

Extending Working Life for Older Workers

Age Discrimination Law,
Policy and Practice

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Introduction

The UK population is ‘ageing rapidly’.¹ Government projections indicate that England will experience a 51 per cent increase in those aged over 65 and a 101 per cent increase in those aged over 85 from 2010 to 2030.² As the ‘baby boom’ generation of the 1960s approaches the state pension age (SPA), the median age of the UK population is projected to rise from 39.7 years in 2010 to 42.2 years by 2035.³

Population ageing is likely to have consequences for industry and government services, including housing, pensions, health and social care, and employment. While legislative and policy measures have been introduced to respond to these challenges, government and society are still regarded as being ‘woefully underprepared’ for demographic change due to a ‘collective failure to address the implications’ of ageing.⁴

This study critically examines the efficacy of one area of government policy in addressing the ‘ageing challenge’. Using legal doctrinal and empirical mixed methods, I investigate whether age discrimination laws are effectively addressing ageing issues and challenges in the context of employment. Age discrimination laws are seen as having broad potential to achieve instrumental and intrinsic objectives. However, my research demonstrates the substantial limitations of age discrimination laws for fulfilling these aims. Drawing on qualitative expert interviews, statistical analysis and organisational case studies, I illustrate the failure of age discrimination laws to achieve attitudinal change in the UK, and reveal the limited prevalence of proactive measures to support older workers at an organisational level. Integrating doctrinal analysis, comparative analysis of Finnish law, and the Delphi method, I develop an agenda for reform and propose targeted legal and policy changes to address these limitations.

¹ Select Committee on Public Service and Demographic Change, ‘Ready for Ageing?’, Report of Session 2012–13, HL Paper 140 (London, The Stationary Office, 14 March 2013) 7.

² *ibid.*

³ Office of National Statistics, ‘UK Population Projected to Reach 70 Million by Mid-2027’ (26–26 2011): www.ons.gov.uk/ons/rel/npp/national-population-projections/2010-based-projections/sum-2010-based-national-population-projections.html; see also European Commission, *Active Ageing and Solidarity between Generations: A Statistical Portrait of the European Union 2012* (Publications Office of the European Union, 2011) 27.

⁴ Select Committee on Public Service and Demographic Change (n 1 above) 7.

In this chapter, I examine why ageing is likely to be an issue of increasing significance for labour law, and consider the role of age discrimination legislation in addressing the ageing ‘challenge’. I also provide an overview of the book’s structure.

I. Implications of Ageing for Labour Law

Older workers were traditionally a feature of the UK labour market. It was only in 1908 that a state pension was introduced for the ‘very old, the very poor, and the very respectable’ at a level (just) sufficient for survival.⁵ For most of the UK’s history, older workers have been expected to remain in employment until no longer capable of working, thereafter becoming dependent on family support or (in recent times) the welfare state.

In the 1970s, the growth of early retirement schemes, private pensions and widespread redundancies targeting older workers caused participation rates for older workers to decline significantly.⁶ By the end of the twentieth century, a third of individuals in the UK aged between 50 and the SPA did not participate in paid employment.⁷

In the last decade, government and employer programmes have focused on counteracting this culture of ‘early exit’ and again increasing employment rates for older workers, both by introducing measures to retain older workers and changing pension entitlements to deter early exit.⁸ However, early exit remains a significant feature of the UK labour market.⁹ Tables 1 and 2 show the employment and inactivity rates for those aged over 50 in the UK. While levels of participation for older workers have increased dramatically since 1992,¹⁰ the tables still demonstrate that a substantial proportion of older workers are currently not participating in employment. Indeed, over 90 per cent of those over 65 years of age are not involved or seeking to be involved in the labour market.

⁵ L Hannah, *Inventing Retirement: The Development of Occupational Pensions in Britain* (Cambridge, Cambridge University Press, 1986) 15–16; P Thane, *Old Age in English History: Past Experiences, Present Issues* (Oxford, Oxford University Press, 2000) 225.

⁶ A-M Guillemard and M Rein, ‘Comparative Patterns of Retirement: Recent Trends in Developed Societies’ (1993) 19 *Annual Review of Sociology* 469, 474; F von Nordheim, ‘Responding Well to the Challenge of an Ageing and Shrinking Workforce: European Union Policies in Support of Member State Efforts to Retain, Reinforce and Re-Integrate Older Workers in Employment’ (2004) 3 *Social Policy and Society* 145, 145.

⁷ S Fredman, ‘The Age of Equality’ in S Fredman and S Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford, Hart Publishing, 2003) 25.

⁸ C Phillipson, ‘Work and Retirement Transitions: Changing Sociological and Social Policy Contexts’ (2004) 3 *Social Policy and Society* 155, 156.

⁹ von Nordheim (n 6 above) 145; W Loretto et al, ‘Older Workers and Options for Flexible Work’, EOC Working Paper No 31 (Equal Opportunities Commission, 2005) 1.

¹⁰ This may be partly connected to the changing gender composition of the workforce, and increased participation rates for women.

