

LAW, AGEING AND POLICY IN THE UNITED KINGDOM

*Helen Meenan and Graeme Broadbent**

INTRODUCTION

At the precise moment of writing, early 2006, there is no age discrimination law in the United Kingdom nor is there a taught subject known as elder law in Higher Education. Many law practitioners (other than solicitors specialising in work for the elderly) could at best guess at the meaning, importance and impact of elder law. However, this picture is not complete and the purpose of this article is to give as true an account as possible of the state of these two fields. This article will explore the social, demographic and legal background in the UK to reveal that we are on the cusp of the introduction of detailed age discrimination laws driven by a European Directive and shaped partially by British contexts. Moreover, despite considerable fragmentation, particularly from the perspective of the older client, the UK has a large body of law dealing with capacity, mental illness and related issues such as property management.

This article will also reveal that the incoming age discrimination law is being subsumed within a broader, more inclusive equality and human rights regime. This process seems wise for our diverse society and the overlapping nature of age with other grounds of discrimination. By contrast, the constituent elements of what may be unofficially termed *Elder Law*, though more established, do need to be streamlined into a more cohesive whole, to be truly accessible to the citizen and his legal adviser. The authors are unaware of any movement in this regard and suggest that in the end demographic and related social pressures may well provide the necessary momentum.

Politics and law-making

For purposes of this article, the United Kingdom may be broadly characterised by a robust parliamentary democracy with a deeply rooted social welfare system,¹ providing many benefits including free

*Helen Meenan holds the Jean Monnet Chair in European Law at Kingston Law School, Kingston University, Kingston Hill, Kingston Upon Thames, Surrey KT2 7LT, United Kingdom and writes and speaks widely on all aspects of age discrimination. Graeme Broadbent is a Senior Lecturer at Kingston Law School and has written a number of books on Social Work Law.

healthcare for all citizens.² It has a common-law legal system and a vigorous media, which has been important in highlighting the implications of population ageing for the citizen. One of the most newsworthy aspects of ageing Britain is the so-called pensions' crisis. This refers to the inability of near future working generations to support their retirees and old age pensioners and the need for older workers to work for longer than today to help finance their own extra years. Some elements of the British press have portrayed any real need to raise the state pension age, in terms of being forced to "work till you drop." However, the message that we are living longer in this country has gained prominence in public awareness in very recent years and is now helping to shape responses to the pensions' crisis. Ageing and older people are also emerging as more prominent issues in British politics in general, with an All-Party Parliamentary Group on Ageing and Older People with a membership of two hundred parliamentarians in the English Parliament.³ This group is concerned with a wide range of political and legislative issues before Parliament, concerning older people and the ageing process.

The European Context

It is important when considering law and policy in the UK to keep one eye to its membership in the European Union. In demographic terms, the ageing and shrinking of the British working age population mirrors that of the EU as a whole;⁴ but, certain features, for example migration flows, play a particular and positive role in the UK. In terms of law making, the UK participated in adopting European hard law in the form of the Employment Framework Directive,⁵ which, for the first time,

¹ Sir William Beveridge, Beveridge Report, *Social Insurance and Allied Services*, available at <http://www.sochealth.co.uk/history/beveridge.htm>.

² The NHS was established in 1948 and provides free healthcare well beyond hospital and general practitioner services. See <http://www.nhs.uk/England/aboutTheNHS/history/default.cmsx>.

³ The Secretariat for this group is provided by Age Concern England, <http://www.ageconcern.org.uk/AgeConcern/4AF1BF26F5574A47BB4771B0852CD3BC.asp>. The European Parliament also has a cross party group, the Inter-group on Ageing, which aims to ensure the prominence of ageing in the European Parliament and to mainstream ageing issues into all policy areas.

⁴ Commn. European Communities, Commn. Commn., *Green Paper Confronting demographic change: a new solidarity between the generations*, 3 COM (Brussels 2005) 94 final, http://ec.europa.eu/employment_social/news/2005/mar/comm2005-94_en.pdf.

⁵ Off. J. European Communities, Council Directive 2000/78/EC (Nov. 27, 2000) (establishing a general framework for equal treatment in employment and occupation), http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_303/l_30320001202en00160022.pdf. This Directive lays down a general framework for combating discrimination on grounds of religion or belief, disability, age and sexual orientation.

outlaws age discrimination in employment in the UK and most other EU member states.⁶

The UK must also honour softer law measures, such as the annual European Employment Guidelines. These are an important component of the European Employment Strategy (EES), which sets key goals for implementation by Member States through national action plans, which aim at convergence for target groups throughout the EU. The EES is a crucial tool for raising overall participation rates in employment in the EU to 70 percent and the participation of older workers to 50 percent by 2010, in line with the Lisbon Strategy. The Lisbon European Council in 2000 set the goal for the EU to become “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁷ The promotion of lifelong learning and active ageing are two ongoing guidelines adopted in the streamlined EES in 2003, though others are also of relevance for older workers.⁸

The UK, along with the other Member States, is both a shaper of and is shaped by hard, softer and soft law measures at the EU level.⁹ Some areas of law and policy of concern to older people and their carers, strictly speaking, fall outside the EU’s hard law remit such as housing and public health.¹⁰ However, many such issues fall within the broad category of EU social policy and may be susceptible to soft law aims and approaches within limits in the EU framework.¹¹

⁶ At time of writing, there are 25 EU Member States; the older ones are France, Germany, Italy, Belgium, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Portugal, Spain, Austria, Sweden and Finland. Ten new Member States joined the EU in 2004, they are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Malta. See http://eur-lex.europa.eu/en/droit_communaire/droit_communaire.htm#3.3.

⁷ Lisbon European Council, *Presidency Conclusions* 5 (Mar. 23-24, 2000), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

⁸ European Commn., Commn. Staff Working Paper Spring European Council, *Choosing to Grow: Knowledge, innovation and jobs in a cohesive society*, (Mar. 21, 2003), http://ec.europa.eu/growthandjobs/pdf/SEC_2003_25_EN.pdf.

⁹ The UK has recently exceeded employment rate targets for women and older workers though it has some ongoing problems, for example, it has been asked to “take urgent action to tackle the causes of the gender pay gap.” Commn. European Communities, Commun. Commn., *Strengthening the implementation of the European Employment Strategy*, 23, 24 COM (2004) 239 final, http://ec.europa.eu/employment_social/employment_strategy/prop_2004/com_2004_0239_en.pdf.

¹⁰ The EU can adopt certain actions which complement Member State actions in the field of public health and incentive measures designed to improve public health. See Treaty Establishing the European Community, Art. 152 (March 25, 1957), <http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078>.

¹¹ See generally Tamara Hervey, *European Social Law and Policy* (London, Longman 1998).

Demographic ageing

The UK population is ageing mainly as a result of increased longevity, which is now at the highest level ever.¹² Recent statistical data indicates that a 65-year-old man in the UK can now expect to live until 82 and a 65-year-old woman can now expect to live until 85.¹³ However, women in the UK can soon expect to reach 90 years of age.¹⁴ The gap between women and men, however, will narrow, which reflects similar trends at the global level.¹⁵ Life expectancy at birth also varies by nature of job and by region in the UK, with professional males in England and Wales expected to live 7.4 years longer than unskilled or manual male groups for the period 1979 to 1999.¹⁶ A difference of 10 years has been found in life expectancy at birth in the period 1999 to 2001, for males in Glasgow, Scotland which has the lowest level (69 years) compared with males in North Dorset, Southern England with the highest level (79 years).¹⁷

Other factors also contribute to an ageing population. The number of under 16-year-olds has fallen from 25 percent in 1971 to 19 percent of the population in 2005.¹⁸ In addition, women are having fewer children at later ages and the number of women in England and Wales who are childless at the end of their fertile years has doubled compared with women born in the mid-1940s.¹⁹ The percentage of people aged 65 and over has grown from 13 percent in 1971 to 16 percent in 2003 and is predicted to rise to 23 percent in 2031.²⁰ The net effect of these changes is that the median age of the population rose from 34.1 years in 1971, reached 38.4 years in 2003 and is predicted to reach 43.3 years in 2031.²¹

¹² National Statistics, Life expectancy, Life expectancy at 65 reaches record levels, <http://www.statistics.gov.uk/cci/nugget.asp?id=168>.

¹³ *Id.*

¹⁴ Julian Knight, BBC News Analysis, *Ageing process may mean working longer*, <http://news.bbc.co.uk/1/hi/business/4450450.stm>.

¹⁵ According to the UN, the average of 71 men per 100 women is expected to increase to 78 per hundred in developed countries. See World Conference, *Report of the Second World Assembly on Ageing*, U.N. Doc. A/CONF.197/9 at 6 (U.N. Madrid, Spain, April 8-12, 2002).

¹⁶ U.K. Natl. Statistics, Soc. Inequalities, Health, *manual workers die earlier than others*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=1007.

¹⁷ *Id.*

¹⁸ U.K. Natl. Statistics, Population, Ageing, *16% of UK population are aged 65 or over*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=949.

¹⁹ Len Cook & Jean Martin, *35 years of social change, Overview*, 35 Soc. Trends, 4 (2005), http://www.statistics.gov.uk/downloads/theme_social/Social_Trends35/Social_Trends_35_Overview.pdf.

²⁰ U.K. Natl. Statistics, People & Migration, Age structure, *Average age rose to 38.4 years in 2003*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=763.

²¹ *Id.*

The UK population has also grown steadily and now approaches 60 million; it is predicted to continue growing until 2050 when it will begin to fall.²² Since the mid-1990s, international migration to the UK has played an important role in sustaining population growth, against the background of a declining number of births.²³ Inward migration has resulted in an increasingly multi-cultural society with a non-white ethnic minority, representing 8 percent of the population.²⁴ Some features of immigrant movements are particularly noteworthy: nearly half of immigrants arriving in the UK leave within five years and a much higher proportion of migrants leaving the UK were aged between 45 and state pension age compared with those arriving.²⁵ Moreover, approximately half of all migrants moving to and leaving the UK was aged between 25 and 45, with a net inflow of people aged 15 to 24.²⁶ These features may help to mark the UK out as a destination for work seekers, and the departure of a greater number of migrants between 45 and state pension age may indicate that they do not currently represent a large-scale threat to public resources in old age.

However, some migrants remain and while the ethnic minority population is younger than the majority population, it is also beginning to age.²⁷ There will be over 1.7 million ethnic minority people over 65 years of age in the UK by 2030.²⁸ There is growing awareness of the need to ensure that all black and ethnic minority elders (BME) are visible within older cohorts and have their particular needs met, particularly in accessing services, where language may be one of a number of issues that make this difficult.²⁹ Elderly Asians in the UK have experienced problems in receiving the care they need due to the breakdown of traditional family structures.³⁰ This is said to be compounded by local

²² See Cook & Martin, *supra* note 19, at 3.

