

Putting Age Discrimination on the Map

Legal protection from unjustifiable age discrimination is a relatively new development and is only available in relatively few jurisdictions around the world. It has taken decades of activism to reach the point which we are at now of recognising the prevalence of prejudicial age-based stereotypes in everyday life and the need to legislate to prohibit them. Yet still, all too often a person's age continues to be a factor in overlooking them for a job, refusing them full access to healthcare or denying them opportunities for further education. There is much work to do.

However, cognisance of the negative impacts of age discrimination is increasing and corresponding legal protections spreading. For example, there is burgeoning activism at the national level to improve on or introduce legislation prohibiting age discrimination and the calls to adopt an international convention on the rights of elder persons are getting louder and more numerous.

ERT spoke with two experts on age discrimination, both of whom have been instrumental in putting age discrimination issues on the map. Robin Allen QC is Head of Cloisters Barristers' Chambers and a former consultant to Age UK and Help Age International, and Alexandre Kalache is President of the International Longevity Centre in Brazil and Global Ambassador on Ageing for HelpAge International.

ERT: You are widely recognised for your expertise in age discrimination. How did you become involved in this area? What life experiences and major influences played a role in getting you to your present position?

Robin Allen: It has been a journey and one which I am hoping still has a long way to go!

Working as an equality lawyer since the late 1970s I have been very fortunate to have been involved with some of the key moments in the development of equality law in Europe and the UK, and also wider.

The Amsterdam Treaty was the most significant moment when “age” became recognised across Europe as an aspect of individuality entitled to specific protection from discrimination.¹ The Amsterdam Treaty amended the EC Treaty introducing a new Article 13 – now Article 19 of the Treaty on the Function of the European Union – that empowered the Council to legislate to give detailed protection. It was not initially clear how that power should best be used. In 1998 I was asked by the European Commission to help think about this. I wrote the key note speech for a Commission conference in Vienna that year which sketched out what I thought should



and could be done with Article 13.² This informed the Commission's proposals for Race and Framework Directives which were announced at the Conference and which became the Directives of 2000.³

However, to be frank, at the time I was very aware that there was a huge amount of work to be done on all areas and that perhaps age was the least developed ground. I was however particularly concerned that Europe did not take the same approach to age as the United States had in enacting the Age Discrimination in Employment Act 1967 (ADEA) by prohibiting employment discrimination only against persons aged 40 years or older. I wanted to see age as a protected ground at all ages, and I am glad to say the Commission took this line in the Framework Directive 2000/78/EC and of course subsequently in the Charter of Fundamental Rights in the same year.

At almost exactly the same time I became involved in some litigation in the UK which sought to challenge the age limitation on protection from unfair dismissal, which was then set at age 65. I had been prompted to be involved in this by two things.

Firstly there had been litigation to equalise the age at which protection was lost for men and women not long before. You will recall that the European Court of Justice in 1993 in *Marshall v Southampton and South West Hampshire AHA (1)*⁴ held that the UK were acting in a discriminatory way in legislating different ages at which men and women lost protection. That case led to harmonising legislation but it always seemed to me that it was unfair and wrong to have any limitation *at all* by reference to age. (I was not alone. Alice Leonard, then chief legal officer at the Equal Opportunities Commission discussed this with me and was keen to see change too.) I was well aware that the rule was based on a stereotype about competence and need. But if a person could be fairly dismissed on grounds of incapacity before they reached 65, I really could not see the reason for not permitting them to work on subject to the same process thereafter. I am well aware that some people think that this is undignified, but I disagree. I think it is more undignified to be shown the door against your wishes without redress even though you are still fit to work.

So this case got me thinking what could be done to change this.

Something else provided an added urgency to my thinking. Some barristers in my chambers focus on clinical negligence cases where knowledge of the statistical tables on expected longevity is essential. These barristers need to be aware of the change in the expected longevity each year in order to prepare schedules of loss and information on this was regularly available at work.

By the late 1990s it had become quite clear to me that not only was longevity increasing fast but in fact the rate of increase was accelerating. That made me resolved to see what

could be done to get rid of the age 65 cap as soon as possible.

As we had no age equality laws we had to see what could be done with other equality laws. With the help of the charity Age Concern (the predecessor to Age UK), and also two other barristers – Rachel Crasnow of Cloisters and Paul Troop of Toops Court Chambers, I brought a case which sought to challenge the rule as being indirectly discriminatory against men. The basic argument was that it hit men harder than women because men left the labour market about 5–8 years later on average than women and therefore many more men than women worked beyond 65. Statistically this was all entirely true.

This litigation eventually arrived in the House of Lords in 2006,⁵ then the highest court in the UK. Sadly the judges did not like my approach to the statistics and, although we had been successful at first instance, ultimately we lost.⁶ The House of Lords was not prepared to bring the case within sex discrimination law but they did recognise that it might potentially be age discrimination when the Framework Directive was transposed into UK law.

The case was argued in March 2006 and that was the very moment the UK was consulting on how it should transpose the Framework Directive in relation to age. It actually made the Employment Equality (Age) Regulations 2006 on 3 April 2006 just after.

It will be recalled that the Framework Directive gave member states a power to derogate from their obligations otherwise to provide universal protection from age discrimination.⁷ The UK decided when making these 2006 Regulations to take advantage of this power. The Regulations thus introduced afresh a default retirement age at 65 after

which employees had effectively no protection from age discrimination. The discussions about this had been going on for some time and I must now go back a few months to the start of the consultation.

The previous year when the consultation was commenced I had met with two friends who then worked for Age Concern – Andy Harrop and Richard Baker. We had decided that we should campaign hard for the abolition of the old 65 rule and against its reintroduction in a new form in the new Regulations. Age Concern led on the political side and had an undoubted partial success since the government announced that the new provision would be subject to review in 2012. Undeterred by the outcome in the House of Lords, indeed spurred on by the suggestion that this might be age discrimination, we resolved that we should do all we could to force the hand of government to bring this restriction to an end.

