

# CROW

Centre for Research into the Older Workforce

## The new law on age discrimination: how prepared are employers?

### Key Messages

**From October 2006, age discrimination in the workplace will be illegal<sup>1</sup>.**

This will cover access to employment, vocational training, working conditions and membership of unions and employee associations. This briefing is based on the Government's draft regulations<sup>2</sup>, and the findings of CROW research into how prepared employers are for the change.

The critical principle is that **decisions about peoples' work should be based on their individual capabilities** and circumstances, and not on the accident of age.

**The experience of other countries suggests that this will lead to significant numbers of disputes,** although UK employers in general do not expect this.

**Age discrimination in the workplace is common,** and is usually the result of the behaviour of individual managers, rather than organisational policy. Indirect age bias is common, and is likely to be the focus of complaints and disputes.

**Employers will have a duty to consider requests from employees who wish to work after 65.**

**The law on unfair dismissal and redundancy will in future apply to any employee, regardless of age.** In most circumstances, it will become illegal for an employer to force anyone to retire on grounds of age before they are 65, and Government will consider abolishing compulsory retirement ages altogether in 2010.

**Discrimination which is "objectively justifiable" will be allowed,** if the employer can demonstrate that discrimination fulfils a legitimate aim and the particular circumstances make it appropriate and necessary.

**Many people would like to stay in work longer, but only on a flexible basis.** Government plans to extend the right to request flexible working to workers with caring responsibilities for elderly relatives, and some employers have already extended this right to all employees.

### Implementing the legislation

Age is one of the last major forms of discrimination at work to be tackled in law, and its impact on employers is the most difficult to predict. Unlike gender, race or disability, ageing affects everyone, but it does so at differing speeds and with differing effects. The principle behind the new law is that individuals should be treated on the basis of their individual ability to carry out the job, and their individual circumstances, not on arbitrary assumptions based on their age.

The Government has published draft regulations ([www.dti.gov.uk](http://www.dti.gov.uk)), following a national consultation and a programme of research, including research commissioned from CROW (McNair & Flynn 2004).

There is little evidence that age affects most peoples' capacity to carry out most jobs in the modern UK economy before they are in their mid 60s. Improvements in technology mean that fewer jobs now require great physical strength although, in recent years, levels of workplace stress have become a major reason for early exit from work.

In general the abolition of age discrimination is likely to be good for both employers and employees, because it will force employers to look at individual capabilities and motivations, rather than simple dates of birth, when making decisions about promotions, training and organisation. Older workers are all different: some people want new challenges in their 50s and 60s, while others want gradual withdrawal from the workplace, and some want to continue to accumulate enough money for a comfortable retirement.

What is clear is that the way in which people are managed can have a profound effect on the contribution which they make. Investment in training, for example, increases the likelihood of people staying longer, and employers who make it easy for people to work on a flexible basis so that they can manage caring responsibilities (for elderly relatives and for

grandchildren) or begin to build their portfolio of interests and social networks for life after retirement, gain added loyalty and motivation.