Table 1: UK Employment Rates for those over 50
(Source: ONS Labour Force Survey)

Employment Rate (per cent)			
	1992	2001	2013
50–64	56.6	62.0	67.4
65+	5.6	4.9	9.5

Table 2: UK Economic Inactivity Rates for those over 50
(Source: ONS Labour Force Survey)

Economic Inactivity Rate (per cent)			
	1992	2001	2013
50–64	38.5	36.0	29.2
65+	94.1	95.0	90.2

Despite this low level of participation, it appears that older workers are again likely to become a feature of the UK labour market. First, advancements in medical care and improved living conditions mean that individuals are living longer and can reasonably expect substantially more productive, healthy years in their old age.¹¹ Using 2008–10 mortality rates, a man aged 65 can expect to live for another 17.8 years and a woman for another 20.4 years.¹² A substantial proportion of these years are likely to be enjoyed in reasonable health:¹³ in 2011, UK women had an average expectancy of 11.9 healthy life years at age 65 and men had 11.1 years (up from 9.5 and 8.2 respectively in 2001).¹⁴ Therefore, individuals are likely to be capable of working for a longer period in old age.

Secondly, there is evidence that a substantial number of individuals will have inadequate income in retirement, meaning they will be financially compelled to continue in employment. In 2008–09, UK government pension benefits¹⁵ for a median earner represented only 37 per cent of average UK earnings, one of the lowest wage replacement rates in the Organisation for Economic Co-operation and Development (OECD).¹⁶ The UK is significantly more reliant on private

¹¹ European Commission (n 3 above) 18.

¹² ONS, 'UK Interim Life Tables, 1980–82 to 2008–10' (29 September 2011): www.ons.gov.uk/ons/rel/lifetables/interim-life-tables/2008-2010/sum-ilt-2008-10.html.

¹³ MW Riley and JW Riley Jr, 'Age Integration and the Lives of Older People' (1994) 34 *The Gerontologist* 110, 110; European Commission (n 3 above) 28–29.

¹⁴ Eurostat, 'Healthy Life Years (1995–2003)' (*Eurostat*, 22 May 2013): open-data.europa.eu/en/data/dataset/SkByEcjkoZu4yUcxSRNLw; Eurostat, 'Healthy Life Years and Life Expectancy at Age 65, by Sex' (*Eurostat*, 17 October 2013): epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdph220.

¹⁵ Including the flat-rate basic pension, plus any earnings-related additional pension and pension credit. However, the figure does not include mandatory or voluntary private pensions.

¹⁶ OECD, 'Pensions at a Glance 2011: Retirement-Income Systems in OECD and G20 Countries' (OECD, 2011) 118–19.

pension provision than other countries.¹⁷ However, the ‘truly spectacular flight away’ from defined benefit (so-called ‘final salary’) pension schemes¹⁸ in the private sector¹⁹ is likely to jeopardise this reliance on private pension provision. At 31 March 2011, only 16 per cent of defined benefit occupational schemes were still open to new members.²⁰ Some employers are now offering their employees defined contribution pension schemes, where the risks of longevity and investment returns are shifted to the individual, rather than employers or the government.²¹ Other employers had (until recently) ceased to make any provision for their employees’ retirement: the 2009 Employers’ Pension Provision Survey of 2,519 UK organisations showed that employers making any pension provision for their employees had declined from 41 per cent in 2007 to 28 per cent in 2009, with occupational pension schemes being provided in only two per cent of private sector firms (compared with five per cent in 2007).²²

The roll-out of pension ‘automatic enrolment’ under the Pensions Act 2008, section 3 from October 2012 may help to extend private pension coverage to many employees. Employers are progressively being required to enrol workers into a workplace pension scheme if they are aged between 22 and the SPA, earn more than a specified minimum wage and work in the UK. However, the level of saving required under the scheme (which is eventually increasing to eight per cent of an employee’s income) is unlikely to address chronic issues of ‘under-saving’ for retirement.²³ According to 2012 figures, 10.7 million individuals in Great Britain are likely to have inadequate income in retirement.²⁴ Participation rates for older workers are likely to increase as individuals face stark financial choices and defined benefit pensions become historical relics.

Thirdly, and relatedly, while the low level of public pension provision in the UK has ensured that the state pension system is more sheltered from the effects of

¹⁷ S Diepeveen, ‘Impact of the Recession on Age Management Policies: United Kingdom’ (Dublin, Eurofound, 2012) 10.

¹⁸ Defined benefit or salary-related pension schemes pay pensions based on individuals’ pensionable earnings and years of service. The schemes pay a guaranteed pension upon retirement, irrespective of investment returns. In contrast, in defined contribution schemes individuals build up a pension ‘pot’ which may be used to purchase an annuity upon retirement. The level of pension is not guaranteed and is linked to investment returns.

¹⁹ C Kilpatrick, ‘The New UK Retirement Regime, Employment Law and Pensions’ (2008) 37 *Industrial Law Journal* 1, 21.

²⁰ The Pensions Regulator, ‘Annual Report and Accounts 2010–2011’ (30 June 2011) 15.

²¹ D Hirsch, ‘Crossroads after 50: Improving Choices in Work and Retirement’, Research Report (York, Joseph Rowntree Foundation, 2003) 7; P Thornton, ‘A Note on the Investment Management of Defined Contribution Schemes’ in P Thornton and D Fleming (eds), *Good Governance for Pension Schemes* (Cambridge, Cambridge University Press, 2011) 265.

²² J Forth and L Stokes, ‘Employers’ Pension Provision Survey 2009’, Research Report No 687 (DWP, 2010) 15–16.

