

Achieving age equality in health and social care

Annex 1

Age and the Equality Act 2010: A brief overview

1. This note provides an overview of the provisions in the Equality Act 2010 that are most relevant in the context of:
 - banning age discrimination in the provision of services and exercise of public functions; and
 - extending the public sector equality duty to apply to age.¹
2. However, it is important to bear in mind that most of the sections in the Act are generic: that is, they generally apply to eight protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. (There are only two sections in the Act that are specific to age).² The provisions described in this note are generic, except where otherwise stated.

Key concepts

Discrimination

3. Discrimination law is generally about a person's treatment compared with others (a **comparator**), not about absolute standards. The comparator may be a real or (except in equal pay cases) hypothetical case.
4. When comparing cases for the purpose of establishing whether discrimination has occurred, "*there must be **no material difference** between the circumstances relating to each case*" (section 23(1)).
5. When comparing cases, it is necessary to compare the way the same person treats **both** the person complaining of discrimination **and** the comparator. A claim of discrimination cannot be based on the fact that one person treated A less well than a different person treated B. If a person can show that s/he has been discriminated against, s/he can claim damages in respect of any loss that s/he has suffered, and often for injury to feelings. It is only necessary for a claimant to prove facts from which the court can decide, in the absence of any other explanation, that discrimination has occurred, whereupon the burden of proof shifts to the respondent to show that it has not acted in a discriminatory way.

¹ The equality duty applies to public bodies in relation to all the functions they exercise. This note focuses on what it might mean in relation to services and public functions.

² Section 5, which defines what it is to share the protected characteristic of age; and section 197 which provides a power to make secondary legislation in relation to age.

6. The same basic definitions of discrimination apply across all protected characteristics, with some variations. Broadly speaking:

Direct discrimination is treating someone *less favourably because of a protected characteristic* (section 13). This does not have to be the victim's own characteristic: the Act also provides protection if the victim does not have the characteristic but associates with others who do, or if the victim is (wrongly) perceived to have the characteristic.

Combined discrimination: dual characteristics. Section 14 of the Equality Act 2010 means that it will be possible for people to bring claims of unlawful direct discrimination because of a combination of two protected characteristics (from the following list: age, disability, gender reassignment, race, religion or belief, sex and sexual orientation).

Indirect discrimination is applying to someone a provision, criterion or practice which puts him/her, and persons with whom s/he shares a protected characteristic, *at a particular disadvantage* (section 19). Deciding whether indirect discrimination has taken place involves comparison with (or between?) others affected by the same provision, criterion or practice.

7. However, disadvantageous treatment that would otherwise be indirect discrimination (for any protected characteristic), or less favourable treatment that would otherwise be direct discrimination (for age only), is **not discrimination** if the person applying it can show it to be a proportionate means of achieving a legitimate aim. (If the person applying the treatment can show this, the different treatment is sometimes said to be "*objectively justified*").

8. The Act does not define "*legitimate aim*" or "*proportionate means*" but there have been a series of cases which help us interpret what these phrases may mean in a range of situations. This two-stage test should be approached in the following way.

First – is the aim a legitimate one?

The aim should be lawful, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims. Although improving efficiency may be a legitimate aim, simply trying to reduce costs would not satisfy the test.

Second – is the means of achieving the aim proportionate?

Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. Something may be 'necessary' without it being the only means of achieving the aim – it is sufficient that less discriminatory measures could not achieve the same objective. A balance has to be struck between the discriminatory effect of the treatment and reasons for applying it, taking into account all available evidence. It is rarely possible to justify discriminatory conduct on the basis of lack of available funds. Nor is it possible to justify such conduct where other less discriminatory means are available.

