



The Law Society

**Equality Act 2010: Banning Age Discrimination in
services, public functions and associations**

May 2011

supporting
solicitors

Response to the Government Equalities Office Consultation

May 2011

Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Mental Health and Disability Committee. The Committee is made up of lawyers practising in the fields of disability discrimination, mental health, mental capacity and community care for claimants and respondents and includes members from other professions and organisations in the field.

The Law Society welcomes the Government's intention to ban age discrimination in services, public functions and associations. Particularly in the area of health and social care, discrimination on the basis of age has been studied, debated and evidenced for a considerable period of time. A change in culture is critically needed. However, such change will be achieved only if it is supported by legislation, guidance, training and benchmarking.

In the experience of healthcare practitioners and patients, age will often have a direct negative impact on a patient's ability to access the full range of services offered by the NHS. This position is mirrored in the provision of social care by local authorities. Age may also directly affect the quality of care that a patient receives. We are especially concerned that the elderly are particularly vulnerable to service cuts in primary and secondary care and an ever increasing pressure on managers within the NHS and other organisations to deliver savings while facing ever-greater demands from an ageing population.

The Government's position that there should be no specific health and social care exceptions, and the requirement upon decision makers to satisfy an objective justification test will, if properly implemented, go some way to allaying our concerns. Proper implementation in our view includes the provision of sufficiently detailed and clear statutory guidance. This is especially necessary following the regressive action taken by Government in respect of the requirements of the public sector equality duty i.e the removal of the duty on public bodies of the requirement to publish details of the engagement they have undertaken when determining their equality policies.

In our response to the previous Government's consultation in September 2009 we said that the ban on unjustifiable age discrimination should be brought into force by 2012. We reiterate this view here and underline our position that legislation will not achieve its purpose without effective mechanisms to monitor and enforce any ban.

Consultation Questions

1. **Are there any other ways that age is used as a criterion to determine access to eligibility and for health and social services we have not considered?**

The consultation paper cites the following areas as examples of where age is used as a criterion in the provision of health and social care:

Age based charging and entitlements

Public health programmes

Advice and guidance on policy and practice in health & social care

Age appropriate services and facilities

The assessment of individual needs

The national resource allocation formulae

The broad areas cited above are comprehensive. Across these areas and service provision as a whole there is a culture of age discrimination and the 'widespread perception that age discrimination remains endemic within health and social services'¹. Changing the culture, attitudes and behaviour of staff within health and social care is key to ending age discrimination in any area of service provision.

2. **Do you think implementing the ban on age discrimination in relation to health and social care without exceptions will have a negative or positive impact on people of a particular age? If you consider that it will have a negative impact what action could be taken to minimise this?**

We do not consider that a ban on unjustifiable age discrimination without exceptions will have a negative impact. A ban will have a financial and/or resource impact which the Government will need to plan to meet without detriment to other areas of service provision. This is imperative if the legislation is to achieve its desired result and we would welcome more detail from Government on this aspect.

By not allowing exceptions, a new responsibility will be placed upon healthcare professionals to understand the concept and parameters of 'objective justification' in their areas of speciality. We welcome the package of support for NHS staff and stakeholders, and in our view more targeted and specific training will be necessary to transform the endemic culture of discrimination.

We strongly disagree however with the exclusion of under 18 year olds from the ban on age discrimination in health or social care and other areas. This is in itself an exception and unjustifiably discriminatory.

¹ 'Old Habits Die Hard - Tackling age discrimination in health and social care, King's Fund 2002.

We are perplexed by the explanation at paragraph 3.3 as to why discrimination law is not being used to promote children's well-being: 'the extended ban only protects people aged 18 or over. It does not apply to the under-18s because a child's age is closely related to his or her levels of development and need. Therefore, the basic principle of age discrimination legislation – that people should be treated the same regardless of their age – is rarely appropriate to the treatment of children.'

There is substantial evidence indicating that young people under 18 experience age discrimination within health and social care. For example, the Children's Commissioner for England has highlighted the lack of age-appropriate treatment of children with mental health needs.²

We do not agree that the extension of age discrimination legislation to under 18s would have significant negative consequences, such as making numerous age appropriate services for young people unlawful. Just as existing anti-discrimination legislation includes exceptions that permit positive discrimination or targeted services in the context of the provision of goods, facilities and services, the Equality Bill provides for age-appropriate treatment where justifiable and proportionate.