²³ Select Committee on Public Service and Demographic Change (n 1 above) 10. Individuals may also ‘opt-out’ from the scheme, which may reduce its effectiveness.

²⁴ *ibid* 7.

an ageing population than other EU countries,²⁵ the UK is still facing a recurrent ‘pensions crisis’.²⁶ As the ‘baby boom’ generation ages, the number of people over the SPA in the UK is expected to increase by 28 per cent, rising from 12.2 million people in 2011 to 15.6 million people by 2035.²⁷ Further, people are living longer, which means they are likely to draw on state pension entitlements for a longer period of time. Indeed, some individuals will spend nearly a third of their life in retirement.²⁸ National Insurance Fund expenditure is projected to increase from around five per cent of GDP in 2008–09 to eight per cent in 2070–71 as a result of the ageing population.^{29,30}

To mediate this pension ‘crisis’, and promote the long-term sustainability of the UK public pension system, the coming years will see a number of increases to the SPA. For women, the SPA will increase from 60 to 65 by 2018.³¹ For both women and men, the SPA will increase to 66 by 2020 and again to 67 years of age between 2026 and 2028.³² It is anticipated that this latter increase will save the government around £60 billion in today’s prices between 2026–27 and 2035–36.³³ The age at which a company or personal pension can be claimed was also increased in 2010 from 50 to 55 years old, encouraging workers with other pension entitlements to remain in employment for longer.

Fourthly, some older workers may actually *want* to stay in employment into old age. Previous studies have found that many older workers remain in employment as they enjoy work, feel loyalty to the organisation, have a sense of contributing to society or a cause, or feel their work has intrinsic value.³⁴ Therefore, older workers may wish to remain in work for its intrinsic or social value.

²⁵ C Phillipson, ‘Transitions from Work to Retirement: Developing a New Social Contract’ (Bristol, Policy Press, December 2002) 11–12.

²⁶ J Harris, ‘The Roots of Public Pensions Provision: Social Insurance and the Beveridge Plan’ in H Pemberton et al (eds), *Britain’s Pensions Crisis: History and Policy*, British Academy occasional paper 7 (Oxford, Oxford University Press, 2006) 34.

²⁷ ONS (n 3 above).

²⁸ Riley and Riley Jr (n 13 above) 110.

²⁹ Government Actuary’s Department, ‘Government Actuary’s Quinquennial Review of the National Insurance Fund as at April 2005’ (London, The Stationery Office, March 2010) 16.

³⁰ To put this in perspective, in 2009 public health care spending accounted for 8.2% of UK GDP (dropping slightly to 8.0% in 2010): U Qaiser, ‘Expenditure on Healthcare in the UK’ (May 2011) 4. This is projected to rise to 8.8% of GDP in 2062–63, with an additional 2.4% being spent on long-term care: Office for Budget Responsibility, ‘Fiscal Sustainability Report’ (London, The Stationery Office, July 2013) 80.

³¹ Pensions Act 2011.

³² HM Treasury and HM Parliament, *Autumn Statement 2011* (London, The Stationery Office, 2011) 23.

³³ *ibid* 6.

³⁴ H Barnes et al, ‘Working after State Pension Age: Qualitative Research’, Research Report No 208 (DWP, 2004) ch 4; J Drew and M Drew, *The Process of Participation and Phased Retirement: Evidence from Mature-Aged Workers in Australia* (Brisbane, Post Pressed, 2005) 101–2; W Loretto and P White, ‘Work, More Work and Retirement: Older Workers’ Perspectives’ (2006) 5 *Social Policy and Society* 495, 499; S McNair, ‘How Different is the Older Labour Market? Attitudes to Work and Retirement among Older People in Britain’ (2006) 5 *Social Policy and Society* 485, 486; S Vickerstaff, ‘Entering the

Fifthly, the decline in the proportion of ‘prime age workers’ in their 30s and 40s as the population ages may force employers to draw on an older workforce. Labour supply of 20–64 year olds across the EU is predicted to decrease by 24.5 million people between 2010 and 2050.³⁵ While this is unlikely to create a generalised labour shortage, particularly as there is already a large pool of unemployed and inactive workers who could be integrated into the labour market,³⁶ employers will need to look beyond the traditional labour market to supplement their workforce,³⁷ including by employing older workers. Thus, older workers are again likely to become a significant feature of the UK labour market.

II. The Role of Discrimination Law for an Ageing Population

While older workers may want or need to remain in work, and governments are seeking to extend working lives into old age, it is unclear whether there are adequate opportunities for older workers to be gainfully employed in the UK. There is limited evidence of whether employers are prepared for an ageing workforce or willing to accommodate the needs of older workers. Indeed, ageism and a preference for ‘prime age’ workers may significantly limit opportunities for older workers in the labour market.³⁸

In this context, age discrimination laws are seen as a key mechanism for addressing negative attitudes towards older workers and encouraging employers to adopt a more rational (and less age-discriminatory) approach to their workforce. Age discrimination legislation was first introduced in the UK in 2006, implementing *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (‘the Framework Directive’)³⁹ in UK law (see Chapter three). Previous government attempts to ‘persuade’ organisations not to discriminate on the basis of age prior to the introduction of age discrimination legislation, including via a Voluntary Code of Practice on

Retirement Zone: How Much Choice Do Individuals Have?’ (2006) 5 *Social Policy and Society* 507, 509; S Vickerstaff, ‘Older Workers: The “Unavoidable Obligation” of Extending Our Working Lives?’ (2010) 4 *Sociology Compass* 869, 873, 875; G Morrell and R Tennant, ‘Pathways to Retirement: The Influence of Employer Policy and Practice on Retirement Decisions’, Research Report No 673 (DWP, 2010) 26–27.