²³ See U.K. Natl. Statistics, Focus on People and Migration, http://www.statistics.gov.uk/focuson/migration/default_print.asp; U.K. Natl. Statistics, People & Migration, *International Migration, Rose in last decade*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=766.

²⁴ See Cook & Martin, *supra* note 19, at 3.

²⁵ U.K. Natl. Statistics, People & Migration, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=766.

²⁶ *Id.*

²⁷ Policy Research Institute on Ageing and Ethnicity, *Policy Response, Equality and non-discrimination in an enlarged European union – Green Paper*, 5, 5-6 (Aug. 2004), http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/priae.pdf.

²⁸ *Channel 4 News*, “Asian Elderly in Crisis Care Lacking for Asian Elderly in the UK” (United Kingdom Feb. 22, 2005) (tv broadcast).

²⁹ Helen Barnard & Nick Pettigrew, Age Concern, Black and Minority Ethnic Elders Links, *Delivery benefits and services for black and minority ethnic older people*, http://www.ageconcern.org.uk/AgeConcern/black_minority_ethnic_links.asp.

³⁰ *Channel 4 News*, “Asian Elderly in Crisis Care Lacking for Asian Elderly in the UK” (United Kingdom Feb. 22, 2005) (tv broadcast).

authority assumptions that this care is still provided by their families.³¹ Across the EU as a whole, the situation of ethnic immigrant women is gradually receiving more attention as a group that often finds itself poor in old age and faces particular barriers before reaching that point.³² This together with the fear that being an older migrant woman is a combination that increases disadvantage beyond the mere addition of age, gender and ethnicity has also led to calls for older migrant women to acquire the status of a target group on their own.³³

Social Britain

The UK's position as one of the world's wealthiest countries belies inequalities in income and in the distribution of wealth.³⁴ The situation of women provides an interesting snap shot. Despite having strong and long-standing legislation against sex discrimination, including equal pay, the situation of women in the workplace is not nearly as secure or well-paid as it ought to be. Employment gaps between women and men remain and women dominate part-time working.³⁵ This may partly be influenced by child-care provision, which has only recently attracted solid support from the Government.³⁶ Sadly, despite regular Government inspections, the quality of nursery care in the UK is mixed. Despite these facts, from 1970 to 2003, the participation rate of women grew from 56 percent to nearly 70 percent.³⁷ But the gender pay gap remains a feature of UK working life with women earning less than men, despite a recent narrowing in the gap.³⁸ In December 2005, the Minister

³¹ *Id.*

³² Closing Conference AGE+, *Poor, Poorer, Poorest? A focus on the socio-economic situation for older migrant women in Europe*, (Amsterdam Sept 22-23, 2005), http://www.ageplus.nl/downloads/OlderMigrantwomenNLSept_2_rev.pdf.

³³ MERI Consortium, *Age + Gender + Ethnicity Results on the social position of migrant women 40+ in: Austria, Germany, Italy and The Netherlands*, 1, 24 (2005), http://www.ageplus.nl/downloads/meri_final.pdf.

³⁴ Cook & Martin, *supra* note 19, at 2; U.K. Natl. Statistics, Focus on Soc. Inequalities, http://www.statistics.gov.uk/focuson/socialinequalities/default_print.asp.

³⁵ Cook & Martin, *supra* note 19, at 5.

³⁶ The Childcare Bill 2005, when enacted, will place a duty on local authorities to improve the quality of childcare for all children under the age of 5. Families on a low income can claim a child tax credit for children and young people who are in full-time education, with an extra allowance for any child under one or a disabled child, *see* Child Tax Credit, http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/TaxCredits/DG_4015478.

³⁷ U.K. Natl. Statistics, Soc. Inequalities, Work, *Employment grows for the disadvantaged*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=1004.

³⁸ In 2003, women's hourly pay was 82% of men's, representing the closest it had been since records began, U.K. Natl. Statistics, Gender-archived, Oct. 2006, Personal Finances, *Women's hourly pay is 82% of men's*, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=437&POS=3&ColRank=2&Rank=192>.

for Women, Tessa Jowell, opined that despite recent progress “the gender pay gap may never be closed completely.”³⁹ Many factors go toward influencing the weaker position of women in the labour market, which in turn is one factor in their poor economic situation in old age, as they have not built up sufficient non-state pensions and savings. In the EU, prior to enlargement, British women were particularly vulnerable to poverty in old age with one in four single older women living in poverty.⁴⁰

Today, estimates of all British pensioners who are predicted to live in poverty after retirement vary between one in ten and four in ten.⁴¹ Over two million older people are currently living below the official poverty level.⁴² The social exclusion of all older people in the UK is beginning to receive more attention from the Government.⁴³ So is the position of the 5 million unpaid carers in the UK whose contribution is vital to British society.⁴⁴ As the population ages, caring obligations will increase for many people and will have a particularly heavy impact on those trying to combine caring with work.

Responses to the pensions’ deficit and demographic ageing

The year 2005 saw significant developments aimed at resolving numerous issues around old age and employment. On November 30, 2005, the Pensions Commission led by Lord Turner produced a report aimed at reforming state pensions in the UK, which are currently payable at age 65 for men and at age 60 for women.⁴⁵ The interim Pensions Commission Report issued in 2004 found that more than 12 million

The gender pay gap was an EU wide phenomenon in EU 15, with women’s average earnings 16 percent below men’s in 2003. The EU Member States were asked in the Employment Guidelines of 2003 to substantially reduce the gender pay gap by 2010, see European Commission Staff Working Paper, *Gender pay gaps in European labour markets – Measurement, analysis and policy implications*, SEC (2003) 937, 3-5 (Brussels, 2003).

³⁹ *Gender pay gap ‘may never go*, The Times 16 (London) (Dec. 5, 2005)

⁴⁰ Age Concern England (2003) *One in Four – A quarter of single women pensioners live in poverty: this scandal must end*, available at http://www.fawcettsociety.org.uk/documents/1infour_000.pdf.

⁴¹ Alexandra Frean, *Retirement poverty trap faces middle-aged*, The Times 16 (London) (Oct. 12, 2005).

⁴² *Id.*

⁴³ Office of the Deputy Prime Minister, *Excluded Older People Social Exclusion Unit Interim Report*, (Great Britain, 2005).

⁴⁴ Here referring to carers in general who look after a relative or friend, not just those involved in elder care, Commn. for Soc. Care Inspection (CSCI), *The state of social care in England 2004-05 A summary*, 8 (CSCI, Dec. 2005) and CSCI *Big Picture reveals gaps in social care*, 2 (Dec. 13 2005), http://www.csci.org.uk/about_csci/news/state_social_care_2005.htm.

⁴⁵ These are due to be equalised at age 65 in April 2010, following European case law.

people over the age of 25 were not saving enough for their retirement.⁴⁶ Lord Turner now proposes that the state pension age be raised gradually for women and men to 66 by 2030, to 67 by 2040 and to 68 by 2050 (in line with increases in life expectancy). Women have fared well in the reform plans.⁴⁷ It is proposed that everyone will receive the state pension at 75 based on their residency in the UK, rather than the size of their contributions. Fewer than 20 percent of women in the UK currently qualify for the state pension of £ 82 per week as they have not worked for long enough, compared to 8 percent of men. Women will also benefit from compulsory savings plans where the employer and employee will each contribute a small percentage of after-tax salary to a new National Pension Saving Scheme. Lord Turner proposes that women will not suffer if they take time out for family reasons. There are also plans to make the state pension more generous from 2010 by linking increases to average wages, and recommendations to help people stay in work for longer such as applying age discrimination legislation to the over 65s, a strong occupational health policy and education and training opportunities for older workers. The Chancellor of the Exchequer has cast doubt on the overall affordability of the package of reforms, so we can expect a slightly turbulent time in the implementation process.

Elder Law in the UK

There is no generic subject known as elder law in legal education in the UK however some elements of this broad subject are taught in a very small number of universities.⁴⁸ There are, however, numerous organisations that promote and protect elderly. Solicitors for the Elderly (SFE) is a national organisation in its eighth year of operation at the time of writing, whose membership is drawn principally from solicitors, barristers and legal executives.⁴⁹ Its aims include developing expertise in areas of public and private law relevant to older people “where there is at present a skills shortage.”⁵⁰ It also aims to provide high-quality training and facilitate networking with NGOs and other interested parties. Membership of SFE depends upon having spent a significant amount of

⁴⁶ BBC News, *State pension age to rise to 68*, <http://news.bbc.co.uk/1/hi/business/5015928.stm>.

⁴⁷ See Philip Webster, Rosemary Bennett & Christine Selb, *Women are winners in pension shake-up*, *The Times* (London) (Dec. 1, 2005).

⁴⁸ The University of Hertfordshire is believed to cover some aspects in its degree course. Traditional fields of relevance for elder law, such as wills, may no longer be a compulsory area of a solicitors' training, resulting in a knowledge and recruitment deficit in young solicitors. E-mail contact with Jayne Wall, SFE Administration (Dec. 29, 2005) (on file with author).

⁴⁹ Solicitors for the Elderly, <http://www.solicitorsfortheelderly.com>.

⁵⁰ *Id.*

time working for elderly clients, and members must follow the SFE code of practice. A short examination was introduced for new members in 2004.⁵¹ SFE has more than 780 members and is run from one main office with twenty-two regional offices, including one in Northern Ireland.⁵² The National Academy of Elder Law Attorneys (NAELA) in the USA and SFE have representative members in each others' associations. SFE does not operate in a vacuum, in that the Law Society of England and Wales (the Law Society) will enable a member of the public to find a solicitor who specialises in dealing with older people and provides some binding guidance for solicitors who deal with older peoples' issues.⁵³ The Law Society has a Probate Section that anyone can join and a Mental Health and Disability Committee with a diverse membership that reviews areas of mental health disability and 'elderly' law and makes recommendations for change. The Society of Trusts and Estates Practitioners is also of interest to, but is not confined to, elder law practitioners. From time to time, the House of Commons, the lower house of Parliament will set up a committee to report on issues of importance for older people as will the Law Commission.⁵⁴ The SFE sits on many committees and enjoys a good working relationship with the Court of Protection, the Public Guardianship Office and Department of Constitutional Affairs.⁵⁵ It responds to many government consultations in an effort to highlight legal issues affecting older people and works closely with older peoples' major charities, providing *pro bono* advice when requested.⁵⁶

The list of specialisms of SFE members spans areas that are roughly comparable with those practised by NAELA members in the USA. These are estate planning, powers of attorney, Court of Protection, probate and administration of the deceased's estate, trust administration, estate planning, tax planning, living wills, gifts, home care, preserving assets for those in long stay residential care, residential and nursing home contracts, advice on funding for long-term care, state retirement and widows pensions, long-term care insurance, welfare benefits, home equity release plans, capacity, mental health law, health and social care

⁵¹ See Wall, *supra* note 48.

