

Consultation Response

Public consultation on the Draft Age Supplement to the Services, Public Functions and Associations Statutory Code of Practice

Ref: 514

Date: May 2014

All rights reserved. Third parties may only reproduce this paper or parts of it for academic, educational or research purposes or where the prior consent of Age UK has been obtained for influencing or developing policy and practice.

Name: Jill Mortimer
Email: Jill.Mortimer@ageuk.org.uk

Age UK
Tavis House
1-6 Tavistock Square
London WC1H 9NA
T 0800 169 80 80 F 020 3033 1000
E policy@ageuk.org.uk
www.ageuk.org.uk

Age UK is a charitable company limited by guarantee and registered in England (registered charity number 1128267 and registered company number 6825798). The registered address is Tavis House 1-6 Tavistock Square, London WC1H 9NA.

About this consultation

The Equality Act 2010 protects people from discrimination in the workplace and in wider society. It replaces previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations. It sets out the different ways in which it is unlawful to treat someone.

Although most provisions in the Act came into effect in 2010, the ban on age discrimination in services, public functions and associations did not come into force until October 2012. This ban is the most significant extension of protection against discrimination in the Equality Act 2010 with implications for those who provide and use services.

The Equality and Human Rights Commission (EHRC) has been given power to enforce the law, for example, by assisting or intervening in individual discrimination cases. However its first priority is to provide guidance, support and encouragement so that organisations and service providers can get it right first time. This is why EHRC publishes codes and guidance that give individuals, business, employers and public authorities the information they need to understand the Equality Act, exercise their rights and meet their responsibilities

This draft Age Supplement to the Services, Public Functions and Associations Statutory Code of Practice aims to be a comprehensive and technical guide to the law. The EHRC is seeking comments on whether it:

1. Is clear, helping the reader to understand the age implications of the Code of Practice and the Act.
2. Is comprehensive, including clarification of all the necessary definitions needed to understand the Code of Practice.
3. Uses the right amount of good and useful examples of lawful and unlawful practice.
4. Is approximately the right length.
5. Will impact upon business costs

About Age UK

Age UK is the United Kingdom's largest charity dedicated to helping everyone make the most of later life. The over-60s is the fastest-growing group in society and there are more of us than ever before. Ageing is not an illness, but it can be challenging. At Age UK we provide services and support at a national and local level to inspire, enable and support older people. We stand up and speak for all those who have reached later life, and also protect the long-term interests of future generations. Our vision is a world where everyone can love later life.

We are a registered charity in the United Kingdom, formed in April 2010 as the new force combining Help the Aged and Age Concern. We have almost 120 years of

combined history to draw on, bringing together talents, services and solutions to enrich the lives of people in later life.

We provide information and advice to around 5 million people each year, run public and parliamentary campaigns, provide training and fund research exclusively focused on later life. We support and assist a network of nearly 170 local Age UKs throughout England: the Age UK family also includes Age Scotland, Age Cymru and Age NI.

Key points and recommendations

Overall, we strongly welcome the Code which we find helpful and, in general, very clear.

- We particularly welcome some of the examples relating to age discrimination in health and social care.
- We would like to see further examples added in relation to financial services, in particular clarifying the position on refusal to provide mortgages, and on restricting access to those who are prepared to transact online.
- We feel that the Code is a reference document and, as such, could usefully be longer to include more examples that would help businesses and organisations recognise when policies and practices are likely to be lawful or unlawful.
- The Code will reduce costs to business by clarifying their responsibilities under the law.

Introduction

Age UK has welcomed the ban on harmful age discrimination in the provision of goods and services, introduced under the Equality Act 2010, that came into force on 1st October 2012.

We especially supported the ban of age discrimination in health and social care, as there is compelling evidence of the harmful effects of age discrimination in these services. As the statistics above demonstrate, there is also a lot of scope for improving older people's access to many goods and services through the ban, and the possibility that the ban may also provide a catalyst to prompt businesses to recognise the potential for new and better designed products funded by the grey market.

We agree that not all discrimination on grounds of age is harmful. In some circumstances there may be good reason for treating one age group differently or providing a discrete service for them.

However we remain concerned that the UK government does not believe that there is sufficient evidence of harmful age discrimination to apply the ban to the financial services sector, and that the Equality Act 2010 (Age Exceptions) Order 2012 included wide ranging exceptions for this sector. It is our view that any concerns about adverse effects of a ban on the financial services sector can be addressed through the test of showing that differential treatment on grounds of age is a proportionate means of achieving a legitimate aim. We raise a number of issues below regarding Chapter 11 and we will continue to monitor the impact of the arrangements.

In what follows, we focus on the specifics covered in the draft Age Supplement and address the consultation questions as requested. We have also submitted the same information on the EHRC's electronic consultation pro-forma. Only questions to which we have given a response are included below.