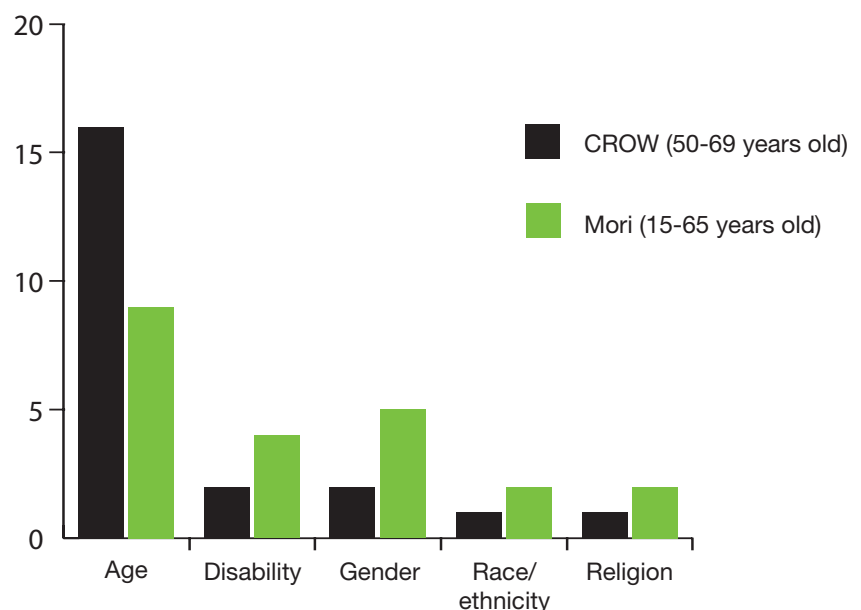
Unlike other forms of discrimination, the age discrimination law will allow discrimination which can be "objectively justified by labour market aims". However, unfair age discrimination is widespread in society and in the workplace, and often hidden behind other factors like length of service. Some kinds of different treatment are generally viewed as beneficial: few would want to stop employers holding parties to celebrate long service, or to reward loyalty with some form of payment. Some rest on traditional patterns of career which may no longer be justifiable: like the assumption that entry levels jobs must go to young people, when there are growing numbers of people returning to work, changing jobs in mid life, or "downscaling" their work as they approach retirement.

To qualify as "objectively justified" discrimination must "fulfil a legitimate aim" and be "appropriate and necessary" in the particular circumstances. It will be legal where there is a genuine occupational

requirement (e.g. casting an actor for an age specific role). Employers will also be allowed to take measures to prevent or compensate for disadvantages suffered by particular age groups (so called "positive action"), but will need to be prepared to justify them.

The remainder of this briefing paper is based on research carried out by the Centre for Research into the Older Workforce at the University of Surrey (CROW) for the Department for Trade and Industry (DTI) which is responsible for drafting the new law. The Department wanted to know how prepared British employers are for the age discrimination law, and asked CROW to carry out a series of case studies of a variety of employers, to identify practices which might cause problems when the law is introduced, and issues which might be clarified in the legislation. CROW carried out in depth interviews with HR directors, union representatives and line managers in fourteen workplaces in the private, public and voluntary sectors. This briefing discusses our main findings, and what they say about British employers' preparedness for the legislation.

### Experience of discrimination by type



**How common is age discrimination at work?**

Age discrimination is a significant problem. Substantial numbers of individuals claim to have experienced age discrimination at work, but employers are rarely aware of it, and because it is not yet illegal, it is difficult to measure how common it is in the workplace. Furthermore, in the absence of a legal structure, there is no generally accepted definition of what constitutes unfair age discrimination.

Age discrimination can affect people at any age, and can happen in many ways, but it probably most often affects older people, and those applying for jobs. This can be seen in the contrast between two surveys. When MORI surveyed people of all ages in 2002, 8% reported having experienced age discrimination related to work. However, when CROW surveyed people between 50 and 70, 14% reported that they had experienced age discrimination at work, and 18% who had experienced it when applying for jobs. Other studies, by Age Concern (2001) and Maturity Works (2003) have reported even higher figures, suggesting that around a third of workers over 50 have experienced age discrimination.

While these studies disagree on its extent, they all agree that age discrimination is common in relation to people over 50. However, it is less reported, for a number of reasons. One is that people view it as natural or inevitable (as they once did sexism or racism), that challenging it (especially in the absence of any legal framework) only exposes the individual to further discrimination, and because it is masked by other forms of discrimination (so, for example, disputes are presented as issues of gender, where there is legal protection, when the real issue is age). The creation of a legal framework for challenging discrimination is likely to unleash a number of hidden cases into the legal system.