⁵² *Id.* Note: there is no similar body in the Republic of Ireland.

⁵³ *Enduring Power of Attorney Guidelines and Gifts of Property Guidelines*, <http://www.lawsociety.org.uk/areasoflaw/view+areasoflawdetails.law?AREAOFLAW>.

⁵⁴ See, e.g., Law Commn. Rep. No. 231 on Mental Incapacity 1995, available from the British Government's Stationery Office (TSO).

⁵⁵ See Wall, *supra* note 48.

⁵⁶ *Id.*

issues and elder abuse.⁵⁷ Some of these subjects have long established roots in English law such as probate, administration of estates, wills and trust administration, and may be introduced during the course of a law degree. They were traditionally taught at a more practical level during the professional educational stage of training to be a solicitor or barrister but are not believed to be compulsory subjects anymore. Others are of far more recent origin. The appointment of the Court of Protection to manage a person's affairs and drawing up an enduring powers of attorney to authorise another person to manage a person's affairs after mental incapacity were made possible by the Mental Health Act 1983 and the Enduring Power of Attorney Act 1985, respectively. Sadly of all the listed fields, elder abuse remains a very underdeveloped area and a recent Government report found that there are half a million abused elders.⁵⁸ The problem is that there is no particular legal framework for reporting or prosecuting elder abuse much less a legal definition of what it is.

The NGO movement for age

The NGO movement for age is quite well organised and long established in the UK. It comprises a wide range of bodies that can loosely be seen as falling into two categories. They are those concerned primarily with the general welfare of older people and those concerned primarily with age discrimination and the working lives of older people, who are often understood as the over 50s for both types of organisation. As well as providing important information and services, older peoples' organisations campaign for improved legislation, services and rights for their members and constituents.

A recent trend has seen a major convergence of the chief age organisations on the issue of age discrimination in employment with leading organisations in both categories forming the Age Advisory Group (AAG). The AAG was set up in 2001 to advise the British Government on how to implement the age strand of the Employment Equality Directive and the impact age discrimination legislation would have on employers.⁵⁹ Its members include three prominent age organisations but the non-age members of the AAG are in the majority

⁵⁷ See the SFE website <http://www.solicitorsfortheelderly.com>; Jayne Wall, *supra* note 48; Caroline Elderly Client Handbook, (Bielanska and Martin Terrell eds., 3d ed., Law Society 2004) (published in association with SFE).

⁵⁸ U.K. House of Commons, *Half a million elderly people are abused in the UK*, http://www.paramedic.org.uk/news_archive/2004/04/News_Item.2004-04-20.2831/view.

⁵⁹ Eironline, Government consults over legislation to combat age discrimination, <http://www.eurofound.europa.eu/eiro/2002/01/feature/uk0201170f.html>.

with nine members, mostly representing business and enterprise, for example, the Confederation of British Industry (CBI) and British Chambers of Commerce (BCC). Very importantly, the National Council of Training Organisations is also a member. The Employment Directive seeks to combat discrimination in vocational training as well as employment. This is an important contrast with the ADEA, which only covers employment.

This article will look briefly at those age organisations that are part of the Age Advisory Group. It will also look at Help the Aged, which was not part of this group but is a sponsor of one of the members and a major national organisation concerned with all aspects of the welfare of older people. AAG members included Age Concern, a national organisation with national offices in Wales, Scotland and Northern Ireland and many local branches throughout the UK.⁶⁰ This organisation is now 65 years old and provides much valuable information, tailor made for older people, and a number of services including house, motor and travel insurance, a postal will-writing service and funeral plans. Importantly, it provides a wealth of information on issues such as concessions for older people and on help with adaptations and repairs. It also provides preliminary information on financial matters such as equity release schemes whereby older people can use their homes to provide an income or a lump sum.⁶¹ Its local charities provide activities such as exercise classes, IT tuition and lunch clubs. Help the Aged works to reduce disadvantages experienced by older people such as poverty, isolation and neglect.⁶² It is involved in a variety of campaigns, including one to stop elder abuse, and has carried out research into ageing for 30 years, which is either by means of commissioned research or providing major biomedical research grants. It provides core funding to the Oxford Institute on Ageing at Oxford University. In the social policy field, Help the Aged commissions five to six research projects a year. Help the Aged produced a research report in 2002, *Age Discrimination in Public Policy: A Review of Evidence*, which found evidence of age discrimination across seven areas of public policy: education, employment, health, social care, social security, transport and citizenship. It has sponsored a two-year research project, which will conclude during 2006, into how age discrimination is experienced by and affects older people. It will explore developing tools and strategies for confronting ageist behaviour and “promote a more age-inclusive

⁶⁰ See generally Age Concern, <http://www.age.org.uk>.

⁶¹ It does, however, advise older people to seek independent legal and financial advice.

⁶² See <http://www.helptheaged.org.uk>.

society.”⁶³ This research will undoubtedly prove valuable for individuals and firms alike especially when the age regulations come into force in 2006. The Third Age Employment Network (TAEN) is a leading organisation dealing with employment, age discrimination and older workers and is a member of the AAG. It consists of a network of member organisations from the public and private sectors and is sponsored and supported institutionally by Help the Aged. It is interested in the intersection of age, employment and training policies. TAEN acts as a voice for older workers and works with the media to tell their story. It also provides information to firms and older workers alike. The Employers Forum on Age was also a member of the AAG and differs from the other organisations in that it is a network made up entirely of employers and has a membership of 250 employer organisations, including many major UK employers.⁶⁴ Another important difference is that it is age neutral and campaigns for age diversity, with an interest in employees of all ages not just the over 45s or over 50s. It arranges workshops and events for members to bring them up to date on the latest law and policy developments in areas relating to age and work.

The British Government conducted a number of public consultations prior to issuing the draft *Employment Equality (Age) Regulations, 2006*, (draft Regulations) in 2005. They enabled NGOs, business or any member of the public to give feedback on proposals for legislation. The members of the AAG also made independent submissions as part of this process. One of the most exciting features of the NGO and equality movement in the UK has been the establishment of the Equality and Diversity Forum (EDF) in 2002.⁶⁵ It was founded by the age organisation TAEN and represents all grounds protected from discrimination under the Employment Directive thus securing a valuable place for grounds that are new to European and national law alike such as age, at the heart of equality and human rights debates and developments. The forum aims to ensure that proposals for legislation dealing with the separate grounds of discrimination honour the cross-cutting nature of equality issues. It has built consensus among its member organisations that jointly support a number of important ideas such as a Single Equality Act for Great Britain, which would replace an unwieldy plethora of equality legislation- including 35 acts and 16 European Directives. The EDF also campaigns for a positive duty for all

⁶³ See Help the Aged Social Policy, http://www.research.helptheaged.org.uk/_research/SocialPolicy/_default.htm.

⁶⁴ See <http://www.efa.org.uk>.

⁶⁵ See <http://www.edf.org.uk>. Note that Help the Aged is a Member of the forum and the Employers Forum on age has observer status. For the rest EDF has 29 full members including a major trade union, the Discrimination Law Association and NGOs representing all equality grounds.

public bodies to promote equality for every ground, not just race, and the extension of protection from discrimination in goods, facilities and services to age, sexual orientation, religion and belief. This protection already exists for race, disability and sex in the UK. Thus, without it, there will remain a divide between the old and new anti-discrimination grounds that is artificial given the multiple and overlapping identities of every person.

One of the hottest issues in recent times has been the question of a public body for the promotion of age equality. *Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services* requires the EU Member States to designate a specialised body for the promotion of gender equality not just in access to and supply of goods and services.⁶⁶ The Directive confirms that such a body may form part of a national body concerned with the defence of human rights or individual rights. This reflects the emergence of single equality bodies concerned with promoting equality and/or supporting victims for all grounds legally protected from discrimination such as the Equality Commission in Northern Ireland. Prior to the adoption of the Employment, Race and Gender Equality in goods and services Directives, the UK had long-standing sex and race equality legislation and more recently disability legislation and has three independent bodies to promote equality and support victims of discrimination on these grounds. These bodies are the Equal Opportunities Commission (EOC), the Commission for Racial Equality and the Disability Rights Commission which is of much more recent origin, having been established in 2000. However, following a review of equality institutions in Great Britain and a public consultation, the Government announced its plans in 2003 to establish a single Commission for Equality and Human Rights (CEHR).

In 2004, the Government produced a White Paper with proposals for the CEHR, which were implemented by the Equality Act 2006 and are now scheduled to come into operation fully in autumn 2007.⁶⁷ The CEHR will act as a single commission representing sex, race, disability and the other grounds of discrimination in the Employment Directive—age, religion or belief, sexual orientation which have not had their own national bodies for the promotion of equality in this country. This body will also provide institutional support for human rights. This development settles the debate of how to support the new grounds of discrimination. The most prominent ideas ranged from providing no

⁶⁶ See Off. J. European Union, Council Directive 2004/113/EC, Article 12 (Dec. 13, 2004).

⁶⁷ Dept. Trade & Indus., *Fairness for all: a New Commission for Equality and Human Rights* 90 (Cm 6185) (The Stationery Office, 2004); see also <http://www.cehr.org.uk/content/contact.rhtm>.

institutional support for these grounds, dividing them up between the existing commissions with the less than perfect possibility that age might be brought within the Disability Rights Commission, for example, to the forthcoming situation of a single unified body that represents all anti-discrimination grounds and human rights. The advantages of the CEHR are said to include a cross cutting approach to tackle obstacles affecting several groups, the ability to better deal with discrimination on multiple grounds, a single access point for individuals and being well placed to promote good relations among different communities.⁶⁸ Pending establishment of the CEHR, the Government plans to make appropriate arrangements for institutional support for age, religion or belief and sexual orientation.

The ultimate inclusion of age in a single commission is both a positive and a necessary development. Age discrimination more than discrimination on any other ground, even gender, can arguably affect anyone and there is enormous diversity represented by all persons of the same age or in the same age group. One of the most appealing aspects of the CEHR is that it promises to benefit children and young people as well as older people.⁶⁹ This is especially welcome as the age organisations tend to focus on people in mid or later life.⁷⁰ The CEHR will enforce legislation and promote *equality for people of different ages*.⁷¹ This mirrors the Employment Directive (and UK age regulations) that does not have upper and lower age limits for protection from age discrimination.⁷² The CEHR's mandate will contrast sharply with the work of the EEOC in the USA, where workers are only protected by age discrimination legislation from the age of 40.

Age Discrimination in the United Kingdom

Prior to the Employment Directive, there was no age discrimination legislation of any kind in the UK. However, it was sometimes possible to establish that an age requirement for a job amounted to indirect sex or race discrimination.⁷³ Many age organisations, in addition to those mentioned above, campaigned actively

⁶⁸ *Id.* at 17.