³⁵ European Commission, ‘The 2012 Ageing Report: Underlying Assumptions and Projection Methodologies’, European Economy 4/2011 (European Commission, 2011) 95.

³⁶ M Herrmann, ‘Population Aging and Economic Development: Anxieties and Policy Responses’ (2012) 5 *Journal of Population Ageing* 23, 28.

³⁷ European Commission (n 3 above) 10; D Schiek, ‘Age Discrimination before the ECJ—Conceptual and Theoretical Issues’ (2011) 48 *Common Market Law Review* 777, 779.

³⁸ See Age UK, ‘Grey Matters—a Survey of Ageism across Europe: EU Briefing and Policy Recommendations’ (June 2011) 11–12.

³⁹ *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L303/16.

Age Discrimination, made limited progress at addressing age discrimination in employment.⁴⁰ Thus, the UK provides significant evidence that the market is unable to resolve issues of age discrimination without legislative intervention: a 2003 study of 1,804 adults aged 18–64 in work or looking for work found that three per cent of respondents reported being bullied or harassed and six per cent reported being discriminated against on the basis of age at work in the previous 12 months.⁴¹ Thus, while age discrimination legislation is merely one tool for improving the treatment of older workers, and can be used in conjunction with other initiatives, it is clear that soft law alone is not sufficient for addressing age discrimination in employment. Therefore, age discrimination legislation has a fundamental role to play in achieving concrete organisational change.

Age discrimination laws may achieve two broad aims: first, they may secure *instrumental* economic ends, in being used as a means of relieving pressure on pension systems or the labour market from demographic ageing; and, secondly, they may achieve *intrinsic* ends, having value in and of themselves in acknowledging the dignity and inherent worth of older workers. These dual aims, and how they may interact, are explored below.

A. Instrumental Ends

Age discrimination laws are focused on increasing participation rates for older workers by preventing employers from irrationally discriminating against workers on the grounds of age. In theory, by preventing irrational age discrimination, and reducing discriminatory barriers that prevent older people from entering and remaining in employment, the laws should increase opportunities for older workers to gain and remain in work and promote more efficient employment practices. By increasing opportunities for older workers, age discrimination laws may help to reduce the social costs related to longer life spans, extended periods in retirement and inadequate pension provision.⁴² Further, by encouraging employers to retain older workers and look beyond the traditional ‘prime age’ workforce, the laws may promote ‘a skilled, trained and adaptable labour force’ with a broader range of experience and expertise.⁴³ This reflects ‘crowding theory’, the idea that employers will benefit from a broader pool of employee talent if discriminatory barriers

⁴⁰ D Grant, ‘Older Women, Work and the Impact of Discrimination’ in M Sargeant (ed), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (Cambridge, Cambridge University Press, 2011) 42; see also CIPD, ‘Tackling Age Discrimination in the Workplace: Creating a New Age for All’ (October 2005).

⁴¹ Ipsos MORI, ‘Workplace Discrimination’ (13 October 2003): www.ipsos-mori.com/researchpublications/researcharchive/948/Workplace-Discrimination.aspx.

⁴² S Fredman, *Discrimination Law*, Clarendon Law Series, 2nd edn (Oxford, Oxford University Press, 2011) 103.

⁴³ B Hepple, ‘Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC’ in S Fredman and S Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford, Hart Publishing, 2003) 71–74.

are eliminated,⁴⁴ and the belief that businesses will retain important skills and knowledge by retaining older workers.⁴⁵ Therefore, age discrimination laws may have significant instrumental benefits in promoting efficiency at the organisational and national level.

These aims are reflected in the rationale for UK age discrimination laws: the Regulatory Impact Assessment for the Employment Equality (Age) Regulations 2006, SI 2006/1031 says:

The legislation should, both by providing protection to those subject to discriminatory practices and by stimulating a cultural change, increase the participation of older and younger workers in the economy, while at the same time helping employers draw on a wider pool of workers.⁴⁶

Discrimination results in poorer quality matches in labour markets, which leads to lower national output ... The risk that exists currently is that [older and younger workers] are not participating fully in the workforce and so human resources are wasted.⁴⁷

Age discrimination laws are geared, therefore, to achieving organisational and economic efficiency, both by promoting workplace efficiency and by avoiding market failure due to irrational prejudice. Efficiency is viewed as a rationale, justification and outcome of discrimination law, via the 'business case' for age equality:

Age discrimination prevents people of all ages from realising their full potential in the workplace. This in turn prevents employers from getting the best performance out of their business and delivering the best service to their customers.⁴⁸

These statements indicate that instrumental economic ends drive UK age discrimination laws. However, it is clear that age discrimination laws can only go so far to increase employment rates for older workers: individual decisions to retire (and, in particular, to retire early) may turn on the availability of a pension, employer policies (such as flexible work practices), enjoyment of work and loyalty to the organisation, personal health, domestic caring responsibilities and relationships and whether work is viewed as having intrinsic value.⁴⁹ At the

⁴⁴ ACL Davies, *Perspectives on Labour Law*, Law in Context, 2nd edn (Cambridge, Cambridge University Press, 2009) 129.