It is worth recognising that:

- Judgements about what is proportionate (and perhaps also legitimate) are likely to change over time. For example, something which is impossible (and therefore not proportionate now) may become proportionate in future if a new technology develops that means it can be done easily and cheaply. Something that is proportionate now may cease to be proportionate, perhaps because a less discriminatory way of achieving the same aim becomes available.
- The fact that an aim is legitimate does not imply that any means of achieving it is proportionate. For example, distributing health care resources to Primary Care Trusts on the basis of the number of older people in their populations – and assuming that other age groups have no need for health care – is unlikely to be proportionate. It is rarely possible to justify discriminatory conduct on the basis of lack of available funds. Nor is it possible to justify such conduct where other less discriminatory means are available.
- The decision will rarely be simple and will depend on the circumstances of the case.

Harassment and victimisation

9. The Act defines harassment and victimisation as well as discrimination. For simplicity, this note concentrates on discrimination, but, broadly speaking:

- **harassment** is unwanted conduct related to a protected characteristic which, for example, violates the dignity of a person with the characteristic (section 26);
- **victimisation** means subjecting a person to detriment because he or she has brought or supported proceedings under discrimination legislation or is suspected of doing so (section 27).

Positive action

10. The Equality Act (section 157) does not prohibit a service provider (or employer in relation to employment in section 158) taking any action which is a proportionate means of achieving the aim of

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

Information about when it may be appropriate to make use of these provisions will be included in EHRC guidance.

Services and public functions

11. Section 29 of the Act makes clear that discrimination in the provision of services and exercise of public functions is unlawful. This ban applies to discrimination because of the eight protected characteristics (including age) listed above.

12. Discrimination on most protected grounds (for example, race, sex, disability) is banned against people of any age, but age discrimination is banned only in relation to people aged 18 or over. (This is because it often is appropriate to treat children differently because of their age).

13. The Act sets out a number of “*exceptions*” to the ban on discrimination: that is, it makes clear that behaviour or policies etc falling within the scope of an exception do not breach the ban on discrimination.

- Some exceptions apply in relation to all the relevant protected characteristics. For example, section 191 and Schedule 22 make clear that it is not a breach of the law on discrimination to do something that is required by an Act of Parliament or other legislation.
- Other exceptions are more specific. For example, paragraph 14 of Schedule 3 to the Act makes clear that it is not unlawful to refuse, in certain circumstances, to provide a service to a pregnant woman for health and safety reasons.

The Act also includes powers to create further “*exceptions*” in secondary legislation. The power to create exceptions in relation to most protected characteristics in relation to services and public functions is at the end of Schedule 3. The power to create exceptions in relation to age is in section 197.

Enforcement

14. The Act includes provisions on how the ban on discrimination in services and public functions may be enforced. Briefly:

- an individual can bring a claim of discrimination in the county court, and the Equality and Human Rights Commission (EHRC) has the legal power help him or her to do so;
- if the court finds that unlawful discrimination has occurred, it may award damages, including for injury of feelings, and/or make an injunction (requiring a person to do, or stop doing, something) or a declaration (that there was unlawful behaviour);
- both the person carrying out the unlawful act and the person/body on whose behalf they were acting can be held to account where appropriate.

Public sector equality duty

The general duty

15. The Equality Act 2010 also strengthens earlier legislation by replacing the three separate equality duties that currently apply to the public sector in relation to disability, race and sex with a new duty which applies in relation to the eight protected characteristics listed above. The duty applies to people of all age groups.

16. The new duty means that a public authority in the exercise of its functions (and a person carrying out a public function in the exercise of that function) must have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it (for example, persons of different age groups).

Section 149 of the Act provides more detail on what is meant by having due regard to the need to “*advance equality of opportunity*” and to “*foster good relations*”.

Specific duties

17. The Act also provides a power to impose additional duties, in secondary legislation, on public authorities bound by the general duty. The intention is that these specific duties will help public authorities meet the requirements of the general duty.

Enforcement

18. Briefly:

- the general duty can be enforced by EHRC or by judicial review;
- the specific duties are enforceable only by EHRC.