We had a two pronged strategy – on the one hand we aimed to make employers see the default retirement provisions in the 2006 Regulations was not necessary and on the other we aimed, through a sustained legal challenge, to create uncertainty as to whether this derogation was even lawful.⁸ The purpose of this second aim was to encourage employers to face up to this uncertainty by trying out what it would be like to run their businesses without the benefit of the provision.

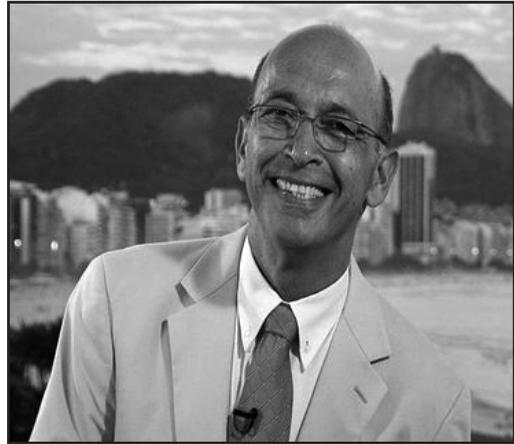
I am of course delighted that the campaign was successful.⁹ As a result of the campaign the government brought forward its review and abolished the default rule with final effect from 1 October 2011.

There are some other aspects to this journey which are also very important.

My work with Richard Baker at Age Concern introduced me to Age Europe and other campaigners for age equality across Europe. Age Europe asked me to draft a proposal for a new Directive to outlaw age discrimination in relation to goods, facilities and services.¹⁰ This work made me think much more deeply about the need to protect against age discrimination in relation to goods, facilities and services and how and why we use age as a proxy. The Directive has played its part in contributing to the debate on a general goods and services directive which is ongoing at present and which has been given some added impetus this year.

More recently I have worked with Age UK and HelpAge International in relation to the proposal for a UN Convention for the rights of Elder Persons and this has brought me into contact with a much wider debate.¹¹ However, I am not just interested in older persons' rights but also in the necessary balance between older and younger persons. I have recently been undertaking¹² some really interesting work with the Northern Ireland Equalities Commission and the Northern Ireland Children's Commissioner on proposals to ensure that in Northern Ireland age discrimination (at least in relation to goods, facilities and services) is outlawed both below and above the age of 18.¹³ This has made me think much harder about the nature of this concept across the full age range.

Alexandre Kalache: Experiences from my youth played a large role in igniting my interest in the rights of older people. Having grown up in a large and multi-cultural extended family, I was constantly surrounded by fascinating older relatives. As a child I chose to spend much of my time with these older people rather than with children my own age. They were wonderful storytellers and I loved to listen to the first hand tales



from their lives spent living in different times and different cultures. When I was a teenager, my grandmother became ill with terminal cancer. She was cared for at home by the family for three years, rarely visiting the hospital. As I was destined to become the doctor in the family, it was natural for me to be very involved in her care – from small tasks like feeding her to giving her injections ... even playing the piano to calm her down. This was a very profound experience for me and had a huge influence on my later life choices.

I began medical school during the first year of the military dictatorship in Brazil. During this period, I discovered politics, initially through the social doctrine of the Catholic Church (what became known as “liberation theology”), and became passionate about a number of particular social projects in the *favelas*. I was elected Student Union President during my time at university and, through the late 1960s and the 1970s, I was actively involved in the strong opposition to the dictatorship.

After graduating from medical school in Brazil, I found that it was difficult to find a job in public health given that I was reluctant to

work for the government, so I went to Britain to gain post-graduate training in social medicine. Witnessing the very different age structure in Britain, which at that time was infinitely older than the population structure in Brazil, opened my eyes. In this period it was difficult to talk about global ageing as population ageing was considered to be a phenomenon that only related to developed countries, and not to developing ones. I decided to pursue a career in this area. Initially, I played the role of an activist, trying to raise awareness of the huge implications arising from the inevitable ageing of developing country populations. Later, when I took up a Directorship at the World Health Organisation, I had a global platform to try to influence change and to champion the rights of older people. I used this role to make it very clear at the United Nations World Assembly on Ageing which took place in Madrid in 2002 that what was needed was to move beyond the standard *needs based approach* towards a much more appropriate *rights based approach*. In the aftermath of a milestone international Conference in Brasilia in 2008 the rights of older people have become a priority for many organisations and countries. It was at this conference that the call for a UN Convention on the Rights of Older Persons was loudly expressed for the first time. In order to move forward on this however, there still needs to be a massive worldwide cultural shift. An ageing population is a social triumph and should be viewed as such.

ERT: What do you observe to be the public perception of the concept of age discrimination in your country? And what do you observe the government's attitude to it to be?

Robin Allen: In my view the public perception of the need for age equality is not yet very profound but it is particularly dynamic. Let me illustrate just how dynamic.

When the government introduced the 2006 Regulations it was generally only in a few exceptional cases that businesses thought that they should actually seek to hire older workers and the general view was that the default retirement age was not merely necessary but was generally desirable as marking an acceptable end to working life. However by the time the default retirement age was removed by legislation this view had changed radically. This can be seen in a survey of employers in *Personnel Today* on 31 May 2011¹⁴ as to their wish to use the power given by the amending legislation to continue, on a firm by firm basis, to have an “employer justified retirement age”. The headline said it all: “More than two-thirds of employers (...) intend to allow their employees to retire whenever they wish, following the abolition of the default retirement age”

This reflected a sea of change in attitudes over a mere five year period. All the old certainties about employment having to have a finite end seemed to have crumbled during the campaign we had launched as the reality of increased longevity dawned.