The experience of other countries is that, while age discrimination is not the most frequent complaint to come before

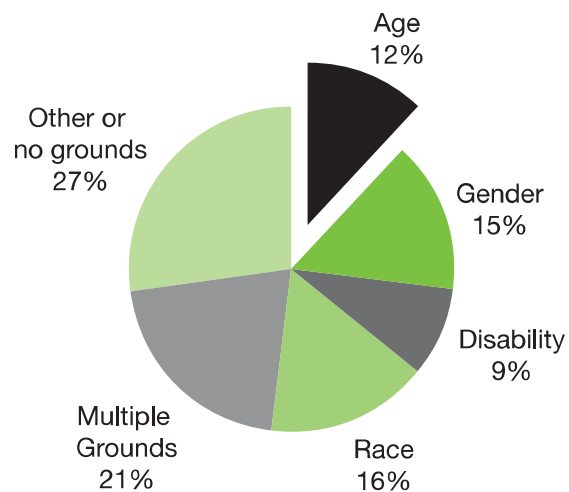
employment courts, a sizable proportion of discrimination cases include an age related complaint. In Ireland, which has an omnibus anti-discrimination law covering nine forms of discrimination, the number of age discrimination cases have steadily risen since 1999 when the legislation was introduced. (Equality Tribunal Ireland 2005)

Discrimination cases in 2004: Ireland

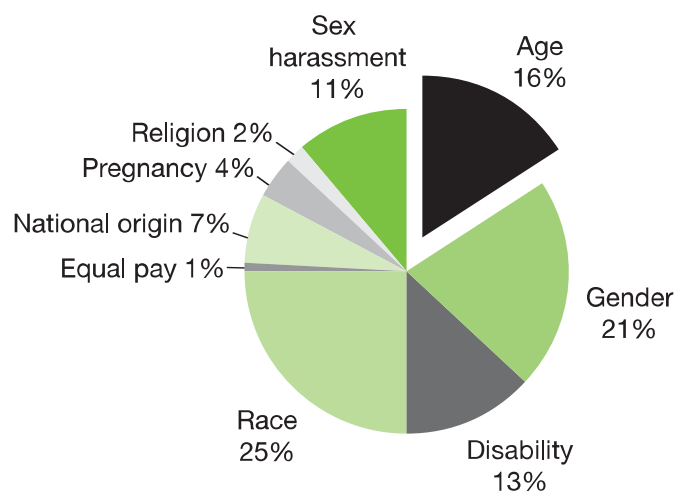
In the United States, 16% of discrimination cases taken by the Equal

Opportunities in Employment Commission (EEOC) feature an age related complaint. (EEOC 2005) This is a high figure, since US federal law provides only limited protection: it covers only workers over 40, it requires claimants to go through a conciliation process before their cases are taken to court (unlike other anti-discrimination law) (Meenan 2000), and that until a recent Supreme Court ruling, it was uncertain whether indirect forms of age discrimination were covered by the law.

**Discrimination cases in 2004: Ireland**



**Discrimination cases in 2004: United States**



Source: Ireland (Equality Tribunals); US (EEOC)<sup>3</sup>.

### How concerned are British employers?

Most human resource managers whom CROW surveyed were aware that the law is to change, but most were waiting to see the draft regulations before making any preparations. They described age discrimination as a "medium ranking priority"<sup>4</sup>, and few could identify policies which they thought would need changing to comply with the new law. Few expected a significant financial impact on their organisations.

However, this does not mean that employers are ignoring age issues in the workplace. Many firms were reviewing the age dimension of their employment policies for mainstream business reasons, against a background of considerable change and reorganisation. Most often, employers were removing age barriers to work in order to address skills shortages, recognising that older workers are an underused resource, when there is a shortage of skilled people available. Initiatives included:

- removing explicit age bars,

- introducing flexible working choices for older workers,
- providing financial incentives
- offering more stimulating or higher quality work opportunities
- offering more opportunities for training and development.

Employers who were doing this generally saw the age discrimination legislation as consistent with their HR strategies, and therefore good for business. This was particularly true in sectors like retailing, where labour shortages are serious<sup>5</sup>.

However, CROW also found employers in "declining" sectors such as manufacturing looking for ways to remove age barriers as a way of making better use of staff.

Government plans to change tax and pension rules to allow people who have formally retired to return to work for their employers while drawing their pensions. Most employers, particularly those facing skills shortages, welcomed this change, but some public sector employers worried about the public relations impact of being seen to pay an employee a salary and pension at the same time.