With regard to health and social care, there is a provision in the Mental Health Act 1983 (section 131A), which came into force in April 2010, which requires hospital managers to ensure that when young people under the age of 18 are admitted (whether under the Mental Health Act 1983 or not) the environment must be suitable for their age, subject to their needs. This is an important provision, and it needs to be supported by the development of age appropriate in-patient facilities. This is an example where the provision of age appropriate services is justified and proportionate. The Convention on the Rights of the Child which provides that children deprived of their liberty should be separated from adults unless it is considered to be in the child's best interests not to do so (article 37(c)).

Whilst discrimination law is not the only way to promote children's well-being, we do not agree that discrimination law has *no* role to play in addressing poor treatment of children, as stated in paragraph 3.3. People of all ages, including older people, children and young people, need to be protected from discrimination through a range of legislative and wider measures.

³ The Children's Commissioner for England (2007) *Pushed into the Shadows: Young People's Experiences of Adult Mental Health facilities*, London and the Children's Commissioner for England (2008) *Out of the Shadows: A Review of the Responses to Recommendations made in Pushed into the Shadows: Young People's Experience of Adult Mental Health Facilities*, London.

3. Are there any areas in health & social care in Scotland or Wales where you believe there may be differences in approach to the use of age in decision making compared to England?

We are unable to comment on the differences in approach in health and social care in Scotland or Wales, but we have provided significant input into the Law Commission's review of Adult Social Care Law which addressed regional variations in the provision of adult social care. In our response to the Law Commission we highlighted the desirability of a single adult social care statute for England and Wales. Consistency and simplicity are the paramount considerations. We encourage Government to analyse possible differences and to take the necessary measures to ensure consistency of the patient experience in access to and quality of care in whatever part of the country they receive that care.

4. Does exception 2 (financial services) in the proposed draft Order in Annex 1 adequately achieve the policy intent described in paragraphs 6.1 to 6.10? If not, or you are not sure, please explain why.

We have previously expressed our view that an exception in respect of financial services may be justified, as the inherent disruption and financial effect on businesses and consumers overall would be negative.

However, any discrimination must be a proportionate and justifiable response to a real risk or other relevant factor in the provision of a particular financial product. A consumer should also be made specifically aware where age has been used as a criterion in valuing a particular financial service or product. It is only then that an assessment may be said to have been done 'with reference to information which is both relevant to the assessment of risk and from a source on which it is reasonable to rely'.

With respect to the currently drafted definition in Section 20A this should be made clearer by specific referral to financial products rather than focussing as it currently does on the 'financial service'.

5. Do you agree that a service level agreement signed by both the ABI and the Government showing how age is used when assessing risk and pricing products is an effective way to achieve improved transparency?

It is clear that the force of statute is necessary in an area where there is considerable mistrust between consumers and businesses. Whilst a service level agreement might have been successful in the context of insurers and genetics tests, we do not agree that this is applicable to the provision of a far wider range of financial services/products.

We would welcome greater elaboration on why the Government does not believe that it is necessary for this to be a legislative requirement and emphasise our view that such a legislative requirement is necessary in order to ensure transparency.

6. **Do you agree that a service level agreement signed by BIBA, ABI and the Government, agreeing that a signposting/referral system should be set up so that those refused an insurance product, because of their age, are referred to a supplier that can help them; is an effective way to achieve improved access?**

We refer to our response to question 5 on the desirability and efficacy of service level agreements in this context.

We do not agree that signposting would be particularly helpful for customers, particularly as such a process would seem to be born out of a system that offers products limited to certain age-groups as a result of arguably unjustifiable age discrimination. In addition to limiting consumer choice, signposting would encourage adverse selection, with certain financial services providing services to one group of consumers, resulting in other service providers still being able to target consumers who fall outside of the older or 18-24 consumer groups.

7. **Are there any instances where the customer experience of people of different ages in accessing financial services (apart from questions of design, delivery, transparency, already addressed) causes concerns? Are existing safeguards adequate? If not, what would be a proportionate way to address these?**

We recognise that the financial services industry is highly regulated and has received considerable legislative focus in recent years.

Nevertheless, the provision of specific information on complaints procedures and bodies able to deal with complaints in relation to possible unjustifiable age discrimination should be provided to consumers upon refusal of a service on the ground of age.