On the other hand I do not think that the public understand the idea of the lump of labour fallacy¹⁵ nor do they have much idea of what is involved in intergenerational fairness.

And I very much doubt that many older people think that age equality is a principle that applies to younger people just as much as it applies to older people but on the other hand I am more sure that the reverse is true: sometimes younger persons can be more generous about this!

Perhaps making generalisations like this is less important than noting that the debate is beginning to develop on a broader basis, from the concerns expressed about

the treatment by the BBC of its older staff – the treatment of Miriam O’Reilly really brought attitudes to older women in the media to the fore – to the discussion of the less favourable treatment that young people face without any apparent justification.¹⁶ There is even a “foundation” for intergenerational fairness.¹⁷

Turning to the government’s attitudes, the picture is one of deeper consideration but there is little evidence of a truly coherent strategy. Indeed it is fair to say that despite some really impressive work being done on the consequences of increased longevity there has been little deep thinking about the right way to balance the allocation of resources for social goods between different age groups. I doubt that any minister could answer the question: On what basis should a public authority decide whether to spend a given sum of money on advantages for older persons such as bus passes, free entries, or a universal winter fuel allowance rather than on younger persons in need of assistance in finding new homes or jobs?

The most important work done by government and Parliament has essentially focussed on making national pensions policy work without scaring the electorate too much.¹⁸ The new pensions legislation has reflected this need without stating, what is an undoubted fact, that no legislation can get this right once and for all and that with the current rate of advance in medical science it is more than likely that new pension age rules will be necessary.

Alexandre Kalache: Until recently, in relative terms, there were few older people in Brazil. The population was young and there was little in the way of social policy focusing specifically on older people. Ageing was not seen as a priority be-

cause the care for the small population of older people was absorbed by the large extended families and in particular, by the women who were expected to stay at home to provide it. Recently however, there has been a rapid increase in the numbers of older Brazilians together with a dramatic change in the family structure. Fewer relatives within families are able or willing to provide care. Brazilian society has not yet absorbed the full implications of these changes. Although there is general public agreement that older people’s needs must be adequately met, the problem is that there is not enough time, and the resources are scarce to replace family care with public sector care.

Over the last 10-12 years, the Brazilian government has increased the emphasis on human rights and taken significant steps to reduce inequality for the entire population. Focus has been placed on the fight to reduce the social gap and inequalities for groups such as women, children and indigenous people.

The protection afforded to older people is greater following the 2003 Elders’ Bill of Rights. The legal framework in place in Brazil provides far better theoretical protection to the rights of older people than the equivalent in many developed countries. Brazil has two critical ingredients in relation to older people that are lacking even in most developed countries. We have the Universal Right to Health¹⁹ which is incorporated into the Brazilian Constitution, and this applies whatever the age. It is true that the public health sector is not as good as it should be, but the fact that the citizen has a stated right to health care regardless of age is providing older Brazilians with far greater reassurance and access to health services. In the past this had been left to the charity sector or the rather unreliable be-

nevolence of the employer. The second important factor which has been consolidated over the past 15 years is the provision of a universal pension. Previously, older people were often completely dependent on their families lacking even a basic income to provide for their immediate needs. As a result of an old age pension that is not linked to formal work contributions, older Brazilians, and in particular poorer older Brazilians, today have a stable and regular income that younger members of their family may not. Clearly, this confers both a degree of autonomy and protection for the individual but it has also resulted in impressive gains in poverty reduction throughout the entire community. Despite these welcome changes however, over the last few years, it seems that the Brazilian government largely perceives inequality in the country to be concentrated among younger women and children. In my opinion, the government is currently neglecting its older citizens, most of whom are also women, because of a lack of specific focus.

ERT: Are there any stereotypes or prejudices that you consider to be particularly harmful?

Robin Allen: Of course there are! Indeed there are so many. People make assumptions about the correlation between a person's age and their health, wealth, wisdom, energy and desire to work, all the time.

While, of course, a statistician can make statements about the way these things change over time, the range of abilities found in any cohort of persons of the same chronological age is huge and so these are very damaging stereotypes when they are misused. I became very aware of this when successfully arguing against the maximum recruitment age used by the National Air Traffic Control

Service.²⁰ Their argument was based on the premise that at around 45 mental capacities diminished and it took 15 years to become an expert so it was necessary to recruit with sufficient time for someone to become expert before their faculties started to diminish. The evidence showed however that the range of mental capacity within the cohort of 45 year olds was much larger than the difference in the mean or median capacities of 44, 45 or 46 year olds. Indeed it was much larger than between 45 and much older persons. In short, this was a useless stereotype.

I suppose that I consider assumptions that youth is always callow and shallow and persons over 60 feeble and slow the most offensive!

Alexandre Kalache: In comparison to most developed countries, I believe that the overall culture in Brazil is more accommodating towards older people. There is a greater inclusiveness generally and people are quicker to express a positive attitude toward older people. Nevertheless, insidious discrimination and negative prejudice towards older people is still widely prevalent. Brazil is a very youth orientated culture. An exaggerated focus on youthful beauty, body and fitness can easily exclude older Brazilians. There is also a very big educational gap in the country. The educational levels of the young are much higher than those of the older population. Many Brazilians wrongly perceive the older population as having little to contribute. Worldwide, older people are still shamelessly stereotyped by the media. They are routinely portrayed as worthless, helpless, dependent, comical or irrelevant. The vast majority of older people cannot recognise themselves in these crude representations. Such stereotyping and harmful exclusion creates a landscape in which negative attitudes and outlooks towards age and older people breed.

ERT: Could you say a bit about how approaches to age discrimination differ around the world? Is there a country that you think is a particularly good example in this respect?