⁴⁵ Fredman, *Discrimination Law* (n 42 above) 105.

⁴⁶ Regulatory Impact Assessment for the Employment Equality (Age) Regulations 2006, SI 2006/1031, [3].

⁴⁷ *ibid* [5].

⁴⁸ DTI, 'Equality and Diversity Coming of Age: Consultation on the Draft Employment Equality (Age) Regulations 2006' (July 2005) 6.

⁴⁹ C Phillipson, 'The Transition to Retirement' in G Cohen (ed), *Social Change and the Life Course* (London, Tavistock Publications, 1987) 161; M Kohli and M Rein, 'The Changing Balance of Work and Retirement' in M Kohli et al (eds), *Time for Retirement: Comparative Studies of Early Exit from the Labor Force* (Cambridge, Cambridge University Press, 1991) 9–11; Fredman, 'The Age of Equality' (n 7 above) 26; Barnes et al (n 34 above) ch 4; Drew and Drew (n 34 above) 98–106; Loretto and White (n 34 above) 498–500, 503; McNair (n 34 above) 486; Vickerstaff, 'Entering the Retirement Zone: How Much Choice Do Individuals Have?' (n 34 above) 509; Vickerstaff, 'Older Workers' (n 34 above) 873, 875; Morrell and Tennant (n 34 above) 26–27, 30, 43, 45. While recognising the broad range of factors that may affect and influence older workers, this book focuses solely on age discrimination laws.

same time, age discrimination laws are a key means of ensuring that employers provide opportunities for older workers to stay at work, and can increase individual motivation to work. Conversely, experiencing age discrimination is associated with intention to retire.⁵⁰ Therefore, and despite their limitations, age discrimination laws have a key role to play in achieving instrumental economic ends.

B. Intrinsic Ends

Through their pursuit of age ‘equality’, age discrimination laws also recognise the inherent dignity and worth of individuals of all ages and the injustice of age discrimination.⁵¹ While equality is seen as both an individual and social good, this has two fundamental limitations. First, age discrimination may be necessary or justified in some circumstances.⁵² Age discrimination is seen as ‘different’ to other forms of discrimination: unlike other grounds, age is not an unchanging or acquired attribute⁵³ and changes over time, being a universal and temporal phenomenon with no fixed characteristics.⁵⁴ Further, everyone has an age, meaning there is no ‘single, clearly defined, oppressed group’ who may benefit from protection.⁵⁵ While this brings non-disabled, heterosexual white men ‘into the fold of discrimination law lobbyists’,⁵⁶ it also undermines the age discrimination cause by accommodating those in a comparatively advantageous position who may be perceived as less ‘deserving’ of protection by equality law. Age may also be viewed with ambivalence due to an enduring social fear of the ageing process and the assumed association between ageing and declining capacity.⁵⁷ Therefore, while age discrimination is undesirable, it is often seen as less undesirable than other

⁵⁰ E Snape and T Redman, ‘Too Old or Too Young? The Impact of Perceived Age Discrimination’ (2003) 13 *Human Resource Management Journal* 78, 86.

⁵¹ Fredman, *Discrimination Law* (n 42 above) 104.

⁵² *ibid* 198.

⁵³ M Sargeant, ‘Mandatory Retirement Age and Age Discrimination’ (2004) 26 *Employee Relations* 151, 154.

⁵⁴ N Adnett and S Hardy, ‘The Peculiar Case of Age Discrimination: Americanising the European Social Model?’ (2007) 23 *European Journal of Law & Economics* 29, 38; M Sargeant, ‘The European Court of Justice and Age Discrimination’ [2011] *Journal of Business Law* 144, 146. See also *Seldon v Clarkson Wright & Jakes (A partnership)* [2012] UKSC 16 (25 April 2012), [2], [4]; *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704. However, this may equally apply to other protected characteristics: gender is also a social construction, rather than a biological given, and (particularly with advances in medical technology) is not necessarily a fixed or unchanging attribute: see, eg, J Lorber, *Paradoxes of Gender* (New Haven CT, Yale University Press, 1994) 13–36. As a result, age may not be inherently different from other protected characteristics.

⁵⁵ C Duncan, ‘Assessing Anti-Ageism Routes to Older Worker Re-Engagement’ (2003) 17 *Work, Employment & Society* 101, 108.

⁵⁶ Schiek (n 37 above) 778.

