to a looming demographic wave and labour market shortages. We heard that conversations with older-workers about their intentions and future options were difficult and avoided by employers for fear of being misconstrued as discriminatory. Other older-workers indicated that they had lost equity and assets underpinning their retirement savings and would therefore have to work beyond 65 years.

Older people we talked to in the course of the project who had retired from the paid workforce were often very active as unpaid workers (volunteers) in the community or supporting whānau (family). However for some increased transport costs were limiting their ability to contribute to the community to the detriment of social capital and community cohesion. Other participants observed that older people were still actively engaged in the workforce well past traditional notions of retirement age

The Commission concluded “Everywhere in New Zealand there are examples both of inspirational older-workers who have chosen to stay working and of others who have to work longer and would like different work conditions but are too afraid to ask.” Employers are profoundly anxious about the implications of an ageing workforce and there remains an urgent need for sector-led active labour market strategies around retention and transition.” “Age is a dominant anxiety in many businesses around New Zealand. We heard again and again in different industrial sectors and across the regions about the issues relating to an ageing workforce. Whether it be succession planning for small business owners, older truck drivers, mentoring schemes in factories, or how to manage transitions to retirement, the ageing demographic of New Zealand’s labour market was firmly on the agenda. However, most businesses acknowledge they are neither actively planning for nor currently managing their ageing workforce.

The final recommendations included the following:

- Develop a national programmatic approach on managing ageing workforce issues, including models of labour market participation for older-workers, approaches to transition and succession strategies for small-business owners.

Right to an adequate standard of living

New Zealand Superannuation is paid fortnightly to all New Zealand citizens or permanent residents aged 65 or over who normally live in New Zealand at the time of application.

The rate depends on a number of personal circumstances such as :

⁸ <http://www.neon.org.nz/nationalconversationaboutwork/>

- whether the person is single, married or in a relationship
- their living situation if single
- whether their partner is included in New Zealand Superannuation payments or not
- any overseas benefit or pension the person may get.

New Zealand Superannuation is effectively a Universal Basic Income for the over 65s. It ensures that poverty levels are low and living standards comparatively high among the older population.⁹ It is estimated that some 55 percent of women and 38 percent of men have no other retirement income.

The level of New Zealand Superannuation is reviewed each year and is adjusted to take into account increases in the cost of living and wages. When wages increase, New Zealand Superannuation is adjusted so that it stays between 66% to 72.5% of average earnings after tax. This means for couples where both are over 65, their pensions will not fall below 66% of the average wage after tax. For single people the pension is about 40% of the average wage.

Q3

Please provide information on existing legislation, policies and programmes to address discrimination against older persons, including measures to address multiple discrimination (eg Discrimination based on age and gender)

In addition to access to the complaints and enquiries service of the Human Rights Commission, discussed below at Q9, New Zealand has a Retirement Commission with a Retirement Commissioner, and a positive ageing strategy.

The Retirement Commission is a Crown entity, established in 1993 by the NZ Superannuation and Retirement Income Act. The Retirement Commission helps New Zealanders prepare financially for retirement through education, information and promotion. The Commission's work contributes towards three key elements vital to New Zealand's retirement income framework. These need to be in place so that all New Zealanders have the confidence and ability to make informed and lasting decisions about their personal finances throughout their lives.

- Contributing to stable effective government policy.
- Actively supporting the development of a trustworthy financial services sector.
- Creating a financially educated population.