Robin Allen: I would not hold myself out as the greatest expert on comparative age discrimination law but I have collected some knowledge on this in my work with HelpAge International and their campaign with others to persuade the United Nations to produce a Convention on the Rights of Elder Persons. Another reason I have had to consider comparative age discrimination law is because within England, Scotland and Wales we treat persons under 18 as not entitled to be protected from discrimination on grounds of age in the provision of goods, facilities and services and I have been asked to advise in relation to the steps Northern Ireland should take – whether they should impose the same limitation or should go for a universal rule.

Taking the position of older persons first: one thing that has struck me particularly is that although we in the UK and in Western Europe, when talking about older persons' rights, tend to think about persons of pensionable age, in many countries of the world the majority of the population still have little prospect of reaching their 60s let alone their 80s or 90s. This leads to some very odd results where legislation defines aged persons or elders as being over 60 because in many parts of the world most people will never benefit from these rights. I have been very impressed with the way in which the South American countries haven taken a strong lead in the definition of older persons' rights. I am also very impressed with the lead taken by Australia,²¹ Canada²² and Belgium²³ in extending the protection from discrimination on grounds of age in relation to younger persons.

In Australia, there is a specific Age Discrimination Commissioner²⁴ and I would really like to see the establishment of an office of Age Discrimination Commissioner here in the UK as well. To have a specific Commissioner working in this field would provide a real focus for change and the discussion of new norms and ways of approaching the really difficult issues ahead.

In Belgium there is also an important discussion on the extent of, and rationale for, age discrimination.²⁵

Alexandre Kalache: I cannot accurately single out any one country that provides an ideal example. Obviously, countries which have a highly developed welfare system are better placed to provide equitable care for their older citizens. It must be borne in mind however, that these countries tend to be richer and have also had much longer to adapt themselves to their ageing populations. Developing countries have had neither the resources nor the luxury of time to respond to their much faster ageing demographics by building such comprehensive systems.

Even within these comprehensive systems in the developed world, there is still very evident and very insidious discrimination. Practical realities within these systems of care routinely illustrate a pervasive cultural prejudice towards older citizens. The care for older persons in developed countries is typically provided by medical and ancillary staff who are recent immigrants – many of whom do not share the same cultural understandings as their patients. Additionally, jobs within geriatric care are often more poorly paid than elsewhere in the health system and are more likely to be filled by less skilled and often less satisfied staff. In my view, geriatric care in most developing countries remains the least considered part

of the system, which in itself is a reflection of a more widespread discrimination. In a multi-centered research I conducted some ten years ago while still working at the World Health Organisation – which we appropriately, I think, called “Missing Voices” – older people referred to this as “institutional abuse and neglect”, pervasive, difficult to pinpoint and yet powerful, eroding one’s self-esteem, self-confidence and dignity.

No legally binding international convention to specifically protect the rights of older people exists. There are specific UN conventions implemented to protect the rights of groups such as women, children, immigrants, and the disabled and indigenous people. Paradoxically, the fastest growing population sub-group, and arguably the most vulnerable, lacks any such internationally agreed legal mechanisms to protect them. To date, most developed countries oppose the notion of such a tailored convention at UN level to protect the rights of older people. To my mind, the high-minded arguments against the proposal basically come down to one thing: ageism. By leading the call for such a convention, developing countries such as Argentina, Brazil, Chile and Uruguay have shown more of a commitment to protect the rights of older people. It is no accident that these countries now attach great importance to the issue of human rights given the transgressions of their recent history when they were plagued with military dictatorships.

ERT: How effective do you think legislation is/will be in bringing about change in your country and beyond?

Robin Allen: There are two great drivers for legislation – the desire of all humans (politicians included!) for a more profound human dignity and economics. In the case of age equality these two are working together

to force nations to confront the issues I have been discussing. The question is whether the academic work, the public discourse, the technical work necessary for public administration and the interests of politicians will enable legislation to really get to grips with these issues. The position in the UK is mixed. The abolition of the default retirement age was a triumph but it has been swiftly followed by a much more mixed picture in relation to the protection from discrimination in the provision of goods, facilities and services. It is of course good news that the UK government introduced subordinate legislation to make the promise of protection in the Equality Act 2010 more real.²⁶ However, that new legislation contains a myriad of exceptions.²⁷ Most importantly the government has almost totally failed to protect from age discrimination in relation to financial services. Yet this is an area in which age discrimination is endemic and rarely if ever justified on any acceptable basis. It will have to be confronted sooner or later. I think this exception was a consequence of timidity in the face of the banks and insurance companies and poor political leadership. This has to be challenged.

Alexandre Kalache: Progress such as the creation of the UN Principles for Older Persons and the establishment of an International Day for Older Persons were important. Not only have they brought about an evolution of the relevant principles but have also brought the subject to the forefront in Brazil and other countries.

With regard to the potential for laws to bring about effective change, there are differences of opinion. Developed countries are arguing that current international laws are sufficient. Their view is that the only gap is one of implementation and that there is no need to create new laws for the protection of older people.

I and others argue that unless we address the specific rights of older persons, they are going to be ignored. The problem with relying solely on the non-legally binding Principles to provide protection is that they are not enforceable. Countries can easily choose to ignore them. In practice we need specific protections enshrined in a single legal framework. Unless there are sanctions available to be imposed on countries that fail to observe legally enforceable rights, I do not believe that substantive progress can be made.

ERT: To what extent do you think that the linear nature of age makes this protected characteristic different from others in discrimination law? Should it be treated differently and if so, how?

Robin Allen: Well, we know that within European Union law direct age discrimination may be rendered justifiable. This exception to the general rule that direct discrimination is not justified in Union law can be attributed to the linear nature of age. There are two aspects of this that might be mentioned.