⁵⁷ B Bytheway, ‘Ageism’ in ML Johnson et al (eds), *The Cambridge Handbook of Age and Ageing* (Cambridge, Cambridge University Press, 2005) 339; C Duncan, ‘The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice’ (2008) 28 *Ageing & Society* 1133, 1143.

forms of discrimination and, indeed, potentially beneficial and efficient in an array of circumstances.⁵⁸ The issue, then, is how to distinguish between legitimate and illegitimate age discrimination.⁵⁹ The law's current approach to this issue is discussed in Chapter three. In summary, while age discrimination is prohibited in general, both direct and indirect discrimination can be justified. The balance that has been struck clearly reflects the fundamental tension between the instrumental and intrinsic ends of age discrimination laws.⁶⁰

Secondly, there is limited agreement as to what 'equality' entails at both the UK and EU level.⁶¹ 'Equality' is not a unitary concept, and what it entails in practice is not straightforward.⁶² While the choice between different conceptions of equality is ultimately a matter for policy and value judgements, not logic,⁶³ UK governments do not appear to have made a choice between competing interpretations. Indeed, Hepple identifies seven meanings of 'equality' evident in the Equality Act 2006 and government equality reviews:

- Respect for equal worth, dignity and identity as fundamental human rights;
- Eliminating status discrimination and disadvantage;
- Consistent treatment/formal equality;
- Substantive equality of opportunity;
- Equality of capabilities;
- Equalities of outcomes; and
- Fairness.⁶⁴

Alternatively, equality could be defined as encompassing:

- Consistency (eg like individuals being treated alike, 'formal equality');
- Individual merit (eg treating individuals according to merit, free from stereotypical assumptions);
- Treating individuals differently according to their needs;
- Achieving a fair distribution of social resources (eg preventing certain groups from bearing particular burdens on the grounds of group membership);
- Equality of opportunities (eg giving individuals an equal set of alternatives from which to choose to pursue their idea of the 'good life');

⁵⁸ Sargeant (n 53 above) 154; S McNair and M Flynn, 'The Age Dimension of Employment Practices: Employer Case Studies', Employment Relations Research Series No 42 (DTI, June 2005) 11.

⁵⁹ This is explicitly acknowledged in the Preamble to the Framework Directive, which states: 'differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified ... and discrimination which must be prohibited' Recital [25]. See Chapter 3.

⁶⁰ Fredman, *Discrimination Law* (n 42 above) 106.

⁶¹ C O'Connell, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 *International Journal of Discrimination and the Law* 7, 10–11.

⁶² See Fredman, 'The Age of Equality' (n 7 above) 37–46.

⁶³ Fredman, *Discrimination Law* (n 42 above) 2.

⁶⁴ BA Hepple, *Equality: The New Legal Framework* (Oxford, Hart Publishing, 2011) 13–24.

- Treating individuals with equal dignity and concern; and/or
- Full participation and inclusion in social institutions.⁶⁵

Reconciling these forms of equality, and the substantive underpinnings of equality law, Fredman advocates a ‘multi-dimensional concept’ of substantive equality, pursuing redistributive, recognition, transformative and participative dimensions.⁶⁶

These varied interpretations of equality continue to be evident in UK age discrimination laws.⁶⁷ UK government policy is ‘built on two principles of equality: equal treatment and equal opportunity’.⁶⁸ Equality is seen as ‘giving everyone an equal right to be treated fairly as an individual ... and giving them an equal opportunity to progress’.⁶⁹ However, government documents increasingly prioritise formal equality of opportunity over other conceptions of equality: indeed, the Regulatory Impact Assessment for the Employment Equality (Age) Regulations 2006, SI 2006/1031 says:

The aim of the legislation is to maximise the participation and economic (and social) contribution of groups that are currently subject to discriminatory practices *both* inside and outside the labour market because of their age ... the Government [aims] to improve opportunities and choice for individuals, and encourage labour market participation, whilst still allowing employers to manage their businesses effectively.⁷⁰

This is consistent with other policy statements:

[Our] goal ... is prosperity for all. We want to promote the opportunity for all to contribute to and share in that prosperity. This is why we are committed to tackling age discrimination. It is only fair that those who experience age discrimination should have the same opportunities as others.⁷¹

However, there is also recognition that equality of opportunity does not mean uniformity of treatment. Rather, ‘it means giving everyone an equal right to be treated fairly as an individual, recognising both their needs and their talents and giving them an equal opportunity to progress’.⁷²

In contrast to this minimalistic focus on equal treatment and formal equality of opportunity, Fredman argues for a more outcomes-focused approach, where

⁶⁵ See Fredman, ‘The Age of Equality’ (n 7 above) 37–46; see also Fredman, *Discrimination Law* (n 42 above) 8–19.

⁶⁶ Fredman, *Discrimination Law* (n 42 above) 25–33. See also B Hepple, ‘Equality at Work’ in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Oxford, Hart Publishing, 2009) 154–60 on the emergence of transformative equality.

⁶⁷ See Fredman, *Discrimination Law* (n 42 above).

⁶⁸ HM Government, ‘The Equality Strategy—Building a Fairer Britain’ (Govt Equalities Office, December 2010) 4.

⁶⁹ *ibid* 9.

⁷⁰ Regulatory Impact Assessment for the Employment Equality (Age) Regulations 2006, SI 2006/1031, [2].

⁷¹ DTI (n 48 above) 4.

⁷² HM Government (n 68 above) 9.

the aim of equality is to ‘facilitate equal participation of all in society, based on equal concern and respect for the dignity of each individual’.⁷³ Age discrimination legislation should arguably recognise the equal worth of human beings of all ages⁷⁴ and the need for dignity, autonomy and respect for all age groups.⁷⁵ By focusing on equal treatment and equality of opportunity, age discrimination laws may neglect and minimise intrinsic ends. Indeed, it is arguable that UK age discrimination laws are failing to achieve intrinsic ends in practice (see Chapter three).