⁶⁹ *Id.* at 128.

⁷⁰ The Children's Society, established in 1881 has a long history of helping vulnerable children, <http://www.the-childrens-society.org.uk>.

⁷¹ Dept. Trade & Indus., *Fairness for all*, *supra* note 67.

⁷² However, the Regulations will establish a national default retirement age of 65 when enacted. The Employment Equality (Age) Regulations 2006, Statutory Instrument 2006 No. 1031 (2006) [hereinafter Regulation].

⁷³ For a brief discussion of this approach, see Helen Meenan, *Age Discrimination in the United Kingdom*, 3 Intl. J. of Discrimination & the L., 227, 241-242 (1999).

for age discrimination laws, particularly for the over 50s. Some key themes at that time included the cost of age discrimination to the individual and to the British economy. On the other hand, business leaders worried about the cost of age discrimination legislation to business and being forced to keep ageing workers forever. Two opposing positions were represented by the age movement that wanted mandatory retirement to be abolished and business, which wanted to retain it. This debate has been settled for the moment by the Regulations, as we shall see below.

The Employment Equality (Age) Regulations 2006, prohibiting age discrimination in employment and training come into force on 1 October 2006,⁷⁴ in line with a three-year extension period permitted by the Directive. As with all European Directives, Member States are allowed to treat the Directives' provisions as minimum requirements and go beyond them.⁷⁵ There are also provisions that allow the Member states to legislate for genuine occupational qualifications and to choose not to apply the Directive in relation to some fields for age and some other grounds. There is also a unique provision that allows justification of direct age discrimination only, which will be discussed further below. Just as with the Employment Directive itself, the UK does not define age. However, the kind of justifications allowed in the Directive referring to minimum or maximum ages, for example, imply that a chronological rather than a social or physiological meaning is the meaning of age envisaged by the Directive. It will be interesting to see if case law or any future legislation will allow more creative approaches to the concept of age that may more accurately reflect the reality of our longevity and health.

The Regulations provide that direct discrimination is where a person discriminates against another "on grounds of" their age and treats them less favourably than he treats or would treat another, permitting the use of a hypothetical comparator where an actual one cannot be located.⁷⁶ This wording is significant. It appears to encompass less favourable treatment on grounds of perceived age as well as actual chronological age. The Regulations confirm that the reference to a person's age includes their apparent age,⁷⁷ which may cover those who are discriminated against because they look older or younger than their

⁷⁴ SI No 2006/1031.

⁷⁵ For analysis of age discrimination and the Employment Directive, see generally Helen Meenan, *Age Equality after the Employment Directive*, 10 Maastricht J. European and Comp. L., 9, 9-28 (1, 2003) and Colm O'Conneide for the European Commn., *Age Discrimination and European Law* (Belgium, 2005).

⁷⁶ Regulation 3(1)(a).

⁷⁷ Regulation 3(3)(b).

chronological age. At this stage, it is unknown to what extent “on grounds of” age deals with those who specifically, because of the ageing process (a highly individualised experience), may suffer physical impairments sooner or more severely than others might. It is also unknown to what extent such age-related physical problems fall under the classification of disability and any consequent discrimination ought to be treated as disability discrimination. These questions help to highlight the need for an equality system that deals with multiple discrimination in both preventive and enforcement terms. They also help to emphasise the unique impact of the ageing process on each individual and foretell challenges for courts and parties in discrimination litigation. The UK is currently undergoing two changes that may create a better environment for tackling multiple discrimination and promoting equality on all grounds of discrimination. The first is the creation of the Commission for Equality and Human Rights (CEHR) discussed above, which will come into operation in 2007 and as a single organisation promises to be better placed to deal with an individual’s multiple identities and thereby better placed to “tackle discrimination on multiple grounds.”⁷⁸ The second is a major government-led review of “the causes of persistent discrimination and inequality in British Society.”⁷⁹ One purpose of the review is to inform the modernisation of British equality legislation with a view to adoption of a Single Equality Act to replace many separate equality laws spanning some 30 years.⁸⁰

Article 6 of the Directive allows EU Member states to justify direct age discrimination only. However, this is built around them permitting differences of treatment on grounds of age “if, within the context of national law, they are objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”⁸¹ The UK’s Regulations have taken advantage of this possibility and give examples of treatment that an employment tribunal or court “may find to be a proportionate means of achieving a legitimate aim.”⁸² They are the setting of age requirements to ensure the protection or promote the vocational integration of people of a particular age group; the fixing of a minimum age to qualify for certain

⁷⁸ Dept. Trade & Indus., *Fairness for all*, *supra* note 67.

⁷⁹ Joint DTI and Cabinet Off., Press Release, *Review of Causes of Discrimination Announced* (Feb. 25, 2005), [http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&Navigate;The Equalities Review *Fairness and Freedom: The Final Report of the Equalities Review* \(The Crown, February, 2007\), <http://www.theequalitiesreview.org.uk>](http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&Navigate;The%20Equalities%20Review%20-%20Fairness%20and%20Freedom%20-%20The%20Final%20Report%20of%20the%20Equalities%20Review)

⁸⁰ Press release, *id.*

⁸¹ Article 6.1, Employment Directive.

⁸² Regulation 8(2)(a)-(c).

advantages linked to employment or occupation in order to recruit or retain older people; and, setting a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period in post before retirement.⁸³ Thus, the legislature has chosen not to name specifically those sectors where minimum or maximum recruitment ages and so forth may apply. Leaving this matter in the hands of employers and training providers who must assess for themselves, in the first place, the legitimacy of their aims and the proportionality of the means they use to achieve them. It is interesting that Part 2 of the Regulations spells out the scope of age discrimination against a person, which refers *inter alia* to offers of employment, terms of employment and refusing to or not offering employment. It confirms that discrimination in arrangements for offers of employment and refusing to offer employment do not apply where a person has reached 65 years of age. While Regulation 30 in Part 4 confirms that dismissal at or over age 65 for reasons of retirement is not unlawful. Thus, age 65 would appear to provide a reference point for maximum recruitment ages.

Regulation 8 provides an exception from discrimination on grounds of age for genuine occupational requirement (GOR), where “having regard to the nature of the employment or the context in which it is carried out-

- (a) possessing a characteristic related to age is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case; and
- (c) either-
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.”

This provision does not specify the occupations where GORs are permissible, leaving it as a matter for employers and ultimately courts and tribunals to test. The Consultation that immediately preceded the draft Employment Equality (Age) Regulations 2006 stated that this approach was adopted as the Government considered that age would only be a GOR in very few cases and gave acting jobs as an example.⁸⁴ The draft regulations specifically mention Barristers and Advocates and make

⁸³ *Id.*

⁸⁴ Dept. Trade & Indus., Equality & Diversity Coming of Age, Report on the Consultation on the Draft Employment Equality (Age) Regulations 2006, 4.11 at 8 (March 2006).

it unlawful for them to discriminate against a person in offering pupillage or training and when they are in employment: in terms, benefits and opportunities and dismissal.⁸⁵ These are interesting inclusions as both limbs of the legal profession in the UK involve a lengthy period of education and training and would usually involve a contractual retirement age. They are therefore likely candidates for the application of maximum recruitment ages. This approach seemingly sends a strong signal to the legal profession that any such practises will be illegal unless objectively justified under Part 1 of the regulations discussed above. The regulations also stipulate clearly how they apply to discrimination by providers of vocational training and also state that “It is unlawful for a training provider, in relation to a person seeking or undergoing training, to subject him to harassment.”⁸⁶ They also clarify that the term training provider does not include “an employer in relation to training for persons employed by him.”⁸⁷ However, Regulation 7(2)(b) includes opportunities for training among the areas in which an employer must not discriminate against an employee. Institutions of further and higher education, including universities, are specifically addressed by the regulations in very clear terms, as are employment agencies, trade organisations and qualifications bodies. Thus, the legislature has taken the precaution of specifically providing for these bodies when it might have been obvious that at least some of them were automatically covered by a Directive that prohibits discrimination in employment and training. The regulations also outlaw discrimination and harassment where a relevant relationship has come to an end. Part 3 of the regulations renders employers and principals liable for discriminatory acts carried out by their employees and agents unless they can prove that they “took such steps as were reasonably practicable to prevent the employee from doing that act...” It also makes it an offence to aid unlawful acts and treats such a person as doing the unlawful act.

Discrimination by way of victimisation is also covered by these regulations and is quite broad.⁸⁸ It includes, for example, victimisation because a person intends to bring proceedings and victimisation because a person suspects that another person has brought or intends to bring proceedings. Harassment on grounds of age is prohibited and is characterised as “where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of- violating B’s dignity; or creating an intimidating, hostile, degrading, humiliating or offensive

⁸⁵ Regulations 15 and 16, respectively.

⁸⁶ Regulation 20(2).

⁸⁷ Regulation 20(4).

⁸⁸ Regulation 4. Note that instructions to discriminate are also prohibited under Regulation 5.

environment for B.”⁸⁹ However, the harassment provision is tempered by the following rider: “Conduct shall be regarded as having the effect specified in paragraph 1 (a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.”⁹⁰ The full scope of this rider will probably be established through the course of litigation. In the meantime, the words *including in particular the perception of B* ought to serve as a warning against age-related jokes, language and culture in the working environment, as they may feed into B’s perceptions. Taken altogether the perceptions of B form only part of the total picture and it seems that a delicate balancing exercise will be required between B’s subjective perceptions and an objective assessment of the effect of the conduct in question with regard to all the circumstances (including B’s perceptions) in each case.

Indirect discrimination, like direct discrimination, is modelled on the recent sexual orientation and religion or belief regulations in the UK. It is slightly cumbersome, involving a number of elements whereby a person applies a provision, criterion or practice to a person which he applies or would apply equally to another person “not of the same age” as that other person, but puts or would put persons of the same age as that person at a particular disadvantage compared with other persons and which does put B at that disadvantage.⁹¹ An added element is the possibility of objective justification. A cannot show the treatment of B or the provision, criterion or practice to be a proportionate means of achieving a legitimate aim. Indirect discrimination was an important concept in English anti-discrimination law long before adoption of the Employment Directive. It is also one of the common concepts legally applicable to all grounds of discrimination protected by this Directive, the Race Directive⁹² and European equality provisions relating to the gender ground and has been applied in other areas in European law.⁹³

⁸⁹ Regulation 6(1).

⁹⁰ Regulation 6(2).

⁹¹ Regulation 3(1)(b).

⁹² Council Directive 2000/43/EC, Off. J. European Communities L 180 at 22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which combats discrimination in goods and services as well as employment and training).

⁹³ For example, with regard to sex, Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ 2002 L269/15. Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ (2004) L373 p. 37. Also note the concept of indirect discrimination used by the European Court of Justice in relation to free movement of workers and non-discrimination on grounds of nationality for example in *O’Flynn v Adjudication Officer*, Case C-237/94 [1996] ECR I-2617.