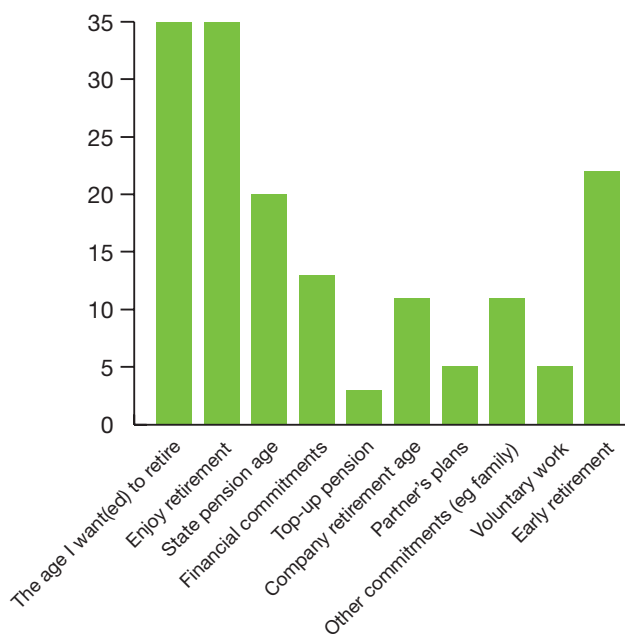
### Retirement

After recruitment to jobs, retirement is the area where age discrimination is most evidently a problem, since requiring people to leave work at a given age is clearly discriminating on grounds of age, not capability. The issue which most commonly worried employers was the Government's original proposal<sup>6</sup> that occupational retirement ages might be abolished, and employers might find themselves unable to remove staff who were no longer able to do their jobs well. Usually, employers were concerned about employing older staff in physically demanding work, and struggled to find the right balance between "age blind" retention and protecting the health and safety of workers. They were particularly concerned that the combination of the age discrimination legislation and the Disability Discrimination Act might compel them to make expensive or unreasonable adjustments to accommodate older workers who are no longer physically capable of continuing in their work.

Government now plans to permit compulsory retirement after a default age of 65, only allowing earlier retirement when this could be objectively justified. This would cause little change for most firms surveyed by CROW, since, although they have in the past had a variety of retirement ages, most had changed to, or were moving towards, a standard retirement age of 65. One large firm was planning to abolish its retirement age altogether.

More important than retirement age itself, for most employers, was the right to plan. Employers, especially those who favoured abolishing occupational retirement ages, wanted to be able to discuss retirement plans with employees, and there was some concern that inviting workers to discuss retirement plans at a given age might be ruled discriminatory. It is now likely that this will be viewed as objectively justifiable in the interests of efficient running of the business, and the Government said that its approach is intended to encourage employers and employees to discuss retirement plans.

### Reason for choosing to retire when you did



Retired respondents only, multiple responses allowed

Furthermore, under the new regulations, the employer will need to give six months notice to an employee whom he wishes to retire, to enable the employee to plan, or to make an application to continue working longer.

### Pay and benefits

The new regulations will prohibit employers from using age as a factor for determining pay and benefits unless it can be objectively justified. Few of the employers CROW surveyed do this, and those that did were confident that they could defend the practice. One employer, for example, allowed staff who were approaching retirement to reduce their working hours at full pay, but thought this was an important part of helping workers make the transition into retirement. Another paid its under-18 staff less than equivalent colleagues, but pointed out that this was consistent with the National Minimum Wage Regulations. The Regulations provide exemptions in both of these cases.

Indirect age discrimination over pay and benefits is more common. The Work and Employment Relations Survey found that one in five employers use age as a factor for determining pay and other conditions of service like annual leave entitlements, but twice as many use length of service which is most common in the public sector. Long service awards were frequently used by employers of all sizes, but these tended to be of small value, and unlikely to lead to formal disputes.

The new regulations will allow employers to use length of service up to five years for determining pay and benefits. However any length of service provisions covering more than five years will need to meet the test of "objective justification" and proportionality.

Some of the employers surveyed imposed age bars (both lower and upper) on membership of private insurance schemes because their insurers charge more for insuring staff in certain age groups. The Government is not planning to specifically exempt private insurance benefits, but an

employer may be able to claim that the age bar is objectively justified.