8. **Does exception 3 and 6 (concessionary services and associations - concessions) in the proposed draft order in Annex 1 adequately achieve the policy intent described in paragraphs 7.3-7.9 above for both service providers and associations? If not, or you are unsure, please explain why?**

The term 'requiring' used in section 30(A)(3)(a) should be replaced with the term 'accessing'. Otherwise, we are content with the wording.

9. **Does exception 4 (age related holidays) in the proposed draft Order in Annex 1 adequately achieve the policy intent described in paragraphs 7.10 to 7.14? If not, or you are not sure, please explain why?**

We are content with the current wording of Exception 4 (age related holidays).

- 10. Does exemption 1 (immigration) in the proposed draft Order in annex 1 adequately achieve the policy intent described in paragraphs 7.14-7.17 above. If not, or you are not sure, please explain why?**

We note the Government states that the 'exception is intended therefore that immigration policy is delivered effectively'. Whilst we agree that immigration policy must be delivered effectively by the UK Border Agency(UKBA) it is also essential that it is delivered fairly.

The recent case of *Quila & Others v SSHD [2010] EWCA Civ 1482* demonstrates that the alleged desire to implement an effective and protective policy on forced marriages can nevertheless have discriminatory consequences in respect of age and lead to perverse consequences which appear to breach individual rights to private and family life.

In our experience immigration is one area of law where the exercise of discretion by Government agencies is very often the subject of legal challenge. Moreover, the general quality of decision making by the UKBA is widely regarded as poor. We are not confident that the grant of an exception in the field of immigration is justified; decisions made on the basis of age by the UKBA must be objectively justified.

- 11. Does exception 5 (residential mobile homes) of the proposed draft Order in annex 1 adequately achieve the policy intent described in paragraphs 7.18 - 7.25. If not, or you are not sure, please explain why?**

At paragraph 7.23 it is suggested that allowing lower age limits for permanent residents in residential park homes is a valid exception. We believe that rental companies should not be allowed to refuse on the basis of age alone. We accept that it may be justifiable for hire companies to pass on increased costs to older or younger customers where this can be justified by relevant and accurate evidence.

- 12. Does exception 7 (sport) of the proposed draft Order adequately achieve the policy intent described in paragraphs 7.26-7.32 above? If not, or you are not sure, please explain why?**

We are content with the current wording of Exception 7 (sport).

- 13. Do you have any further comments about the draft Order (Annexe I) over and above any comments you have already made about the exceptions it covers?**

No.

14. What would you like guidance to cover to ensure that businesses and organisations are clear about what they need and do not need to do?

Any guidance should:

(a) set out the statutory requirements

(b) clarify the meaning and consequences of age discrimination

(c) enable businesses to assess whether any services they offer fall under the ban or exceptions easily

(d) provide relevant examples of practices or processes to highlight both direct and indirect age discrimination.

(d) encourage businesses and organisations to carry out a proper audit of their processes so as to be able to identify potentially discriminatory practices.

(e) encourage staff education and training

Perhaps the most important question is the status that any guidance should have. We are firmly of the view that there should be comprehensive statutory guidance for business and other organisations. In holding this view we note that the current statutory guidance on discrimination in service provision does not encompass the characteristic of age and will require revision.

15. What particular types of businesses or organisations do you think will need tailored guidance on how the changes affect them?

The NHS, local authorities and financial service providers will require tailored guidance. Particular attention should also be given to communicating the guidance to smaller businesses in an easily accessible and understandable form.

16. What do you see as the best way to communicate this guidance to businesses and organisations? Where would you normally go for guidance on discrimination law?

Communication must be clear, simple and accessible. Business and industry forums, publications and websites should be targeted. Human Resources publications are particularly useful in carrying the message to businesses and other organisations.

The websites of the following relevant government departments/agencies including the following should also carry guidance:

Government Equalities Office

Department of Health

Department for Communities and Local Government

Department for Business, Innovation & Skills

Equality & Human Rights Commission

17. Can you provide any data on costs and benefits, which have not already been included in the impact assessment?

We do not hold such data.

18. Can you provide any further information or views to help us calculate the economic benefits of reducing discrimination? Please give details of the sector(s) to which you are referring?

We are unable to assist with this.