The linear nature of age has been used as a predictive tool in relation to statistical truths about, for instance, the correlation between age and some illnesses. So while age stereotypes are frequently objectionable when applied without consideration to personal characteristics, they are also deployed to great advantage in, for instance, the design of public health campaigns.

The second aspect is the use to which the linear aspect of age as a characteristic has been used as a proxy for length of service or length of enjoyment of a benefit and so on.

So in short the fact that we more readily accept that direct age discrimination may be justified is indeed a reflection of this aspect.

The American jurisprudence has certainly taken note of the linear basis of age and has imposed a lesser burden of proof not requiring strict scrutiny.²⁸ There is some indication that our judges will take a similar approach,²⁹ though I think that this would be regrettable. The Supreme Court of the Republic of Ireland has also considered this point.³⁰ However this is less evident in the jurisprudence of the Court of Justice of the European Union (CJEU) where age equality is seen as a fundamental right.³¹ So there may be a looming debate about this among jurists.

Alexandre Kalache: The linear nature of age implies that every age is different and is affected by different issues and discriminations. Many of the issues that affect an individual in their 20s are certainly not the same as those that affect an individual in their 60s, or 80s. I believe that an awareness of this specificity is important. Of course, older people are not a homogeneous group. They are in fact more diverse than younger people as they have had more years to accumulate differences. They have also had more time to accumulate disadvantages alongside any advantages and this is a process that begins at the earliest stages of life. We do not suddenly arrive at old age. Nor do we become different people at the onset of older age. But, as older people, we are subject to specific cultural forces.

The Bismark Pension trap provides an example of discrimination based on the linear nature of age. The scheme was developed in the 19th Century in Germany and established retirement at the age of 65. It was a suitable response at a time when life expectancy, even in a rich country such as Germany, was not much higher than 40 years. Only a small number of people would reach the age of 65 due to prevailing poverty, lack of sanitation, poor education and ineffective medical care.

Some 130 years later, this retirement age is still being used as the default in most countries despite the dramatic and almost universal rise in life expectancy. For example a child born in Germany today can expect to live more than 80 years. To reach older age is no longer the exception but the norm. Not only are many more people now living considerably longer but they are also doing so in much better health and with much more sophisticated skills. Society however, has not yet come to terms with the change in paradigm. We are still locked into a 19th century mindset. Far too many healthy older people with precious professional skills throughout the world are simply discarded as the result of an outdated and entirely arbitrary chronological age. It is discrimination not based on talent or ability but on the number of years lived. To my mind, this is an absurdity.

ERT: What, in your view, is the best way to approach issues of age discrimination against children?

Robin Allen: I believe profoundly in the principle of equality before the law expounded in the Universal Declaration of Human Rights. On that basis I am very clearly of the view that children and young persons must benefit from the same laws in relation to protection from age discrimination as adults. Politicians that think otherwise diminish the potency of the laws that they enact by building into their enactments, not a paradox, but a confusion. A law against age discrimination should not operate on an age discriminatory basis. This is the fault with the American ADEA.

Consider how this works in our current laws: a person aged 19 may be refused entry to a club because he is under the 25 age limit applied by the owner and he or she has a claim, but their sibling aged 17.11, barred at the

same time as them does not. They both suffer the same indignity and any justification for an age 25 rule ought to be established not merely for 18 – 24.11 year olds. What possible reason justifies this kind of distinction? The truth is that there was a lack of political will to confront such an absurd result and this demonstrates how far we have to go in order to address the problem of age discrimination profoundly.

Take another problem: child mental health. At present there is evidence that – in some parts of the United Kingdom at least – there is a disproportion in the allocation of resources to address the mental health problems of those under 18 as compared with over that age.³² An under 18 has no right to sue in relation to this under the existing age legislation. They may of course have a claim under the Human Rights Act 1998 but the fact of the exclusion of under 18s from our specific protective legislation creates either a false or deeply undesirable normative position. However, I also think that the work done by our Children’s Commissioners in highlighting the less favourable treatment of children and young persons is enormously important and has in many places begun to set the tone of public debate. I applaud what has been achieved by the Commissioners. I must also acknowledge how much the UN Convention on the Rights of the Child has contributed in this field as well. Moreover, the highest courts now recognise that the provisions of this Convention are essentially *ius cogens*.³³

I would not want to undermine the work done by these Commissioners for a moment, nor would I wish to downplay the importance of this UN Convention. My key concern is that it is ridiculous to create an artificial boundary at 18 between the different classes of rights. The need for special

protection at certain ages does not for a minute justify a failure to create a harmonised age equality law.

Alexandre Kalache: I believe that the best way to approach this issue is to deal with it separately. Some values are universal and we have the general principles arising from the Universal Declaration of Human Rights that apply to everybody regardless of age. It should be noted that the Declaration was created in 1948, when the prevailing age structure in both developed and developing countries was composed of a large predominance of children.

However, I think that because of particular or unique features, some groups need special targeted protection. It was this focused attention that led to the creation of the UN Convention on the Rights of the Child which contains specific provisions designed to protect children from sexual and labour abuse amongst other things.

I think that it is vital to have a mix of strong general human rights principles and laws that apply to everybody that can be used in conjunction with a tailored rights framework designed to prevent discrimination against specific groups, age-groups included.

ERT: What are some of the age-related issues in relation to recruitment, pay and working conditions in your country?

Robin Allen: There are many and each day more emerge. What follows is therefore not offered as a definitive list but includes some of the problems that I consider to be particularly important if not necessarily particularly problematic!

First there is a really interesting problem concerning change. As employers and unions

confront the need to avoid age discrimination they have had to revisit collective agreements and old established working practices. Many of these contain provisions which are *prima facie* discriminatory. Identifying this possibility is one thing but remedying it can be quite another. Is it enough to maintain a progressive direction of travel when trying to change these or must all discrimination be eradicated forthwith? This has been a particularly thorny problem in Germany where many collective agreements have contained detailed discriminatory provisions and where expectations and, in some cases, budgets and other forms of financial planning have been built around these. The extended period of six years that states were given for transposition of the Framework Directive was meant to allow for this to be addressed but it seems that it has not always been enough.