The Commission has a role in protecting the interests of residents and intending residents of retirement villages by monitoring the Retirement Villages Act 2003. The New Zealand Positive Ageing Strategy provides a framework for developing and understanding policy with implications for older people. The Strategy's 10 goals guide policies and programmes across central and local government, to improve opportunities

⁹ Prue Hyman (2007) Retirement Income –Issues for Women, background paper prepared for the 2007 Review of Retirement Income Policies (Wellington Retirement Commissioner)

for older people to participate in their communities in ways they choose. The ten goals are:

- Income - secure and adequate income for older people
- Health - equitable, timely, affordable and accessible health services for older people
- Housing - affordable and appropriate housing options for older people
- Transport - affordable and accessible transport options for older people
- Ageing in the Community - older people feel safe and secure and can age in the community
- Cultural Diversity - a range of culturally appropriate services allows choices for older people
- Rural Services - older people living in rural communities are not disadvantaged when accessing services
- Positive Attitudes - people of all ages have positive attitudes to ageing and older people
- Employment Opportunities - elimination of ageism and the promotion of flexible work options
- Opportunities for Personal Growth and Participation - increasing opportunities for personal growth and community participation

The Ministry of Social Development (MSD) co-ordinates and reports on central and local government activities supporting these goals. MSD also tracks progress on indicators developed out of the 10 goals.¹⁰

The Human Rights Commission is of the view that there is a need for high quality research on the gender implications of ageing in both the employment sphere and in terms of retirement income sufficiency. This is necessary because good data is scarce and because women on average have saved less because they have earned less over their lifetime and because their savings have to last longer.

Q9

Please provide information on existing legislation, policies and programmes to ensure access to justice and judicial remedies for violations of the rights of older persons, including references to specific mandates of institutions such as national human rights institutions to address their rights.

Access to complaints and enquiries to the Human Rights Commission

Complaints to the Human Rights Commission can be made in a variety of ways:

- On line

¹⁰ <http://www.msd.govt.nz/what-we-can-do/seniorcitizens/positive-ageing/progress/index.html>

- By (free) phone
- By 'dropping in' to one of three Human Rights Commission offices
- Facilitated through a community agency such as a Citizens Advice Bureau
- Interpreting and teletyping services are also available to assist people in making a complaint.

The prohibited grounds of discrimination set out in the Human Rights Act include age, sex and disability. It is against the law to be discriminated against in many areas of public life, including in work, education, official practice and policy and the provision of goods and services. The Commission can also consider broader human rights issues.

Commission staff provide information to try to help solve the complaint. If the complaint meets the criteria for unlawful discrimination, one of the Commission's mediators responds to the complainant. The mediator helps both parties find possible solutions using a dispute resolution process. Most complaints are sorted out by informal intervention or mediation. The results can include an apology, an agreement not to do the same thing in the future, education or training, and compensation. Mediation settles most complaints. If mediation is not successful a complainant can take their issue to the Human Rights Review Tribunal. The complainant can apply for free legal representation to the Office of Human Rights Proceedings or fund legal representation themselves.

In addition to the already mentioned case of *McAlister v Air New Zealand*, above, a very important human rights ruling was *Howard v Attorney-General (No. 3)*¹¹. Mr Howard complained that the Injury Prevention Rehabilitation and Compensation Act discriminated against him on the ground of age because he was no longer eligible for rehabilitation when he turned 65.

The case was the first decision under Part 1A of the Human Rights Act 1993. Part 1A of the Act became law on 1 January 2002. Part 1A applies to the actions of the government, as well as to the actions of any person or body performing a public function, power or duty conferred or imposed by law.

An action will be discriminatory under Part 1A if:

- it involves a distinction based on a prohibited ground of discrimination that leads to disadvantage, and
- the disadvantage cannot be justified as being a reasonable limit in a free and democratic society.

A limitation will be justified if it serves a purpose that is sufficiently important to justify some limitation of the right; is rationally connected to that purpose; impairs the right no more than is reasonably necessary to achieve what it sets out to do; and is in due proportion to the objective it seeks to achieve.

The government was unable to satisfy the Human Rights Review Tribunal that limiting Mr Howard's access to rehabilitation because of his age was justified.

¹¹ (2008) 8 HRNZ 378 <http://www.nzlii.org/nz/cases/NZHRRT/2008/10.html> Accessed 31 March 2011

Thank you for the opportunity to contribute to this work.