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NEW SOUTH WALES COUNCIL ON THE AGEING

LAUNCH OF POSITION PAPER ON AGE DISCRIMINATION

WEDNESDAY 26 AUGUST 1987

Ageing and the Law - Ten Lessons from the USA

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AGEING AND THE LAW - LESSONS FROM THE UNITED STATES

The Hon. Justice Michael Kirby

Because we in Australia frequently follow United States legislative patterns (usually about 15 or 20 years later) it may be instructive for us to have a brief look at just what they are doing in the United States about age discrimination so that we can consider whether similar legal moves should be introduced in our country. Some rules against discrimination in the United States arise out of specific provisions of the United States Constitution which are not relevant to Australia, with its very different Constitution, which has no Bill of Rights. I will therefore deal only with the legislation that has been passed by Congress. When Congress was drafting the civil rights legislation of 1964 it considered whether to include age discrimination within the scope of that general Act. Ultimately it concluded the subject of age discrimination was best left to further investigation and study. A study was set up and the result was the federal Age Discrimination in Employment Act of 1967 (ADEA). Under that Act discrimination against employees on the basis of age was outlawed in the federal service and in bodies relying on federal funds. Many States of the United States introduced similar legislation to provide redress to older people who claimed they were the victims of discriminatory practices in employment. The Act was fostered by a concern for the plight of jobless older Americans. The purposes behind the Act were expressed in it in the following terms :

* to promote employment of older persons based on their ability rather than age;
* to prohibit arbitrary age discrimination in employment;
* to help employers and workers find ways of meeting problems arising from the impact of age on employment

The legislation set up administrative machinery to promote conciliation and mediation in preference to court action, and permitted access to the Equal Employment Opportunity Commission to investigate and to conciliate disputes.

In 1978 the United States Act was amended once again to strengthen the machinery for dealing with what were described as the 'unsatisfactory old age classifications'. The 1978 amendments included a Congressional finding that age-based distinctions such as mandatory retirement were unrelated to actual capabilities and caused financial and psychological hardship :

> Increasingly it is being recognised that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those persons who wish to be re-employed have a much more difficult time finding a new job than younger persons.
> H. of Rep. No. 95 - 527, Part I, 95th Congress, First Session (1977)

In the testimony offered to the Congressional hearings, one medical witness put it thus :

> In the past ageing was thought to be invariably accompanied by diminution in mental and other capacities. A person's abilities were thought to deteriorate in direct proportion to their age. Almost every investigation that has been undertaken on the topic has shown definitively that chronological age and functional ability are not related. Ageing as a process of wearing out is related to the concept of biological age, but biological age and chronological age are not co-relative. ... The concept that a

> person at age 65 or for that matter 70 or 75 inexorably has suffered a loss of ability and functional capacity is completely at variance with known facts. ... There is no rational basis for taking age 65 as a milestone as either physical or mental capacity. (Hearings before the Sub-committee on Labour of the Senator Committee on Human Resources, 95th Congress, First Session (1977) (Statement of A.E. Gunn, J.D., M.D.)).

Members of Congress noted that learning ability and intelligence do not necessarily decrease with age but may remain steady or even increase depending on one's profession, interests and health. The brain can substantially deteriorate before the ability to learn is affected. The age associated with loss due to brain deterioration varies widely from age 65 to over 90. Many Members of Congress observed that defenders of mandatory retirement ages offered no evidence in support of their contention but instead resorted to stereotypes. They asserted that the same kinds of stereotypes had for years been offered as justification for restraints on blacks and women in the United States.

With this background the Congress voted to amend the Age Discrimination in Employment Act, raising the earliest allowable mandatory retirement age to 70 for all people covered by federal legislation who were not federal employees and prohibiting mandatory retirement of most federal employees on the basis of age. The prohibition of mandatory retirement of most federal employees was intended as an example for the rest of the employers in the United States.

One legal commentator has suggested that the congressional action in the United States reflects :

> A growing realisation that the impact of many mandatory retirement laws is arbitrary and devastating both personally and socially. The conclusion to be drawn from the available evidence on ageing is thus clear : a significant

> segment of society is being victimised by rules that perpetuate the very stereotypes used to justify the rules in the first place. ... Just as it is wrong to assume a man is more qualified than a woman to administer an estate, it is wrong to assume that those who have reached a certain age have decreased mental and other professional capacity.

In the United States we have now begun to see litigation based on these principles. In one important case a judge has commenced proceedings claiming that State legislation requiring him to retire at the age of 70 was invalid. The proceedings are still current but one commentator pointed out that the Justices of the Supreme Court, who would ultimately have to hear the case, and who in the United States still hold office for life :

> need not look far to discover that age is not a reliable criterion of mental decline. 127 Uni. of Pennsylvania L.Rev. 798, 816 (1979).

Although the Council on the Ageing in New South Wales has called for attention to the problems of early enforced retirement and the special problems of mandatory fixed retirement ages based on arbitrary birth dates, we see nothing in Australia equivalent to the ferment on this topic in the United States. This is curious, because as some commentators point out, the ageing are fairly well represented in our legislatures. Furthermore, they are an increasing number of our population. They will become in the decades ahead an increasingly powerful voice as they grow more numerous (their numbers are swelled by early enforced retirement) and as they come to include the more assertive people of today's middle years.

I predict that we will see in Australia increasing resistance to what has been termed 'ageism'. Just as we addressed the International Year of the Child and the International Year for Handicapped Persons, the time cannot be far off when Australian society and its laws must face specifically the problems of the ageing. If we look to the United States, with its legal

system which shares many common features with our own, we can see dimly the pattern of laws ahead. There will be an increasing realisation that those who wish to retire early should be entitled to do so. There will be an increasing recognition of the need to provide such people with index-linked and consumption-related pensions. There will also be recognition of the need to provide employment activity for those who want to remain in employment. New attention will be given to finding suitable work for older workers, especially those made redundant by technology. There may even be legislation which requires personal assessment of the capacities of employees and forbids mandatory retirement at a fixed age.

But the increasing number of younger people who are brought into retirement from age 55 on poses new problems for our society and its laws. I believe that in the decade ahead we will see the law come to grips with these problems and I would not be surprised if legislatures in Australia, as in the United States, moved to discourage or even forbid the mandatory retirement of people on the basis only of their chronological age. I am glad to see that the NSW Council on the Ageing, amongst its many other pressing and important tasks, is looking to this question. It is undoubtedly a question of our decade.