One employer was planning to incorporate age into equal pay reviews in order to remove unjustified age biases in its pay awards.

### Working past retirement

Under the new regulations, employers will have a duty to consider requests to stay in work beyond the company's compulsory retirement age. The employer must inform employees of this right, discuss options with the employee, and, when requests are refused, be able to demonstrate that he has considered the request seriously.

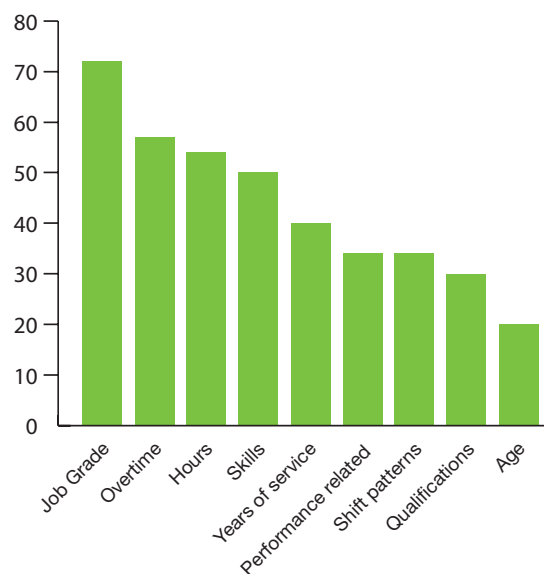
Most employers surveyed said that they would consider requests from workers who wished to continue working after normal retirement age. However, such requests were rare, and those who made them tended to want to work for a short period in order to complete a specific project or piece of work, rather than continue long term.

Large employers, particularly those in the public sector, had more formal systems

for managing working past retirement. These included flexible work options such as reducing working hours or changing job responsibilities. Older employees might be expected to undertake performance and health assessments to ensure their continued capability. Smaller employers were less likely to have formal policies, but tended to be more willing to consider requests for staying in work longer, probably because the relationships were more personal, and the match of the individual's aspiration and the firms needs easier to demonstrate, and people working after 65 tend to be concentrated in smaller firms.

In all of the firms which allowed it, working past retirement was on less secure terms and conditions, like fixed term or "zero hours" contracts, or employment on consultancy contracts. While such working patterns may be attractive to older workers who want to have more choice in their working patterns (Lissenburgh & Smeaton 2003), it has also been suggested that those who work past retirement can be vulnerable to job loss and exploitation since they enjoy fewer employment rights than colleagues. (Platman 2004)

### How pay and benefits are determined



Source WERS 98

The new law will make working after 65 more secure for all workers. The regulations will remove the upper age limit on unfair dismissal claims, and if an employee can prove that her/his dismissal is unfair, it will not be sufficient for the employer to claim that (s)he was "retired" or over 65. Similarly, service after the age of 65 will count for redundancy purposes. The regulations will cover not only employees, but contract workers and the self-employed as well, and workers who are employed on a freelance or consultancy basis will be protected by most parts of the regulation.

**Appraisal and performance management**

Fair and reliable systems for measuring the performance and development needs of staff are good management practice, but they will be particularly important once age discrimination legislation is introduced, since employers will need to demonstrate that decisions on training, development, promotion, and dismissal are objectively justified. Most of the employers surveyed by CROW had appraisal or performance management systems in place, but their application varied. HR directors felt that their systems were not always systematically applied by

line managers, and that as people approached retirement age, the processes were less rigorously applied.

Employees who are close to retirement were seen as needing less attention to their career development, and poor performance was often overlooked when retirement was in sight. In some cases it was felt that such an approach was kind to people approaching the end of their career, but it is clearly discriminatory, and an area which employers may need to review.

**Recruitment, career development and redundancy**

Recruitment is probably the area where age discrimination against older people is most common, and it is well established that people who find themselves out of work after the age of 50 have much greater difficulty finding jobs than younger people.