The Regulations stipulate jurisdiction for both employment tribunals and county or sheriff courts. Claims must be presented to an employment tribunal within three months of the discriminatory act, or within six months of the discriminatory act in the case of a county or sheriff court.⁹⁴ However, each may consider a complaint “which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”⁹⁵ The employment tribunal’s jurisdiction comprises discrimination and harassment under Part 2 of the Regulations, except, where the act concerns a relationship which has come to an end, discriminatory acts carried out by institutions of further and higher education and under certain circumstances, discriminatory acts of qualification bodies.⁹⁶ The latter two fall within the jurisdiction of the county or sheriff courts.⁹⁷ An employment tribunal has the power to award three principal types of remedy: (a) an order declaring the rights of the complainant and the respondent; (b) an order requiring the respondent to pay compensation to the complainant; and (c) “a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates.”⁹⁸ The Regulations confirm that a county or sheriff court may include compensation for injury to feelings in any award of damages.⁹⁹

Of the remaining Regulations, two more noteworthy aspects are the dis- application of the regulations to service in the state naval, military or air forces, which is permitted by the Directive for age (and disability)¹⁰⁰ and its treatment of retirement. Recital 14 of the Preamble to the Employment Directive states, “This Directive shall be without prejudice to national provisions laying down retirement ages.” The full meaning of this recital has been the subject of comment and speculation. At the minimum, it would seem to mean that those EU Member States with national retirement ages are unaffected by the Directive and can maintain that position without change on implementation of the Directive. However, the UK did not have national retirement ages but most contracts of employment contain a retirement age that is often set at the same age as that at which the state pension becomes payable. In

⁹⁴ Regulations 42(1) and (2), respectively.

⁹⁵ Regulation 42(3).

⁹⁶ Regulation 36(2).

⁹⁷ Regulation 39(4).

⁹⁸ Regulation 38(1).

⁹⁹ Regulation 39.

¹⁰⁰ Council Dir. 2000/78/EC, Art. 3.4. OJ [2000] L303, p.16 (European Communities, Nov. 27, 2000).

2003, Sir Bob Hepple wrote that, as the UK had no national retirement age, mandatory retirement ages would have to be justified under Article 6.1 of the Directive.¹⁰¹ In the meantime, the UK proposed a national default retirement age of 65 in conjunction with a right for an employee to request not to retire and a duty for an employer to consider such a request. These are contained in Schedule 6 of the regulations and will work as follows. In a workplace with no normal or contractual retirement age, the age of 65 would be the default retirement age. Any mandatory retirement age below the age of 65 will have to be objectively justified by an employer. Dismissal on the planned retirement age (for reasons of retirement) if above or below 65 or at the default age of 65 must be communicated to the employee with at least six months written notice.¹⁰² Schedule 6 deals with the duty to consider working beyond retirement.¹⁰³ In addition to the intention to dismiss for reasons of retirement, the employer must notify the employee of the right to make a request and must continue to notify the employee up to the 14th day prior to the dismissal. An employee is entitled to make only one request not to retire and this must be made in writing not more than six months before the intended date of retirement.¹⁰⁴ Where a duty to consider a request arises, the employer must act in good faith and a meeting must take place between the employer and the employee, and the employer must notify his decision to the employee within 14 days of the meeting. However, the employer can consider the request without a meeting if it is not reasonably practicable to hold the meeting within two months of the request and this is not due to a failure of the employer, so long as representations made by the employee are considered. The employee is entitled to make an appeal in writing against the employer's decision within 14 days of notice of the employer's decision. This necessitates a further meeting and the employer is obliged to give his decision within 14 days after the date of the meeting. The only remedy available in this respect is compensation for failure to notify the employee of his right to make a request and the date of his retirement.¹⁰⁵ Where retirement is the sole reason for dismissal at or over the age of 65, the dismissal shall not be unlawful.¹⁰⁶ However, prior to these regulations, employees who were aged at or above the normal retirement age or 65 in the case of a business without a NRA could not claim either unfair dismissal compensation or redundancy payments. The Regulations remove these upper age limits so

¹⁰¹ Fredman & Spencer, *Age as an Equality Issue*, 89 (Hart Publishing, Oxford, 2003).

¹⁰² Regulation, Sched. 6, ¶ 2(1).

¹⁰³ Regulation, Sched. 6.

¹⁰⁴ Regulation, Sched. 6, ¶ 5(3)(4)(5).

¹⁰⁵ Regulation, Sched. 7, ¶ 8.

¹⁰⁶ Regulation 30.

that individuals who successfully request the right to work beyond the NRA or age 65, as the case may be, will be protected by unfair dismissal legislation.¹⁰⁷

The UK's default retirement age is a creative solution in an environment where employers and age organisations wanted different things. British age organisations favoured voluntary or flexible approaches to retirement.¹⁰⁸ However, the government has already promised to review its decision to have a default retirement age in 2011 and to abolish it if it is not necessary.¹⁰⁹ Two factors will influence its decision, whether it remains appropriate and necessary for workforce planning and to avoid negative effects on pensions and employment benefits and "the influence of any other social policy objectives."¹¹⁰ The government will look *inter alia* at evidence on longevity and the employment patterns of older people in reaching its decision.¹¹¹

Education

One of the key drivers of policy at both national and international levels has been the impact of globalisation and the creation of the knowledge or learning society.¹¹² This, in turn, has promoted a focus on the promotion of learning, whether in a formal educational setting (real or virtual) or otherwise as a necessary condition for participation in this society.¹¹³ The notion of lifelong learning has been one manifestation of this.¹¹⁴ Taken literally, this should encourage the idea of learning across the lifespan, which ought to be for the benefit of older people, of whom there will be increasing numbers as the 21st century progresses. However, behind the rhetoric lies the reality, which is that, in Britain, the thrust of official lifelong learning policy is confined to promotion of particular types of education for the economically active, thereby downgrading, for example, social or

¹⁰⁷ See Council on Tribunals, Comment: Age Discrimination, Oct. 2006, http://www.council-on-tribunals.gov.uk/adjust/item/comment_age.htm (commenting on Schedule 8, amendments to unfair dismissal legislation).

¹⁰⁸ Helen Meenan, Maastricht Journal, *supra* note 75, at 15.

¹⁰⁹ Consultation, *supra* note 84, at 71.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 72.

¹¹² See, e.g., M. Castells, *The Rise of the Network Society* (2d ed., 2000); R. Reich, *The Work of Nations* (1991).

¹¹³ See generally the discussion in Ruth Levitas *The Inclusive Society?* (1998); see also Off. Dep. Prime Minister, *Excluded Older People*, Social Exclusion Unit Interim Report (2005).

¹¹⁴ A succinct account of recent developments appears in, Andy Green, *The many faces of lifelong learning: recent education policy trends in Europe*, Journal of Education Policy 17(6) 611 (2002). A more extensive account is, Organisation for Economic Co-operation and Development (OECD), *Lifelong Learning for All* (1996).

leisured learning and excluding those beyond working age.¹¹⁵ The right to education in the European Convention on Human Rights¹¹⁶ does not, it seems, extend to post-compulsory education: the right is negative in character and has been interpreted as only requiring states not to deny access to education.¹¹⁷ However, there is a strong case for reform of national education policy here on at least two grounds. First, if there is an increasing demand for education from older people, then, in order to promote social inclusion, the UK will need to recognise indicators of worth for education other than the purely economic.¹¹⁸ Second, current policy and practice ignore the benefits to the health of the older population from engagement with education and the attendant indirect economic benefits this brings.¹¹⁹ The development of policies to promote activity in old age would thus, it is suggested, bring both individual and collective benefits to the UK. A further imperative derives from changes in the way legal services are being delivered. Greater use of on-line methods of obtaining legal advice¹²⁰ or resolving disputes¹²¹ will demand enhanced skills in the use of ICT. This is particularly significant with regard to the population now entering its 60s, which has not grown up with computers and may need help to enable them to participate fully in the legal system and indeed elsewhere.

Capacity

The promotion of autonomy across the population, regardless of age, is dependent on notions of capacity.¹²² While lack of capacity is most readily identifiable with regard to individuals such as minors and the mentally ill or disabled, it is more problematic with regard to older people, depending in the first instance on, for example, legal advisers recognising when a question of capacity needs to be raised. Questions of

¹¹⁵ See Malcolm Tight, 'Bridging the 'learning divide': the nature and politics of participation, *Studies in the Education of Adults* 30(2) 110 (1998).

¹¹⁶ Article 2, First Protocol, European Convention on Human Rights.

¹¹⁷ See *Belgian Linguistic Case (No. 2)* (1968) 1 EHRR 252; *X v United Kingdom* (1980) 23 DR 228; Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (2000) Vol. 1 ch.19.

¹¹⁸ OECD, *op. cit.*, *supra* n.114 at .31.

¹¹⁹ See, e.g., Cathie Hammond, *Learning to be Healthy* (2002).

¹²⁰ Indeed, Richard Susskind argues that face to face transactions between lawyers and clients will become a thing of the past and be replaced with on-line interfaces. Richard Susskind, *Transforming the Law* (2000). The development of websites such as www.tescolegalstore.com is a further example of the trend in this direction.

¹²¹ This is beginning to happen in some forms of civil dispute in the UK and is seen as a longer-term solution: Lord Justice Brooke, *Court modernisation and the crisis facing our civil courts*, <http://www.dca.gov.uk/judicial/speeches/ljb241104>.

¹²² For official discussions of the issues, see *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults* Cm 3803 (1997) and *Making Decisions* Cm 4465 (1999). See also Law Commission *Mental Incapacity* (Report No. 231, 1995).

capacity are subject to a general test which is applied to individuals regardless of age. Capacity is a legal concept and relates to the particular issue in question. It is thus possible that a person has capacity in relation to one matter but not in relation to another. It is not synonymous with mental illness: a person who is mentally disordered is not automatically denuded of all autonomy.¹²³ Against a background of a presumption of capacity, the test is one of the ability of the individual to understand the matter in question;¹²⁴ it follows that a person is regarded as lacking capacity where (s)he is incapable of taking a particular decision or engaging in a particular activity. Where a person has full capacity, then it not only confers power on that person to make decisions and act autonomously, but it also attaches to that person's duties and responsibilities. The test is one of understanding, not wisdom; it therefore follows that where a person has capacity, that person's decision-making powers cannot be impugned, even if a decision is made that other people might regard as bizarre, unwise or immoral.¹²⁵ With regard to older people, this creates, potentially at least, something of a clash between the law's role in promoting personal autonomy and protecting those who might be vulnerable. The decision whether a person does or does not have capacity thus takes on considerable significance, especially with regard to such matters as consent to medical treatment and dispositions of property.