Overall, we strongly welcome the Code which we find helpful and, in general, very clear. We find examples extremely helpful and would welcome more in all the chapters. Although this would make the Code longer, it will be used as a reference documents by organisations rather than read cover to cover, and a wider range of examples will help the reader grasp the specifics of the provisions.

Chapter 2: The protected characteristic of age

This chapter is clear and helpful. We have no further comment

Chapter 3: Direct discrimination

Q2. If the Chapter was not clear, please tell us where it is unclear and / or how it could be clarified?

Paragraph 3.15

We question the use of ‘appropriate and reasonably necessary’ in the first sentence, rather than ‘proportionate’. We think it would be clearer to use the correct term (‘proportionate’) to start with in paragraph 3.15, as proportionate is then defined as ‘appropriate and reasonably necessary’ in paragraph 3.17. This would also ensure consistency with paragraph 4.10 where ‘proportionate’ is the term used.

Paragraph 3.10

The drafting does not make it clear whether or not banning groups of under 25s would be lawful because of the club owner having trouble with ‘some younger clubbers’.

Paragraph 3.19

The second example (‘local authority’) is not entirely clear. Including the words ‘not exclusively’ in the second line begs the question of whether these words are relevant to the substance of the example. Would the position have been different if the day centre was *exclusively* for the benefit of people aged 75+?

Paragraph 3.23

This example is unclear because it doesn’t explain that (presumably) the immunisation programme is age-restricted.

Q9. Are there any other comments that you would like to make about Chapter 3?

Paragraph 3.19

In employment, the Seldon case sets out more detail on the principles needed to objectively justify direct age discrimination. If any of these principles are likely to apply in the delivery of services, it would be helpful to see them reflected here. It would be particularly helpful to add examples that would *not* be legitimate, for example (if applicable), the ‘congeniality’ argument in Seldon.

Paragraph 3.6

We particularly welcome the example under paragraph 3.6. We know that age discrimination has restricted access to surgery, as shown by the report ‘Access all ages’, which found that access to surgery for prostate cancer drops by 80%,

comparing 65 – 69 with 75 – 79 age groups, and breast cancer surgery peaks at 65 – 69.¹

Paragraph 3.22

We also welcome the example at 3.22 regarding home care and the fundamental principles of human dignity and self-determination. Analyses carried out by the Personal Social Services Research Unit showed differences in levels of care and support between older and younger age groups after accounting for differences required to compensate people with varying levels of need (e.g. disability and impairment). One data set suggested that older service users (65 and over) would require a 25% increase in support to remove these age differences compared to younger people (aged 18 to 64). Another data set suggested that older people's access to services is slightly more limited than for younger people.²

Chapter 4: Indirect discrimination

Q2. If the Chapter was not clear, please tell us where it is unclear and / or how it could be clarified?

Paragraphs 4.4 and 4.9

It is not clear whether/when giving preferential services, such as loyalty bonuses, on the basis of the length of time someone has been using the service would be lawful. The examples given at 4.4 suggest it is lawful if the service has been used regularly for 20 years. The example at 4.9 suggests it would be unlawful to give a loyalty discount to those with a subscription for 20 years. The two examples appear to be inconsistent.

Q9 Are there any other comments that you would like to make about Chapter 4?

In health services, a crucial way in which indirect discrimination against older people occurs is through the use of proxies for age. Evidence would suggest that doctors do not necessarily use age explicitly but instead will refer to co-morbidities or frailty in deciding to limit treatments, without properly assessing the impact these might, or might not, have on the efficacy of possible treatments. Co-morbidities and frailty are much more prevalent amongst older people. Rather than automatically restricting treatment, the appropriate approach could be :

- Detailing the assessment process that when recording decision/reasons to treat or not
- Considering the possible impact that co-morbidities and/or frailty and/or disability would have and the influence this has on the choice of treatment

¹ *Access All Ages: Assessing the impact of age on access to surgical treatment*, Royal College of Surgeons/Age UK/MHP Health Mandate, 2012

² *The Cost of Addressing Age Discrimination in Social Care*, Julien Forder, PSSRU discussion paper 2538, 2008

- Demonstrate that the appropriate professionals/expertise/services could be made available to mitigate risks of co-morbidities and/or frailty and/or disability

Chapter 5: Harassment, victimisation and other unlawful acts

Q9. Are there any other comments that you would like to make about Chapter 5?

We note that, in relation to employment, third party harassment procedures were recently repealed, thereby stopping employers being responsible for members of the public harassing their staff. We would be interested to know whether this is relevant to this section of the Code

Chapter 6: Positive action

This section is clear and all the relevant definitions are included. Further examples would be very helpful.

Chapter 7: Services and public functions

Q2. If the Chapter was not clear, please tell us where it is unclear and / or how it could be clarified?

Paragraph 7.3

The part of the law that relates to the disposal and management of premises is especially relevant to older people's housing, for example retirement villages, sheltered housing and care homes. Although this Age Supplement may not be the place to clarify Part 4 of the Act, it would be helpful to have a reference to where the reader can get technical guidance on the implications of Part 4 with regard to age.