However, very few examples of explicit age bars in recruitment were cited. Usually, the reasons related to legal constraints (e.g. not hiring young people to sell alcohol or drive HGVs) or the costs of insurance. The new regulations will specifically exempt the former, but not the

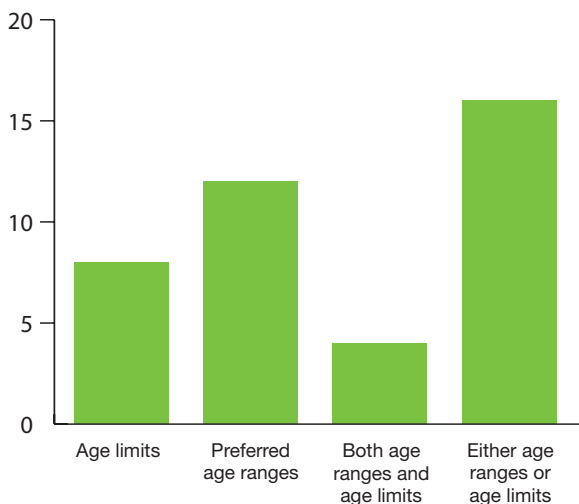
latter. However, an employer who does not hire someone for insurance related reasons may be able to claim that the decision was objectively justified.

The limited number of explicit age bars on recruitment shows that some progress has been made since the Government launched its Age Positive campaign when around one in six employers included explicit age bars or "preferred age ranges" in job advertisements (DWP 2001). Perhaps more importantly, HR directors were thinking about how to make the recruitment process more age-blind. Few asked for date of birth on application forms, and two were considering the introduction of competency based application forms so that young people with the right qualifications, but less experience, would not be disadvantaged.

Some employers anticipated needing to reform their graduate trainee or work experience schemes to ensure that mature students and graduates have the opportunity to take part. One employer observed that the Government's own apprenticeship programme only subsidises 18-24 year old apprentices, and could itself be considered age discriminatory.

The only explicit age bars in training observed were those in a few organisations which do not train workers who are "approaching retirement" (although there was no agreement about how long a period this might be). Most employers believed that older workers were less likely to participate in training than younger colleagues, but were unsure why. Evidence from the Labour Force Survey (Urwin 2004) suggests both that older workers are generally less likely to be offered training (perhaps because they are seen as less career-minded) and are less likely to take up training when offered. One manufacturer was concerned that some of its older workers avoided training because they wished to conceal basic skills needs from their line managers, and was working through its trade union learning representatives to identify skills needs.

**Information included in vacancy advertising**



Source DWP 2001

Employers who offered enhanced redundancy based this benefit on length of service, and some offered enhanced pension contributions to staff who were made redundant after 50. One large employer had surveyed 25 other major corporations and found that most had operated similar schemes. This will likely remain.

### Flexible working

Most people working after the age of 50 are strongly attached to work, and would like to go on working after "normal retirement age" if that work could be part-time or flexible in other ways. This pattern has now been well established by three independent studies, (CROW 2004, Employers Forum on Age 2004 and HSBC 2005). However, until now, the legal right to request flexible working has been limited to parents of children under 8, despite the fact that many people over 50 have caring responsibilities for older relatives and/or grandchildren which affect their ability to work full time.

In December, the Government proposed extending the right to request flexible working, to workers with caring responsibilities for elderly relatives, and the CROW/ survey found that most of the employers had already extended the right to request, either formally or informally, to all employees whether or not they have caring responsibilities. However, some had found it difficult to accommodate such requests, and one public sector employer said that its approach tended to be "strong on policy but weak in practice", although, where the staff shortages are severe, as in parts of the NHS, there were striking examples of imaginative practice.

Employers who offered final salary pension schemes noted that older workers tended not to request reductions in working hours as they approached retirement because they believed (usually wrongly) that this would significantly reduce their pensions once they retire<sup>7</sup>. A more justifiable concern is that a worker who wishes to move to a less demanding, and therefore less well paid, role in the final years of their career would suffer

financially in a final salary scheme, since the final salary would be lower. To address this, Government is proposing to replace the current Civil Service final salary pension scheme with one based on average lifetime earnings.