For what it is worth in my view the CJEU should be more intolerant of these difficulties. It is really important that its normative stance on age discrimination should not be watered down.

Secondly, I am generally opposed to length of service pay increments. I appeared for the Equality and Human Rights Commission in the gender equal pay case *Cadman v Health & Safety Executive*³⁴ in which the CJEU considered that some such increments might be justified. However, I consider that they have had economic consequences creating a mismatch between value to the firm or public undertaking and the worker's enterprise. I do not deny that there is frequently a good correlation between expertise and length of service but I ask why use length of service as a proxy. Any properly run organisation ought to be able to know the worth of its staff and ought to be alive to an increase in skills that can come but will not necessarily come with increased service.

The next issue that I think is very interesting concerns those situations in which a really good argument can be made for justified age discrimination in order to address a very specific shortage of job opportunities. University posts provide a good example of this.

Finally I think that the dignity arguments – that it is more dignified to avoid confronting failures in job performance or capacity as a person advances to a possible retirement – need much deeper reflection. I acknowledge that provisions which force retirement can prevent the need to address performance issues, but personally I do not accept the dignity argument. Perhaps this is a long way around to saying that I think that my client Mr Seldon had a point!³⁵

Beyond these are a range of issues such as the use of age as a proxy for continued health where there is a specific health and safety issue such as in flying planes and driving trains, redundancy policy issues, life assurance provision and of course the general trend from final salary to career average pensions.

Alexandre Kalache: Until recently, there was no legal framework to prohibit discrimination in recruitment at all. It was commonplace to see job adverts which unashamedly stated “no over 40s” for example. An improvement in laws in many places has helped to ensure that this is no longer admissible. However, age discriminatory practices in hiring still persist. For example, it is still routine for recruiters to reject potential candidates on the basis of a photograph, date of birth or a “too lengthy” job history.

Therefore, whilst it is vital to ensure that legal protections are in place, it is also necessary to begin the slow process of changing the attitudes of society as a whole. Employers, recruitment and human resources

personnel, along with the rest of us, need a much greater understanding of the realities and nature of contemporary ageing. This process must begin early. It requires school and university students to be exposed to positive images of older people. The vast majority of older people are not in the geriatric ward – and yet medical students are seldom exposed to older patients outside of that context. We should aim to expose younger people to the communities where older people actually live and are active. Intergenerational exchanges and other methods really can help to foster the necessary shift in attitudes.

ERT: Are there any issues within the employment context which raise concerns about discrimination against younger people or children?

Robin Allen: I have already mentioned that the exclusion of those under 18 from protection from age discrimination is a breach of the principle of equality before the law in the field of goods, facilities and services, is not justified and should be removed. I do not like the statutory exclusion of the national minimum wage legislation.³⁶

Alexandre Kalache: In terms of recruitment, the main problem faced by younger job applicants in Brazil is that they are often lacking in adequate training and skills. I am ashamed to say that the education and vocational system in my country continues to fail a very large proportion of young people. It is not youth that excludes younger people from job opportunities in Brazil, but rather a lack of preparedness that policy makers must urgently address.

It is hard to gauge the extent of discrimination against very young workers in Brazil as much of it happens within the context of informal or illegal employment and as such

is often below the radar of many measurements. It is fair to say that recent governments have been more proactive in addressing many of the abuses relating to youth and child exploitation.

ERT: What, in your view, is the impact of the prohibition of age discrimination on the regulation of retirement and pensions?

Robin Allen: This is a very big question which in part I have already answered. The abolition of the default retirement age provisions has been enormously important. Now employers have to have specific job related justifications and what is more, because of the litigation in *Seldon* and the judgment of the Supreme Court in that case, we know that all justifications for direct discrimination have to be rooted in the social policy aims of the state. However, as Lady Hale pointed out in *Seldon*, these may conflict.³⁷ Moreover, the social policy of the state in relation to retirement and pensions is undoubtedly somewhat fluid. The state wants employers to have a high degree of freedom to run their businesses as they want but on the other hand it wants employees to save as much as possible so that for as long as possible they will be able to finance themselves in retirement.

To a large extent it seems that the state wishes to will the end without legislating significantly to secure the means to achieve that end.

What does this mean in the longer run? In my view it means that it ought to be harder to justify a forced retirement policy as the need to earn to secure a retired future increases. The only way to offset this argument is by better pension provision. Here the move to pensions policies based on creating an employment opportunity linked not to the crea-

tion of a defined benefit but a defined fund may become increasingly important. Obviously final salary schemes will disappear sooner or later from the private sector and I suspect also from the public.

Alexandre Kalache: There is a huge impact and this can be seen in countries that have already abolished the mandatory retirement age. It is important to respect an individual's right to continue to work as well as their right to stop working. The right to stop is a very important part of this conversation. For many people working in boring, demeaning, physically arduous or repetitive jobs, an increase in the mandatory retirement age would be harmful and unfair; although, neither should this right to stop working arise unsustainably early. Sustainability is, in fact, the operative word. The responses to the *longevity revolution*, such as the consideration of the raising of pension ages, need to be carefully calibrated and implemented in conjunction with much more imaginative and graduated retirement options.

In respecting the right to work, a priority must also be given to the right to continuing education as it provides an opportunity for retraining or reinvigoration to face another 5 to 10 more years in the workforce. There are people below the age of 65 that, despite being competent enough to continue working, have not been offered the opportunities that open new doors, allowing them to pursue new interests and to learn new skills and therefore they have no desire to continue working. All people, including older people, have greater job satisfaction and higher productivity if they feel a sense of relevance in their work and this comes with on-going training. Continuing education must be seen as a very important response to the longevity revolution that will result in both enormous individual and societal gain.