C. Reconciling Conflicting Objectives

Even a minimalist understanding of ‘equality’ may come into conflict with instrumental ends. Some scholars argue that age discrimination law is unnecessary, ‘inefficient’ and even harmful, and that the market should be allowed to resolve any issues of discrimination through the operation of competitive pressures.⁷⁶ In this view, ‘equality is costly’ and likely to limit organisational efficiency.⁷⁷ While this likely overstates the issue, there may be some net costs associated with age equality⁷⁸ and commercial rationality can co-exist with discrimination.⁷⁹ Therefore, intrinsic and instrumental ends may well come into conflict.

The real issue, then, is how the costs of equality should be allocated,⁸⁰ and how age discrimination legislation should reconcile competing objectives. There has been very limited consideration of how conflicting policy objectives (or conflicting interpretations of different objectives) should be reconciled or managed.⁸¹ This reflects the failure of governments to put forward a vision or coherent strategy for addressing demographic change.⁸² Indeed, it is debatable whether labour law *can* or *should* be used to reconcile these competing objectives.

In reality, where the pursuit of equality or intrinsic objectives is perceived as coming into conflict with organisational efficiency, the UK government has chosen to adopt a ‘light touch’ approach to discrimination legislation to

⁷³ Fredman, ‘The Age of Equality’ (n 7 above) 21.

⁷⁴ N Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, Applied Legal Philosophy (Farnham, Ashgate, 2011) 2.

⁷⁵ See R Cotterrell, ‘Is Law Just a Means to an End’ (2008) 4 *Socio-Legal Review* 1, 7.

⁷⁶ R Posner, *Aging and Old Age* (Chicago IL, University of Chicago Press, 1995) 319; RA Epstein, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination* (London, Civitas, 2002) 19–20.

⁷⁷ Posner (n 76 above) 324.

⁷⁸ Fredman, ‘The Age of Equality’ (n 7 above) 49.

⁷⁹ W Loretto et al, ‘Ageism and Employment: Controversies, Ambiguities and Younger People’s Perceptions’ (2000) 20 *Ageing and Society* 279, 284–85.

⁸⁰ Fredman, ‘The Age of Equality’ (n 7 above) 49–50.

⁸¹ In the EU context, see AT Williams, ‘Promoting Justice after Lisbon: Groundwork for a New Philosophy of EU Law’ (2010) 30 *Oxford Journal of Legal Studies* 663.

⁸² Select Committee on Public Service and Demographic Change (n 1 above) 8.

minimise its detrimental impacts on business.⁸³ The pursuit of equality is therefore subservient to business or efficiency concerns. This reflects the dominant view that market concerns ‘trump’ equality.⁸⁴ Indeed, a renewed focus on the ‘business case’ for equality may have led a shift away from equality, towards ‘diversity management’ and a lesser concern with social justice and intrinsic ends generally.⁸⁵

Therefore, instrumental economic ends may *displace* equality, though there has been limited consideration of why this should be the case.⁸⁶ Weller argues that the parameters of the equality discourse should be shifted to stress social and political concerns for ‘justice and universal rights to fair treatment’, rather than the economic business case for equality.⁸⁷ If this were the case, ‘liberal notions of individual justice [could] challenge employers’ property rights’,⁸⁸ creating the potential for a different weighting of societal objectives.

In the chapters that follow, I explore the effectiveness of UK age discrimination laws in achieving both instrumental and intrinsic ends, and consider how the law reconciles these objectives where they conflict. However, the foregoing discussion demonstrates the tendency of UK age discrimination laws to prioritise instrumental ends over intrinsic objectives.

III. Research Questions

While age discrimination laws are seen as having broad potential to achieve instrumental and intrinsic objectives, it is unclear what impact they are having in practice. Serious questions remain as to the efficacy of these laws: are they promoting equality and reducing age discrimination in employment? Are they creating (quality) work opportunities for older workers? What can be done to improve the efficacy of the laws? In this book, I use empirical mixed methods to cast light on these complex legal issues. In doing so, I address two overarching questions, focusing on the employment context:

- How are UK age discrimination laws operating in practice?
- How (if at all) could UK age discrimination laws be improved?

⁸³ See, eg, the Explanatory Memorandum to the Employment Equality (Age) Regulations 2006, SI 2006/1031, 2; Employment Relations Directorate, ‘Final Regulatory Impact Assessment: Age Discrimination—Summary’ (March 2006) 8.

⁸⁴ Fredman, *Discrimination Law* (n 42 above) 35–37.

⁸⁵ A Greene and G Kirton, ‘Trade Union Perspectives on Diversity Management’ in M Özbilgin (ed), *Equality, Diversity and Inclusion at Work: A Research Companion* (Cheltenham, Edward Elgar, 2009) 265–66.

⁸⁶ S Fredman, *Discrimination Law*, Clarendon Law Series (Oxford, Oxford University Press, 2002) 25.

⁸⁷ SA Weller, ‘Discrimination, Labour Markets and the Labour Market Prospects of Older Workers: What Can a Legal Case Teach Us?’ (2007) 21 *Work, Employment & Society* 417, 432.

⁸⁸ *ibid* 432.