Recent legislation¹²⁶ has created a statutory framework which will be implemented in stages. It now creates a new general rule that anything done for a person without capacity should be done in the best interests of that individual.¹²⁷ The notion of best interests is problematic, given that it can be viewed from a number of standpoints.

Planning for future loss of capacity is facilitated by means of powers of attorney and advance decisions to refuse treatment.¹²⁸ For the purposes of English law, a power of attorney is "a formal arrangement

¹²³ This is clear from the Mental Health Act 1983, under which some of the provisions are premised on the existence of capacity to act autonomously. Examples would be § 131, which allows for the admission to hospital or mental nursing home of informal patients (e.g., those not subject to compulsory detention); but see *R v Bournewood Community and Mental Health NHS Trust ex p. L* [1999] 1 A.C. 458; § 57, which provides for specified treatments to be given only with the consent of the patient and § 58 which provides for consent to be one basis for specified treatments. See also P. Fennell, *Inscribing Paternalism in the Law: Consent to Treatment and Mental Disorder*, 17 J. L. & Socy. 29 (1990).

¹²⁴ Mental Capacity Act 2005, § 2 (2005) (Eng.).

¹²⁵ See, e.g., *St. George's Healthcare NHS Trust v S* [1998] 3 All E.R. 673; cf *Re C* [1994] 1 All E.R. 819.

¹²⁶ Mental Capacity Act 2005 (2005).

¹²⁷ *Id.* at 4.

¹²⁸ Governed by Mental Capacity Act 2005, §§ 9-14 & §§ 24-26 (2005). The provisions on advance decisions being implemented progressively during 2007.

created by a deed in which one person ('the donor') gives another person ('the attorney') authority to act in his name and on his behalf."¹²⁹ This, potentially, enables a person who has capacity at the time of executing the instrument to make provision for a time when she may lack capacity. However, a weakness in the original scheme under the Powers of Attorney Act 1971¹³⁰ was that the power of attorney was only valid where the donor retained capacity. This shortcoming was remedied by the Enduring Powers of Attorney Act 1985, which created a new form of power of attorney that survives the donor's subsequent incapacity. The advantages of the revised system were summarised by Vinelott J:¹³¹

The 1985 Act made a very remarkable change in the law. It created a regime for the administration of the affairs of somebody who becomes incapable of managing their affairs which is supplemental to that provided by the Mental Health Act 1983. In effect, the Act permits a person, while capable of managing his or her affairs, to select somebody who will be responsible for managing his or her affairs if there is a supervening incapacity, so avoiding the expense and (I think, possibly, in the minds of some) the embarrassment of invoking the full jurisdiction of the Court of Protection.

This allusion to the Court of Protection is to a body whose name, as Vinelott J hints, perhaps evokes Dickensian images. It has jurisdiction to supervise the affairs of those subject to its jurisdiction and to adjudicate over any disputes that may arise with regard to the management of the property of an incapacitated person.¹³² The jurisdiction of the Court of Protection and the operation of powers of attorney and their allied regime under the 1985 Act were restricted to the management of property, in the event of actual or future incapacity respectively, and were not able to deal with matters to do with the person such as decisions regarding medical treatment.¹³³ This has now been remedied by the Mental Capacity Act 2005, which creates a new legal

¹²⁹ Denzil Lush, *Cretney & Lush on Enduring Powers of Attorney* (5th ed., Jordan Publ'g Ltd. 2002).

¹³⁰ Powers of Attorney Act, 1971, c. 27 (Eng.), discussed in Lush, *op. cit.*, ch. 1.

¹³¹ Re R [1990] 2 All E.R. 893 at 895; *see also* Re K, Re F [1988] 1 All E.R. 358 at 359-360 (per Hoffmann J.).

¹³² *See* Mental Capacity Act 2005, c. 9, pt. 2.

¹³³ *See* Re F [1990] 2 A.C. 1 at 58-60 (Lord Brandon).

regime whereby a person may now make a lasting power of attorney, which, like its predecessors, must be completed in an authorised form and is subject to registration with the Public Guardian.¹³⁴ However, a person may also make an advance decision to refuse treatment under sections 24-26 of the Act, to which any power of attorney is subject¹³⁵. The unified regime under the 2005 Act represents an improvement on the previously diffuse system.

Disposition of property following death depends on whether a person has made a will, which must be made by a person with capacity. Where this is so, property devolves in accordance with the testator's wishes as expressed in the will, subject only to statutory provisions designed to secure the position of dependants.¹³⁶ Where there is no will, then the estate devolves by operation of law according to the principles of intestate succession.¹³⁷

Mental illness

Turning from questions of capacity to questions of mental illness, the law again does not differentiate between individuals on grounds of age but rather provides for a number of conditions, broadly described,¹³⁸ which trigger powers that may be exercised by health and other professionals. However, the way in which the conditions to which the Act applies are defined and understood means that including, say, dementia may be problematic, as it may not be regarded as a mental illness.¹³⁹

In terms of community help, mental illness provides one possible ground on which a local authority may intervene. The system of providing what are called community care services is administered via local government.¹⁴⁰ The law in this area is, in the words of one commentator,¹⁴¹ "beyond peradventure, in a mess." It is fragmented, with a division of responsibilities between social services authorities,

¹³⁴ See Mental Capacity Act 2005, § 9, sched. 1, §§ 9-14, 58.

¹³⁵ *Id.* at §.11.

¹³⁶ See generally John Barlow, Lesley King & Anthony King, *Wills, Administration and Taxation: A Practical Guide* (8th ed., Sweet and Maxwell Ltd. 2003).

¹³⁷ *Id.*

¹³⁸ The term covers "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind," Mental Health Act 1983, c. 20, § 1(2) (Eng.).

¹³⁹ See generally Richard Jones, *Mental Health Act Manual* (9th ed., Sweet & Maxwell Ltd. 2004).

¹⁴⁰ See generally *Caring for People*, 1989, Cm. 849; *Modernising Social Services*, 1998, Cm. 4169; Luke Clements, *Community Care & The Law* (3d ed., Legal Action Group 2004) (providing a practical guide to the law relating to community care).

¹⁴¹ Luke Clements, *Community Care: Towards a Workable Statute*, XIX Liverpool L. Rev. No. 2, 181 (1997).

health authorities, housing authorities and other bodies. It is characterised by cross referencing, a range of criteria and patchy enforcement mechanisms.¹⁴²

The system (though system might be a misdescription of something that is anything but systematic) requires a local social services authority, usually coterminous with a local authority for other purposes, to publish plans of the services it provides and to find out numbers of persons in its area falling within section 29 National Assistance Act 1948 and to assess their individual needs. Section 29, a measure drafted in the immediate post WW II era and reflecting its concerns and terminology, refers to the blind and partially sighted; the deaf and hard of hearing; persons suffering from mental disorder; and others who are substantially or permanently handicapped by illness, injury or congenital deformity. Once it has identified such persons, though the Act does not say how it does this, the authority is under a general duty to promote the welfare of such persons. There is no requirement placed on the local authority to be pro-active here; being reactive would be entirely lawful within the statutory scheme. A separate duty exists under section 46 National Health Service and Community Care Act 1990 to consult with relevant bodies, specified in the Act, and then, having done so, to publish a plan for the provision of community care services in its area. It will be noticed that we have moved from a general duty of promoting the welfare of those identified under section 29 to a general duty to publish plans of the availability of services as a freestanding obligation, not linked or even connected conceptually to the duty under the 1948 Act. The term “community care services” is also defined in a very specific way. It means services under Part III National Assistance Act 1948 (essentially services involving the provision of housing, which can include residential homes for the elderly), section 45 Health Services and Public Health Act 1968 (particularly relevant in the present context as it enables local authorities to “make arrangements for promoting the welfare of old people”); and section 21 and Schedule 8 National Health Service Act 1977, which, among others, provides for the provision of services to help

¹⁴² Piecing together the law involves consideration of a number of disparate statutes and it may be as well to collect them here before looking at their interrelationships in the main body of the text. The principal pieces of legislation are: National Assistance Act 1948; Health Services and Public Health Act 1968; Chronically Sick and Disabled Persons Act 1970; Local Authority Social Services Act 1970; National Health Service Act 1977; Health and Social Services and Social Security Adjudications Act 1983; Mental Health Act 1983; Disabled Persons (Services, Consultation and Representation) Act 1986; National Health Service and Community Care Act 1990; Carers (Recognition and Services) Act 1995; Community Care (Direct Payments) Act 1996; Health Act 1999; Care Standards Act 2000; Carers and Disabled Children Act 2000; Health and Social Care Act 2001; Community Care (Delayed Discharges) Act 2003; Health and Social Care (Community Health and Standards) Act 2003; Carers (Equal Opportunities) Act 2004.

in the prevention of illness and to support those who are suffering from illness (such help may include home help and help with laundry etc.). Finally, services under section 117 Mental Health Act 1983 also fall within this referential definition of community care services. Services under section 117 are, however, only available to those who have been detained compulsorily in a hospital under the Mental Health Act and provides for assistance following discharge, and, as such, are for older people and of limited relevance.

Having identified what such services are, a local authority is required to carry out an assessment of need where it appears to the authority that a person might have a need for such services. Again, the authority does not have to be proactive and go out and seek those in its area who may need such services, but more usually responds to information provided to it, often by a member of the person's family or via some other statutory agency. Once the authority has become aware that a person may need such services, it is under a legal duty to assess whether the person does indeed need such services. The criteria for assessment are couched in general terms by means of guidance from the Secretary of State,¹⁴³ together with any local frameworks that may be established by social services authorities. The legislation itself provides no such guidance leaving the matter at large. Inevitably, in practice, standards vary across the country; in its report for 2004-5, the Commission for Social Care Inspection concluded that, while there had been welcome improvements in standards, further improvements in service delivery were still needed.¹⁴⁴ It is clear, however, that any assessment should, not only as a matter of good practice but as a matter of law, be carried out in collaboration with the applicant and should take account of (though not necessarily give effect to) any preferences expressed by her.¹⁴⁵ It should also take into account the needs of any carer, who may, in any event request a separate assessment of her own needs.¹⁴⁶ If, in the course of making an assessment of need for community care services, it appears that the person being assessed is a

¹⁴³ See Dept. of Health, *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care*, LAC (2002) 13 (Dept. of Health 2002); Dept. of Health, *The Community Care Assessment Directions 2004*, LAC (2004) 24 (Dept. of Health 2004); Local Authorities Social Services Act, 1970, § 7 (Eng.) (requiring local authorities to work under the general guidance of the Secretary of State).

¹⁴⁴ Commn. for Soc. Care Inspec., *The State of Social Care in England 2004-05 (2005)*, http://www.csci.org.uk/PDF/state_social_care_a.pdf.

¹⁴⁵ See *Fair Access to Care Service: Guidance on Eligibility Criteria for Adult Social Care*, *supra* note 143; *The Community Care Assessment Directions 2004*, *supra* note 143.