ERT: What are the key issues surrounding age discrimination in health/social care?

Robin Allen: There are two key issues. The first concerns the fair distribution of resources between different age groups; this is an issue of intergenerational fairness. The second is the issue of appropriate generalisations as a basis for the formation of policy. They are of course interconnected but it is better to consider them separately first to see how they work.

Health and social care needs must be met and in most cases the state is not merely the provider of last resort but essentially the guardian of proper provision. Accordingly, a budget has to be fixed for this, whether on a yearly programme or rolling basis. Equality in the use of this budget is essential and this is a very difficult issue. Age is not the only relevant protected characteristic; gender and disability and race are also often highly relevant. That is why the public sector Equality Duty is so important in this area. However, from my perspective, public administration has not begun to take age equality seriously in this area and much more work will have to be done.

I have not specifically mentioned the debate about policies on non-resuscitation, which are often a particular application of specific views on intergenerational fairness. I think that a new approach to intergenerational issues will illuminate this kind of thinking. Indeed in my view it will become increasingly clear that the first and last seven to ten or so years of life have a special importance which cannot be easily valued against other years. Those years at the start of life are well known to provide a foundation for many of our subsequent life chances. The years at the end of life, though obviously they cannot be identified

so rigidly, form the period when our life chances diminish to nothing.

That said, I don't want to suggest that it is never appropriate to use age as the basis for some, indeed many, programmes at other times of life. The health and social care needs of children or of mothers, or Asians at risk of diabetes in their 50s, for instance, are very well known. This means that it is appropriate to use thought through generalisations to frame health care programmes. The key, however, is to avoid rigidity and to ensure that, where appropriate, others not falling into the specifically targeted age group can also benefit.

Alexandre Kalache: There are seemingly contradictory attitudes on this issue. On the one hand, there is a reluctance to provide high quality care to people who are considered too old concurrent with the view that it is too costly and the resources are better spent elsewhere. On the other hand, there is a common attitude that we should prolong life at whatever cost even when there is no longer any prospect of quality of life. I strongly believe in the right of access to appropriate modern health care for people of all ages. I also strongly believe in an individual's right to determine when medical intervention is no longer appropriate. I recently witnessed an example of the negative result of the obsession to prolong life at whatever cost. This was the case of a 91 year old woman who, after a vibrant life, was forced to spend her last months in an intensive care unit. She was entitled to have family around her for only one hour per day. The situation in which she found herself was completely contrary to her wishes. She expressed the view that she had experienced a wonderful life and that all she now wanted was to die in a reassuring environment with her family. She was prevented from doing this and was deprived of

the right to define the manner of the second most significant event of her life. My view is that the right to a dignified death is as intrinsic to humanity as the right to a dignified life. In countries where the health care system is more market driven such as the United States (where 17% of the total GDP is up for grabs), the wide-ranging opportunities for colossal profit in prolonging “life” produces a failure to respect the limits of life.

All people must have both the right to a dignified life and the right to a dignified death but, in the normal course of things, death is an older age event (in Brazil, for example, 75% of deaths now occur at the age of 70 and above). It is for this reason that older people in particular are leading the struggle for empowerment over this issue.

ERT: If age plays a part when professionals make decisions about the care or treatment patients receive, when should this be deemed unlawful?

Robin Allen: I have already outlined my answer to this. Well-researched and justified health and social care programmes which target particularly vulnerable age groups will continue to be necessary and must be lawful until we move to the only imagined world of entirely personal health care!

I do not consider that age is ever relevant to decisions that diminish life chances.

Alexandre Kalache: Age alone should never form the basis of the decisions of medical professionals. Decisions should be based on the quality of life experienced. I would worry about the outcome for people like my mother if such decisions were made on the basis of age discrimination instead of quality of life. My mother is now 95. Until five years ago she was very independent, was

living alone and had full use of her mental faculties. She has recently deteriorated in some health aspects and now requires a carer to assist her but she is still socially active, responsive and continues to enjoy her pets and plays the piano. She still has quality of life and for as long as she does, I will fight to provide her with proper care and protection. Of course there will come a day when she no longer has quality of life and we will have to face that day when it comes.

ERT: How should the prohibition of age discrimination be applied in relation to the regulation of reproductive rights?

Robin Allen: This question engages again with the issue of intergenerational fairness. Many would argue that after a particular age a person has no continuing right to want to become a biological parent. They may well be able to become a non-biological parent but here too there are often policies in place which make this really difficult.

Let’s consider an exaggerated example: should a 90 year old person be able to adopt a two year old? That is a question easily posed in the abstract but which has to be answered in the specific context.

A 90 year old who is bed-ridden and a stroke victim would be functionally incompetent and it would be wrong for them to be a parent for those reasons – not because of their age. Should the 90 year old be denied that opportunity on the basis that they are expected to become functionally incompetent in a few years and so be unable to give enough care and attention to the child? This is a much more difficult question. For a start there are a number of records of men of 90 becoming fathers.³⁸ What modern science will enable women to do in order to overcome the menopause is only just beginning to be discovered.

I think that all one can say is that rigid policies about threshold or maximum ages are wrong in principle, though more flexible policies that require much more careful assessment of the merits of assisted reproduction or of adoption are entirely appropriate.

Alexandre Kalache: I don't have a problem with restricted access to reproductive services on the basis of respect for the biological restraints of the process. Technol-

ogy may tinker with the biological clock but I do not expect to see 80 year olds giving birth anytime soon. Nor do I feel that this is ever going to assume the most important area of discrimination against older people. Biological limitations in old age do exist and common sense must also apply within the law. The more important issue should be to increase access to reproductive and sex-related advice for people of all ages.