I approach these questions from an empirical perspective, using qualitative and quantitative research techniques and analysis to inform my normative views about how law *should* be (see Chapter two). In my research, I focus on demand-related issues facing older workers, with a particular emphasis on organisational practices and perspectives and how they impact upon an ageing workforce. While supply-related issues and individual perspectives are of fundamental importance to demographic ageing, they have been fairly comprehensively studied by other authors.⁸⁹ In contrast, there has been a relative dearth of research focusing on employers and their response to the ageing workforce.⁹⁰ This book therefore helps to correct this imbalance, through its focus on demand-side issues and employer practices and perspectives.

IV. Chapter Overview

In Chapter two I outline the reflexive law theoretical standpoint informing this book, and detail the ‘mixed methods’ research design employed in this study, which integrates qualitative, quantitative, doctrinal and comparative elements. I also explore how these various methods complement and enhance my overall research design.

Drawing on the research framework in Chapter two, in Chapters three through to eight I present the results from each of the research methods. In Chapter three I detail doctrinal research on age discrimination legislation and case law to describe and identify potential limitations in the existing legal framework. I argue that a number of aspects of the law remain unclear and underdeveloped, particularly in relation to the use of employer-justified retirement ages (‘EJRAs’) and positive action in the UK. Further, broad exceptions to the prohibition of age discrimination may undermine the position of older workers.

In Chapter four I present the results from 17 semi-structured qualitative expert interviews that explored expert views on UK age discrimination laws in late 2012. The interviews reveal that experts feel age discrimination laws in the UK are unclear and lack certainty. There was a strong feeling across many interviewees that employers are adopting a compliance-focused approach to

⁸⁹ See, eg, Barnes et al (n 34 above) ch 4; Drew and Drew (n 34 above); Loretto and White (n 34 above) 499; McNair (n 34 above) 486; Vickerstaff, ‘Entering the Retirement Zone: How Much Choice Do Individuals Have?’ (n 34 above) 509; Vickerstaff, ‘Older Workers’ (n 34 above) 873, 875; S Manfredi, ‘Developing Good Practice in Managing Age Diversity in the Higher Education Sector: An Evidence-Based Approach’ (Centre for Diversity Policy Research and Practice, 2008); Morrell and Tennant (n 34 above) 26–27.

⁹⁰ See W Loretto, ‘Work and Retirement in an Ageing World: The Case of Older Workers in the UK’ (2010) 5 *Twenty-First Century Society* 279, 280, 282.

implementing age discrimination laws, meaning there is little proactive practice in workplaces to support older workers. Further, there was significant concern that attitudinal change is not keeping pace with legislative reforms, particularly among employers. While the experts generally did not feel that legal change was required, they noted that the implementation of age discrimination laws had significant limitations.

Chapter five triangulates these qualitative and doctrinal findings with statistical analysis of the 2011 Workplace Employment Relations Study (WERS6), the flagship survey of employment relations in Britain. Corroborating the findings in Chapter four, I argue that employers are adopting a compliance-focused approach to implementing age discrimination laws, with limited evidence of proactive practice in workplaces to support older workers. While organisation size and type, union presence, and largest occupational group may be linked with the adoption of good practice, the ‘best’ WERS workplaces do not uniformly reflect these organisational characteristics. Panel data show that employers are adopting more age-aware policies and practices following the implementation of age discrimination legislation. However, past age-aware practices are strongly predictive of present practices, indicating that age discrimination legislation is having limited impact in some organisations.

Chapter six considers a comparative perspective on age discrimination laws, with reference to the laws in Finland, to illuminate and critique the legal situation in the UK. Finland has the longest history of legal intervention in age discrimination in the EU⁹¹ and is notable for the relative success of its labour market interventions relating to older workers.⁹² Therefore, it is an interesting and worthwhile comparator for other EU countries. Drawing on comparative legal doctrinal analysis, 13 semi-structured qualitative interviews with Finnish experts and statistical data, I argue that Finnish laws demonstrate a more proactive, collective and employer-focused approach to preventing age discrimination. However, statistical data are ambivalent on relative outcomes in the two countries. Despite this, there are a number of lessons from the Finnish experience that may inform UK law and policy-making.

Drawing on these results, Chapter seven details five organisational case studies of ‘best practice’ employers for older workers in the UK and Finland. It considers the role of law and age discrimination legislation in effecting organisational change, and draws conclusions on the impact of organisational structures and national context in promoting best practice. Law appears to be having limited impact on organisational practice, with business factors, organisational leadership and workplace culture as more significant drivers of good practice.

⁹¹ Adnett and Hardy (n 54 above) 35.

⁹² H Sarfati, ‘Social Dialogue: A Potential “Highroad” to Policies Addressing Ageing in the EU Member States’ (2006) 59 *International Social Security Review* 49, 63.

Chapter eight draws together the results from previous chapters by presenting the findings from an online expert Delphi ‘roundtable’. Using this method, UK experts were asked to consider a range of scenarios derived from the literature, expert interviews and comparative analysis that might improve the operation of UK age discrimination laws. While most scenarios were regarded as being impracticable under a deregulatory governmental agenda, the respondents regarded some key changes as being important, desirable and practicable. I argue that these proposals should be seriously considered and vigorously pursued.

Finally, Chapter nine concludes by evaluating the efficacy of UK age discrimination laws, and putting forward a programme for change.