Q9. Are there any other comments that you would like to make about Chapter 7?

Paragraph 7.13

In the example under this paragraph, the sentence 'Several employees over 60 complain about this' begs the question of what would have happened had they not complained. Presumably it would still have been discriminatory had they not complained?

Chapter 8: Associations

Q2. If the Chapter was not clear, please tell us where it is unclear and / or how it could be clarified?

Paragraph 8.21

Where lists of examples are given, as in this paragraph, it would be helpful to explain in the introductory text whether the list is complete or whether further examples are

possible. For example, a concession might include a special benefit for a long-standing member (a right to a subsidised trip, say)

Q9. Are there any other comments that you would like to make about Chapter 8?

Paragraph 8.9

We strongly welcome this example, as we know a requirement to be online creates real problems for some older people. Around two-thirds of people aged 75+ have never used the internet. We would like to see a similar example in Chapter 11 (see below).

Chapter 9: Application of general exceptions to the protected characteristics of age

We have no comment on this chapter

Chapter 10: Age specific exception: concessionary services

We have no comment on this chapter

Chapter 11: Age specific exception: financial services

Q2. If the Chapter was not clear, please tell us where it is unclear and / or how it could be clarified?

Paragraph 11.4

It is unclear whether this list is complete, or whether further examples might be possible (or what would happen if new financial services are developed). For example, there are other forms of financial advice such as investment advice, insurance brokering or tax advice. Would these fall within the exception?

The example is also a little odd, as VAT returns would not (in the everyday sense of the word) be regarded as being of a 'payment nature'. It would be helpful for the Code to say whether the definitions of terms such as 'payment nature' relate to terms defined in other legislation or whether they are left to the Courts to define.

Q9. Are there any other comments that you would like to make about Chapter 10?

Paragraph 11.6

We strongly welcome the clarity provided by this paragraph as to victimisation or harassment. However, we suggest it should also make reference to the requirement that, if a risk assessment is made, it should meet certain conditions, in case users miss paragraph 11.7.

We also particularly welcome the second example ('woman in her 70s') as we are aware of cases where this has indeed happened.

Paragraph 11.10

The Code should make it clear that companies should not rely on the ABI's publication of data that is relevant to the use of age in the assessment of risk for some forms of insurance. Age UK would not regard this data as being an acceptable data source, because it is presented at a very high level of generalisation, and we would expect companies to rely instead on data more related to their business. There is also no guidance in the document about companies' practice of using very wide age-bands (classifying everybody aged 65-75 as the same risk, for example), which we would regard as a discriminatory generalisation. We know that it is possible for providers to risk-rate in much narrower age bands for many products.

We strongly welcome the first example under paragraph 11.10.

We suggest that the second example (65-year old woman) should refer to a woman of 75 visiting family overseas. We think it unlikely that a 65-year old would have health conditions that are likely to recur within one year simply because of her age, so an older person might be a clearer example.

Mortgages

We are aware of considerable age discrimination in the mortgage market, where we know that many (if not most) providers impose upper age limits without, in our view, any assessment of individual ability to repay. We would like to see an example added clarifying the situation in relation to the Equality Act. Here is an example from our postbag:

'I am faced with having to sell my home by this November as I have an interest-only mortgage with XX Bank who currently have a policy of refusing to enter into another agreement when a mortgagee reaches the age of 75. I wondered if this could be regarded as "ageist" bearing in mind the fact that many more people are now living longer these days. The Bank have been fairly reasonable in allowing me about eighteen months after my 75th birthday on 2nd March 2013. I am well able to meet the monthly payments and all mortgage providers advertise that "your home is at risk if you fail to keep up with your mortgage payments"- they never say there is an age limit on interest-only mortgages.'

Chapter 12: Other age specific exemptions

Paragraph 12.16

Should the first bullet point also include 'over-age' or do age restricted services of this kind only have minimum ages?

Paragraph 12.17

The first bullet point should be broadened to refer to any medium through which the service is provided. For example, a service may be provided online or over the telephone, not just at 'premises'.

Chapter 13: Enforcement

This chapter is clear. We have no further comment

Using the supplementary Code in your organisation

We feel the overall length of the supplementary Code is certainly not excessive. We have suggested some further examples and clarifications which will add to the length, and nothing currently covered is superfluous. Overall the Code will not impose an unreasonable burden on business. On the contrary, more examples and clarifications will help businesses and organisations ensure that their policies and practices are lawful and thus reduce their costs.

Implementing the new ban on age discrimination in services

The new ban on age discrimination will bring benefits to our organisation and to society. Unjustified age discrimination in services has a severe impact on older people – see the examples on access to health care for example.

The ban will reduce our costs, because the Equality Act sets out a valuable framework which improves clarity.