Interviewer on behalf of ERT:
Joanna Whiteman

1 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and Related Acts, Official Journal C 340, 10 November 1997

2 The speech has been published with a commentary: Allen, R., "Article 13 EC, evolution and current contexts", in Meenan, H. (ed.), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, Cambridge University Press, 2007, pp. 38-73.

3 See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

4 Case C-271/91 *Marshall v Southampton and South West Hampshire AHA* (1), 1993 E.C.R. I-04367.

5 See *Secretary of State for Trade and Industry v Rutherford & Ors*, [2006] UKHL 19.

6 At the time there was a different test for indirect discrimination to that which is now used.

7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 6.

8 The challenge to its legality was brought in the so called *Heyday* litigation: Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 CMLR 4; and later *Age UK, R (on the application of) v Secretary of State for Business, Innovation & Skills & Ors* [2009] EWHC 2336 (Admin).

9 In the latter judgment the judge Blake J. specifically held at Para 128 that he did not consider that the exclusion in the regulations would have been lawful if introduced in 2009.

10 Allen, R., "Proposal for a Council Directive implementing the principle of equal treatment in respect of age in access to and supply of goods, facilities and services", 2006, available at: http://www.age-platform.eu/images/stories/Proposal_for_draft_directive_-_adopted_by_AGE_Council_June_2007_as_working_document.pdf

11 Allen, R., "Legal issues for strengthening international legislation on the rights of older persons", Age UK, available at: <http://social.un.org/ageing-workinggroup/documents/LegalIssuesforStrengtheningInternationalLegislationonRightsofOlderPersonsAgeUK.PDF>.

12 With Dee Masters of Cloisters Chambers.

- 13 Equality Commission for Northern Ireland, "Should new age law protect children", 2013, available at: http://www.equalityni.org/sections/default.asp?cms=The%20Law_Pressing%20for%20reform_Age%20law%20reform&cmsid=4_967_969&id=969&secid=5
- 14 Ecclestone, J., "Majority of employers will allow workers to choose retirement age", *Personnel Today*, 31 May 2011.
- 15 This is the common belief that within an economy there is a fixed number of jobs so that unless older persons cease to work new entrants into the labour market cannot find jobs. To its great credit the government of the UK has specifically eschewed this belief in the Regulatory Impact Assessment for the new abolition regulations, available at: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11-634-phasing-out-default-retirement-age-impact-assessment.pdf>. The government has cited Gruber, J., Milligan, K. and Wise, D., "Social Security Programs and Retirement Around the World: The Relationship to Youth Employment, Introduction and Summary", *National Bureau of Economic Research Working Paper No. 14647*, January 2009.
- 16 See Children's Rights Alliance for England, *Making the case: why children should be protected from age discrimination and how it can be done: Proposals for the Equality Bill*, 2009.
- 17 Intergenerational Foundation (IF), www.if.org.uk.
- 18 See, for instance, Pensions Act 2007, Schedule 3.
- 19 O Estatuto do Idoso, Secretaria Especial dos Direitos Humanos, Presidencia da Republica, Brasilia, 2008 – CDD 341.272.
- 20 Judgment of the Employment Tribunal of 20th February 2009 in *Baker v National Air Traffic Services Limited* ET 2203501/2007.
- 21 Age Discrimination Act 2004.
- 22 Both federal and provincial laws give this protection.
- 23 See Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (BS 30 V 07), Articles 3 and 5.
- 24 Australian Human Rights Commission, *Australian Human Rights Commissioner The Hon Susan Ryan AO*, available at: <http://www.humanrights.gov.au/about/commissioners/age-discrimination-commissioner-hon-susan-ryan-ao>.
- 25 Centre for Equal Opportunities and the Fight against Racism, information available at: <http://www.diversite.be>.
- 26 The Equality Act 2010 (Age Exceptions) Order 2012.
- 27 For a discussion of the exceptions see Romney, D. and Masters, D., "Beginner's guide to the ban on age discrimination in goods and services", *The Law Gazette*, 11 September 2012.
- 28 See *Massachusetts Board of Retirement v Murgia* 427 US 307.
- 29 See *R. (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37.
- 30 *Article 26 and the Employment Equality Bill 1996, In Re* [1997] IESC 6; [1997] 2 IR 321.
- 31 Case C-144/04 *Werner Mangold v Rüdiger Helm* 2005 E.C.R. I-09981.
- 32 See, for instance, Devaney, J., Bunting, L., Davidson, G., Hayes, D., Lazenbatt, A. and Spratt, T., *Still Vulnerable – The Impact of Early Childhood Experiences on Adolescent Suicide and Accidental Death*, Northern Ireland Commissioner for Children and Young People, 2012.
- 33 See, for instance, *H (H) v Deputy Prosecutor of the Italian Republic, Genoa and others* [2012] WLR 90 and in particular Lord Mance's judgment at Para 98.
- 34 Case C-17/05 2006 *Cadman v Health & Safety Executive* E.C.R. I-09583.
- 35 *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16.
- 36 Equality Act 2010, Schedule 9, Part 2, Para 11-120.
- 37 See above, note 35, Para 28.
- 38 Guinness World Records states: "The oldest ever man to father a child was reportedly Les Colley (1898-1998, Australia), who had his ninth child, a son named Oswald to his third wife at the age of 92 years 10 months. Colley met Oswald's Fijian mother in 1991 through a dating agency at the age of 90." More recent newspaper reports talk of an Indian man of 96 losing his three year old. Other stories of more modern Methuselahs abound, for instance there is a Thomas Parr buried in Westminster Abbey who was reputedly 152 at his death and who is alleged to have fathered children in his 100s. He was painted by van Dyck and Rubens. However, his longevity is held suspect by many!