¹⁴⁶ See Disabled Persons (Services Representation and Consultation) Act 1986, c. 33, § 8 (Eng.); Carers (Recognition and Services) Act 1995, c. 12, § 1 (Eng.); Carers and Disabled Children Act 2000, c. 16, § 1. (Eng.); Carers (Equal Opportunities) Act 2004, c. 15, § 1 (Eng.); Dept. of Health, *The Community Care Assessment Directions 2004*, LAC (2004) 24.

disabled person, then the authority must make a separate assessment to decide whether the needs of the disabled person call for the provision by the authority of any services under section 2 Chronically Sick and Disabled Persons Act 1970. The services available under section 2 include many that would be relevant to older people: provision of practical assistance at home; provision of or assistance in obtaining wireless, television, library or similar recreational facilities; provision of, or help in enjoying, lectures, games outings to other recreational faculties outside the home; provision of travel to participate in any services provided under section 29 National Assistance Act; provision of assistance in adapting the home or providing additional faculties for greater safety, comfort or convenience; facilitating holidays; provision of meals; provision of assistance in obtaining telephone and equipment necessary to enable a person to use it. Many of these descriptions of what can be made available have an archaic ring to them. One notable feature of this legislation is the emphasis on the services being provided either by the authority or by another provider;¹⁴⁷ the local authority is thus not just cast into the role of provider but also of facilitator, a matrix that has been expanded under the Health and Social Care Act 2001 to the point of the authority discharging its duties in some cases by the provision of money to facilitate the purchase of the appropriate services or equipment. While this has arguably increased the choice available to the recipient of such services, it runs the concomitant risk of fragmentation and time-consuming searches to find the best provider.

A further feature of the 1970 Act is the absence of a specific budget to accompany it. During the passage of the Bill through Parliament, members of both Houses expressed broad support for the legislation,¹⁴⁸ which always seems to be the case with supportive social welfare legislation. Members seem almost afraid to raise dissenting voices when legislation is proposed to help, in this case, the disabled. A few voices pointed out that this was likely to involve considerable expenditure and that, as the legislation appeared needs led, thought had to be given to the question of how to finance the scheme.¹⁴⁹ Such voices were a small minority of those speaking and their concerns were largely ignored. While local authority finance was in a relatively healthy state

¹⁴⁷ See Community Care (Direct Payments) Act 1996, c. 30 § 1 (Eng.); Health and Social Care Act 2001, c. 15, § 57 (Eng.).

¹⁴⁸ See e.g. H.C. Debs. vol. 792, cols. 1851- 1863, De. 5, 1969 (these remarks, by the sponsor of the Bill, Mr. Alf Morris M.P., were echoed throughout the debates); H.C. Debs. vol.798 col. 911ff, (further remarks of Mr. Morris in the House of Commons); Alf Morris, *The disabled have their Act, now they need the action*, The Times 10 (London) (May 26, 1982).

¹⁴⁹ See, e.g., H.C. Debs. Vol. 792 cols. 1914-1915, Dec. 5, 1969 (remarks by Dr. John Dunwoody); H.L. Debs, vol 309 col. 256, Mar. 15, 1970 (remarks by Baroness Serota); *id.* at cols. 1157-1159, Apr. 30, 1970 (exchange between Baroness Serota and Lord Sandford).

and limited demands were made on it, this was not a serious issue. What has become clear in more recent years is that the strains on local authority finance have led authorities to consider not only what people might need but also what the local authority could afford. Matters came to a head, in a legal sense at least, when the House of Lords had to consider a challenge brought by an 81-year-old infirm man, Mr. Barry, against the withdrawal of services he had previously been assessed as needing, on the ground that the local authority in question could no longer continue to afford to provide them.¹⁵⁰ Two issues in particular were raised, of importance for the operation of the scheme of assistance to the disabled and by implication elsewhere in the system. First, could an authority withdraw services in circumstances that it had previously assessed a person as needing? It was held, at any early stage in the proceedings and not challenged on appeal, that the authority was acting unlawfully in behaving in this way.¹⁵¹ The only way services previously assessed as being needed could be withdrawn was following a new assessment on the individual concerned. Mr Barry's success on this point turned out to be a pyrrhic victory. The local authority reassessed his needs and he was found not to need the services he had previously been assessed as needing.¹⁵² Indeed, this aspect of the judgment, linked to the second point taken on appeal, led local authorities to institute rolling programmes of reassessment in order to avoid resource problems. The second issue raised in the case was whether a local authority could take account of its resources when assessing for need. The House of Lords held that it could.¹⁵³ The judges in the majority felt that it could not be right that authorities could not take account of their resources when assessing need. The dissentient minority, relying on a more literal reading of the provision in question, held that resources were absent from consideration. The consequence of this decision was that authorities could match their provision of assistance to their spending power, a result the government may well have desired but not what was stated in the Act. The decision also marked a significant power swing away from potential service users and toward local authorities, which not only seemed to go against the spirit of the legalisation as conceived (correctly it is suggested) by the minority but also against modern notions of social care which emphasise the empowerment of the individual.¹⁵⁴ The authority was thus left with considerable power not only as to how to

¹⁵⁰ R v. Gloucestershire County Council *ex parte* Barry, [1997] A.C. 584.

¹⁵¹ *Id.* at 596 (*per* Lord Lloyd).

¹⁵² *Id.* at 597.

¹⁵³ By a majority of 3 (Lords Nicholls, Hoffmann and Clyde) to 2 (Lords Lloyd and Steyn): [1997] A.C. 584.

¹⁵⁴ *Supra* note 32.

carry out the assessment and in the determination of what provision should be made in any individual case (something remaining unaffected by the *Barry* judgment), but also with regard to the factors to be taken into account, and the weight to be given to them, when reaching a determination in an assessment and the ability to control what provision is ultimately made.¹⁵⁵ The financial equation is further complicated by the fact that local authorities can charge a reasonable sum¹⁵⁶ – a sum *it* considers reasonable – for any services it provides by virtue of section 29 National Assistance Act 1948 or section 2 Chronically Sick and Disabled Persons Act 1970.

The idea of community care is that, as far as is possible, those in need of services should be enabled to stay at home. Legislation has underpinned this notion by encouraging, with financial inducements in some cases, a situation whereby as far as possible people should receive any care they need at home. A particular problem that has dogged this area has been the fact that health care and social care have been the responsibility of different authorities operating on an area basis. Thus, there has been the unseemly spectacle of authorities arguing that a particular person is the responsibility of either a neighbouring authority or of, say, a health as opposed to social services authority,¹⁵⁷ and this despite the duty under section 22 of the National Health Service Act 1977 on health and local authorities to cooperate to advance health and welfare.¹⁵⁸ The dividing line between health and social care needs is not, however, easy to draw in practice. Part of the undertow of this is the continued and continuing financial constraints affecting both local authorities and health care providers. If demands for services did not exceed the capacity of authorities to supply them, the problem would be less acute. But there has been a general and ongoing shortage of resource in this area.

To enable persons needing care, so far as possible, to remain at home, the position of carers has been increasingly recognised not simply as an adjunct to the needs of the individual but in their own right¹⁵⁹. The encouragement of the care provided by others, often family members (and of those often women), has been seen as a better way of providing

¹⁵⁵ Commn. for Soc. Care Inspec., *The State of Social Care in England 2004-05* (Dec. 2005), http://www.csci.org.uk/PDF/state_social_care_a.pdf.

¹⁵⁶ See Health and Social Services and Social Security Adjudications Act 1983, § 17 (Eng.) (as amended).

¹⁵⁷ See, e.g., *Avon County Council v Hooper*, [1997] 1 WLR 1605.

¹⁵⁸ See also Health Act 1999; Health and Social Care Act 2001; Community Care (Delayed Discharges) Act 2003.

¹⁵⁹ See generally Disabled Persons (Services Representation and Consultation) Act 1986; Carers (Recognition and Services) Act 1995; Carers and Disabled Children Act 2000; Carers (Equal Opportunities) Act 2004; Dept. of Health, *The Community Care Assessment Directions 2004*.

care for those who do not need full time professional care. However, once the focus goes beyond the function of the carer in providing care, there is little by way of legal regulation enabling carers to enjoy support other than financial or respite care. Despite government policy predicated on the notion of family friendly employment practices, there is little by way of tangible support for this: the matter largely resolves itself on negotiation between individual employees and employers. This has been one of the reasons why, where such care is provided, it has tended to be provided by women. Where residential care is needed, this may be provided by public authorities or, increasingly, by the private sector. Standards are monitored by means of a system of licensing backed up by an inspectorate.¹⁶⁰ Financial support remains an issue here also.

The matter is exacerbated by the complex and multifarious mechanisms for challenging community care and allied decisions.¹⁶¹ There is no dedicated tribunal with jurisdiction to resolve all community care disputes. Formal mechanisms include a complaints procedure,¹⁶² which is internal to the local authority in question, and recourse to law by means of an application for judicial review. Application may also be made to the local government ombudsman, whose jurisdiction is based on maladministration and only covers failings in delivery of services falling short of a breach of law.¹⁶³ Other mechanisms include invoking help from a Member of Parliament¹⁶⁴ or the Secretary of State. The latter may, by use of a variety of powers affect an unsatisfactory situation in a number of ways. The Secretary of State may issue directions to a particular local authority requiring it to exercise its social service functions in particular ways or to issue guidance to require all authorities to act in accordance with a centrally dictated requirement.¹⁶⁵ In the last resort, the Secretary of State may take over the functions of a failing local authority and run them centrally.¹⁶⁶ The lack of coherent scheme of remedies means that a person seeking to challenge or query a local

¹⁶⁰ National Assistance Act 1948, 11 & 12 Geo. 6, c. 29, pt. III (Eng.); Care Standards Act, 2000, c. 14, pt. III (Eng.).

¹⁶¹ See Clements, *op. cit.*, *supra* n.140, ch. X; *see generally* Norman Lewis & Patrick Birkinshaw, *When Citizens Complain: Reforming Justice and Administration* (Open Univ. Press 1993).

¹⁶² Health and Social Care (Community Health and Standards) Act, 2003, c. 43, § 114 (Eng.) (providing that the Secretary of State may make regulations establishing mechanisms for dealing with complaints relating to social services). This has been implemented by The Local Authority Social Services Complaints (England) Regulations 2006 (S.I. 2006 No.1681) and Department of Health guidance *Learning from Complaints* (DH 2006).

¹⁶³ Established under the Local Government Act 1974.

¹⁶⁴ *See, e.g.*, Richard Rawlings, *The MP's Complaints Service*, 53 M.L.R., Mar, 1999 22-42 and 149-169.

¹⁶⁵ Local Authority Social Services Act 1970, c. 42, §§ 7-7A (Eng.).