### Pensions

One of the major concerns of companies was how age related disparities in pension schemes will be addressed in the legislation. The regulations will explicitly exempt most pension rules and practices from the regulations<sup>8</sup>.

Most of the private sector employers studied operated more than one pension

scheme, either for different grades of staff, or because they had experienced mergers, with groups of staff arriving with protected pension rights under a previous scheme. In one case a single firm was operating 20 separate schemes. In recent years a large number of firms have closed their final salary pension schemes to new entrants, offering them defined benefit schemes instead. The result is that many firms offer defined benefits to longer serving employees, and less advantageous defined contribution pension entitlements to staff who had been recruited more recently, and who are in general younger. This will remain legal.

## Final Thoughts

CROW's research for the DTI brings a mixed message to Government as it prepares to legislate. There was evidence of employers changing their approach to age in the workplace in response to business needs and skills shortages, rather than the pending legislation. Direct forms of age discrimination seemed to be becoming rarer since the Government launched its Age Positive campaign, and innovative approaches to helping older workers stay in work longer were reported. Most human resource managers saw the change as likely to lead to improvement in management practices and hence to business benefits.

Employers in general were uncertain about the likely impact of the legislation, and on the whole were inclined to "wait and see". However, the experience of the Employers' Forum on Age, which tries to bring together leading edge practice on age discrimination is that when employers begin to address their approach to age management, they find it much more complex than they had expected. International experience also suggests that employers tend to underestimate the extent and seriousness of age discrimination, and that the numbers of age discrimination cases going through

courts and tribunals does not reduce over time.

It is also important to note that there can be a very large gap between an organisation's formal policies at corporate level, and the practice as applied by front line managers. This was a concern expressed by HR managers, and the experience of all discrimination law is that where disputes arise it is more usually a matter of line managers not implementing, or not being aware of, the policy, than of discriminatory policy itself. This is likely to be a particular problem with age discrimination, since unfounded prejudices about age are deeply ingrained in society's attitudes, and many forms of discrimination will be thought of as natural by managers, workmates and by the victims themselves.

Until now, most employers have been waiting for the Government to publish the draft regulations. The law will be in force in October 2006, and by that time employers will need to be not merely preparing for implementation, but to have systems and procedures in place and operating. It remains to be seen whether they have left it too late.

# About CROW

The Centre for Research into the Older Workforce exists to study the implications of demographic change for the workforce: in terms of individual motivation, employers' behaviour, and education and advice services.

CROW's research is intended to have practical benefits for employers who want to better manage employees of all ages, but particularly their older workers. We offer a consultancy service to employers, including:

- audit of your firm's policy and strategy documents in the light of the pending legislation, such as the age discrimination regulations
- through confidential interviews with line managers and employees, review HR practices, identifying how HR policies are being implemented in the workplace
- briefings for your managers on good practice in managing employees of all ages
- recommendations to senior managers on how to improve the effectiveness of your organisation's age management.

Contact CROW by phone (01483 683137) or email ([crow@surrey.ac.uk](mailto:crow@surrey.ac.uk)) for further information.

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## Notes

- 1 This is part of the implementation of European Directive on Equal Treatment in Employment and Occupation.
- 2 The Draft Regulations were published in July 2005 and can be found on the DTI Website at [www.dti.gov.uk/er/equality/age.htm](http://www.dti.gov.uk/er/equality/age.htm)
- 3 In Ireland, complaints which are made on multiple grounds are tabulated separately, while the EEOC tabulates multiple ground claims for each of the complaints cited

4 CROW's research for DTI was an "in depth" study of a small number of firms and cannot be assumed to be "representative" of employers as a whole. However, there were clear common patterns and the fourteen case studies represent organisations of various sizes, sectors, types of workforces, and economic contexts.

5 This is reported by other studies, including (Taylor & Walker 1994) and (Arrowsmith & McGoldrick 1997)

6 In the DTI's 2003 consultation paper *Age Matters*

7 Final salary pension schemes normally calculate final salary on the basis of the full-time equivalent salary, not the actual part-time one.

8 It is perhaps worth noting that the Irish Government has recently extended its long standing discrimination law to include pension rules.

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