¹⁶⁶ *Id.* at 7D.

authority decision is faced with a bewildering array of possibilities and needs to think carefully about which is the most appropriate and likely to be the most effective in any given case. Going to court is enormously expensive and takes a great deal of motivation and tenacity. Invoking any form of remedy requires some impetus and it is entirely likely that many decisions go unchallenged because those whom they affect are unable or unwilling to do so.

Older people and the criminal law

The protective function of the criminal law perhaps traditionally finds expression most readily by conceptualising older people as potential victims. The concept of elder abuse has not formed the subject matter of legislation as such, leaving the matter to be dealt with in a fragmented way by, largely, the existing legal and administrative frameworks.¹⁶⁷ Both words are problematic, with the literature disclosing no agreed definitions which could be translated into legislative form.¹⁶⁸ As a result, as with other areas of English law, there simply exists general legislation into which older victims might be fitted. Various forms of elder abuse, such as causing physical, psychological and financial harm can ordinarily be accommodated within laws creating fatal and non-fatal offences against the person¹⁶⁹ or theft and fraud.¹⁷⁰ The concepts created by the definitions of the various offences are sufficiently broad to cover the major categories of harm likely to be perpetrated. The courts have, on occasion, recognised that age may be a factor that is relevant to a determination of criminal responsibility. *R v Watson*¹⁷¹ serves as an example. This was a case of manslaughter where the victim, an 87 year old man, suffered a fatal heart attack precipitated

¹⁶⁷ See Alison Brammer, *The Law, Social Work Practice and Elder Abuse*, in THE LAW AND SOCIAL WORK 163, 163-174 (Lesley-Anne Cull and Jeremy Roche eds., 2001).

¹⁶⁸ See generally, e.g., Rosalie S. Wolf & Karl A. Pillemer, *Helping Elderly Victims: The Reality of Elder Abuse*, 19 CONTEM. SOC. 710 (Sept. 1990); Action on Elder Abuse, Dep't of Health, Rep. on Project to Establish a Monitoring and reporting Process for Adult Prot. Referrals Made In Accordance With 'No Secrets,' <http://www.dh.gov.uk/assetRoot/04/11/41/14/04114114.pdf> (defining "elder abuse"); Gerald C. Bennett, Paul Kingston & Bridget Penhale, *The Dimensions of Elder Abuse: Perspective for Practitioners*, (Macmillan 1997); Alison Brammer & Simon Biggs, *Defining Elder Abuse*, 20 J. Soc. Welfare & Family L. 285, (1998).

¹⁶⁹ See Offences Against the Person Act 1861, 24 & 25 Vict., c. 100, § 18, 20, 47 (Eng.); Sexual Offences Act 2003, c. 42, § 1-3 (Eng.); Also, at common law for offences of murder, assault and battery.

¹⁷⁰ Under the Theft Act 1968, c. 60, § 1(Eng.), Fraud Act 2006, c. 35, § 1-5(Eng.).

¹⁷¹ [1989] 1 W.L.R. 684. The notion that a person takes his victim as he finds him would mean that if injuries inflicted on an older person were more severe than would be the case with a younger victim, for example because of frailty or brittle bones, the offender is liable for the full extent of the injuries caused even if they go beyond those intended; see generally *R. v. Blaue* [1975] 1 W.L.R. 1411.

by a burglary. The Court of Appeal recognised the effect of such an occurrence on a vulnerable person by holding the defendants liable on the basis that they could recognise the victim's vulnerability by reason of his advanced age and frailty. The relevance of such issues to liability is, however, limited and the law has not generally embraced age as a factor in criminal liability. Perhaps the creation of aggravated offences when committed against older people might send out a stronger signal of society's denunciation of crimes against the elderly.¹⁷²

An area of particular current controversy relates to euthanasia. A person cannot consent to his or her death, and therefore assisted suicide is an offence of murder or manslaughter depending on the circumstances.¹⁷³ Under the little used Suicide Act 1961, killing in pursuance of a suicide pact is manslaughter rather than murder.¹⁷⁴ The reform of the law on mental capacity under the Mental Capacity Act 2005, discussed above, in giving effect to advance decisions to refuse treatment, has raised the controversy of the danger of influencing older people to agree to forego treatment, a fear not allayed by the recent reintroduction of a Bill¹⁷⁵ to legalise assisted suicide. Taken in tandem, these measures have created a regime not specifically directed to older people but capable of having a particular impact upon them and caused alarm in some quarters concerning the potential for abuse.

Greater difficulty, however, attaches to issues of evidence. Where the activities take place in a domestic setting, there may be a family relationship in which the older person is both financially and otherwise dependent on other members of the household. This may lead to reluctance on the part of the older victim to report abuse because of fear of the possible consequences for the victim herself or for other members of her family. Reporting sexual abuse may be particularly difficult, not to say distasteful, to the victim, perhaps even more so than with a younger victim. There is also the issue of credibility, especially

¹⁷² Cf. Offences Against the Person Act 1861, *supra* note 169 and Crime and Disorder Act 1998, c. 37, § 31 (Eng.) (comparing the range of aggravated assaults in the Offences Against the Person Act 1861, though a better model would be racially aggravated offences: Crime and Disorder Act 1998, § 31 designates certain offences as capable of being racially aggravated, the effect of this being that they attract a higher penalty).

¹⁷³ *R (on the Application of Pretty) v DPP*, [2002] 1 All E.R. 1 (affirmed in effect by the European Court of Human Rights on the basis that the right to life in Article 2 of the European Convention on Human Rights does not include the right to die), *aff'd*, *Pretty v United Kingdom* [2002] 2 F.L.R. 45.

¹⁷⁴ David Ormerod, *Smith and Hogan Criminal Law* 493-497 (11th ed. Oxford Univ. Press 2005) (discussing further this provision).

¹⁷⁵ Assisted Dying for the Terminally Ill Bill, 2005, Bill [36] (Gr. Brit.) (introduced as a private member's bill by Lord Joffe on November 9, 2005, which would allow the terminally ill to seek and obtain assistance to end their lives, subject to procedural safeguards to prevent abuse, especially in the form of coercion). At the time of writing, this had not been passed into law by Parliament.

where there are no other witnesses or corroborative evidence (as will often be the case with domestic incidents), any injuries are consistent with non-criminal activity or there is some doubt about the mental capacity of the victim. Criminal law in the UK is also based on principles of individual responsibility.¹⁷⁶ Thus, where there is more than one member of the household, identifying an individual perpetrator or perpetrators might be difficult. However, there are principled objections to aggregating liability where more than one person may have been involved. Recent legislation¹⁷⁷ has sought to address this particular difficulty by providing that, in cases of homicide, where it is clear that the death of a vulnerable adult has occurred and that the perpetrator must have been one or other members of the household, then a form of collective responsibility can be applied to hold each apparent perpetrator responsible.¹⁷⁸ While a very limited and not uncontroversial measure, it remains to be seen how this works in practice; it is as yet too early to tell. A further issue relates to the requirement that specific incidents must form the basis of any case brought. Again, in an attempt to address this, incidents may be taken selectively or aggregated where violence occurs, and again it remains to be seen how this new legislation will operate.

The discussion thus far has related to an older victim in a domestic setting. It is entirely possible that such criminality can occur in institutional settings. The safeguards are greater, for example, in the regulatory regimes of such residences and the vetting of staff which should reduce potential risks.¹⁷⁹ Nonetheless, the evidential points alluded to above apply with equal force here. Both scenarios are located in private space crime, and there is a danger of the discourse of the older victim being located primarily or totally in this setting, this neglecting the impact of public space crime on older people.¹⁸⁰

Further, the concentration on older people as victims may deflect from the discussion of older people as perpetrators of crime and to address any particular considerations relating to them. This, it has been argued,¹⁸¹ constructs older people as welfare victims rather than criminals, thus disguising the true nature of their behaviour. In terms of

¹⁷⁶ See generally Ormerod, *op. cit.*, *supra* note 174; William Wilson, *Central Issues in Criminal Theory* (Hart Publ'g Ltd. 2002).

¹⁷⁷ Domestic Violence, Crime and Victims Act 2004, c. 28, § 5 (Eng.); see generally Richard Ward & Roger Bird, *Domestic Violence, Crime and Victims Act 2004: A Practitioner's Guide* (Jordans Ltd. 2005).

¹⁷⁸ See Domestic Crime and Victims Act 2004, §§ 6 & 6.

¹⁷⁹ See Care Standards Act 2000, *supra* note 142; see also Commn. for Soc. Care Inspec., *The State of Social Care in England 2004-05* (Dec. 2005), http://www.csci.org.uk/PDF/state_social_care_a.pdf.

¹⁸⁰ See generally Mike Brogden & Preet Nijhar, *Crime, Abuse and the Elderly* (Willan Publ'g 2000).

¹⁸¹ *Id.* at 37.

criminal activity, while potentially there is no limit on the offences that may be committed by older people, in practice they are responsible for a smaller range of offences than their younger counterparts. Potential areas of growth have been in increasing incidences of neighbour disputes and regulatory offences, rather than in areas of traditional criminality.¹⁸² There are also issues that may arise in relation to process. The legislation covering both the investigative and trial stages of the criminal process¹⁸³ make little specific mention of the position of older people, focusing instead on more generic features such as capacity, vulnerability and disability.¹⁸⁴ At the more punitive end of the post sentencing stage, there is an issue of the ability of prisons to cope with older inmates and of such inmates surviving in an environment designed essentially for younger and more able-bodied offenders.

Conclusion

The picture that emerges from the foregoing, admittedly selective, discussion is that there is no coherent body of law that can properly be described as elder law, nor is there a consistent policy with regard to older people at an official level. First, the law that does exist and is applicable to older people is fragmented. It derives from statutes and cases across the whole gamut of legal provision with very little targeted specifically with older people in mind. Rather, the law tends to be based on concepts into which older people might fit, but fit along with others. There is some evidence of a more focused approach in some emerging areas such as the forthcoming age discrimination Regulations which are due to come into force in late 2006 and are, in many respects, age neutral.¹⁸⁵ But, as we have seen, this is a limited development. Second, for the rest, the law is based on differing, and sometimes conflicting, premises. Thus, we have seen how, for example, the law seeks to promote autonomy while elsewhere creating dependency; it characterises older people as both actors and victims; or as producers and consumers of wealth. Resolving such tensions is a considerable task, but is one that, given the demographic changes highlighted at the outset, legislators cannot continue to ignore.

¹⁸² *Id.* at 125.

¹⁸³ Principally the Police and Criminal Evidence Act 1984, c. 60 (Eng.), (as amended) and the associated Codes of Practice.

¹⁸⁴ See, e.g., *id.* at Code C, Part II (Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers), <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACECodeCH.pdf?view=Binary>.

¹⁸⁵ The Employment Equality (Age) Regulations, 2006, 1031 (U.K.).