



Government
Equalities Office

Putting equality at the heart of government

**Equality Act 2010:
Banning age discrimination in services,
public functions and associations**

**A consultation on proposed exceptions
to the ban**

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Ministerial foreword

Equality is at the heart of this Coalition Government. It is fundamental to building a strong economy and a fair society. To rebuild our economy it is essential to make sure we benefit from the talents of everyone in this country.

Moving forward means putting an end to old-fashioned stereotyping of people because of their age and recognising the valuable contribution people of all ages can make to society as workers, consumers and citizens.

In the workplace, age discrimination is already banned; and the Coalition Government has decided to phase out the Default Retirement Age, because we believe that those who need or want and are able to work past 65 should not be denied that opportunity.

Outside the workplace, the Equality Act 2010 also contains a ban on age discrimination in the provision of services, the exercise of public functions, and by private clubs and other associations.

We plan to bring this new ban into effect in April 2012. We believe that implementing this provision is important. If age discrimination is wrong at work, it is equally wrong outside work. Discrimination can form a significant barrier to people's opportunities in life, preventing greater freedom, mobility and choice. When older customers are turned away from the market place through unfair treatment, the economy misses out on increased business and revenue, and costs to the State increase as families suffer the ill effects of social exclusion. Ensuring that services can flourish which meet the needs of people of all ages and help individuals achieve their aspirations for better later lives is a very important goal.

Many businesses and organisations do of course have excellent records on reaching out to people of all ages. For these service providers, introducing this new protection for age will have minimal impact. They will not need to do anything different from what they currently do to ensure that they do not discriminate.

Before bringing in the new ban on age discrimination outside the workplace, we need to make sure that the new law prohibits only harmful or unjustifiable treatment that results in genuinely unfair discrimination because of age. We do not want to outlaw the many instances of beneficial and justifiably different treatment. To avoid such unintended consequences, we need to set out in secondary legislation the beneficial circumstances in which it would remain lawful to use age as a reason for treating people differently. In other words, we need to decide where specific exceptions are required.

This is where you can help. This consultation sets out those areas where we believe that different treatment of people of different ages is justified, where we think specific exceptions are necessary and how the legislation will be drafted to take account of these. We do hope that you will let us know what you think. By doing so, you can help us ensure that the legislation is appropriate and practical and provides real benefits to consumers and the public as a whole.



A handwritten signature in black ink, appearing to read 'Theresa May'.

Rt. Hon. Theresa May MP
Home Secretary and Minister
for Women and Equalities



A handwritten signature in black ink, appearing to read 'Lynne Featherstone'.

Lynne Featherstone MP
Parliamentary Under
Secretary of State

Minister for Equalities

I. Executive summary

- I.1 The Equality Act 2010 (“the Act”), which became an Act of Parliament in April last year, contains provisions banning age discrimination in the provision of services and the exercise of public functions, and by private clubs and other associations. Our current intention is to bring this ban into effect in April 2012. Before we can do so, however, we need to set out in secondary legislation the circumstances in which it would remain lawful to use age as a reason for treating people differently, and to specify what exceptions should apply.
- I.2 Our approach to considering which age-based practices should be able to continue when the ban comes into force is a practical one and based on the five principles of good regulation set out by the Better Regulation Executive. We have set out below how these principles will apply to legislation banning age discrimination:
- **Transparent** – so that individuals are clear about their rights and so that the public, private and voluntary sectors are clear about their legal responsibilities. We are consulting on the draft legislation for exceptions from the ban to ensure that the exceptions are correctly framed, and before commencing the ban there will be detailed practical guidance produced to help service providers. This will help to avoid unintended consequences.
 - **Accountable** – so that we can ensure that people of all ages are treated fairly and have an equal opportunity to access services; and service users can enforce that right through the courts. There has been previous consultation on proposals and now consultation on draft legislation to ensure that there is effective public scrutiny of what is proposed.
 - **Proportionate** – so that the solution is appropriate to the perceived risk. Thus legislation tackles unjustifiable age discrimination, but still allows service providers to treat people differently because of their age where there are justifiable or beneficial reasons to do so. We do not want the law to interfere unnecessarily where age is used in a valid way to help target or provide services, but need to ensure that age discrimination is taken as seriously as other types of discrimination.

- **Consistent** – so that the way in which we implement the ban on age discrimination in the provision of services and the exercise of public functions, and by private clubs and other associations, is consistent with the other provisions contained in the Equality Act; and any differences in approach are clearly explained.
- **Targeted** – so that the legislation addresses real problems in a common sense way, taking account of how people of different ages live and their different needs as well as how businesses and other organisations operate. The ban will apply to all service providers, to ensure consistently, however, exceptions ensure that differences amongst sectors are accounted for and that the legislation does not impose disproportionate burdens on business.

1.3 We need to make sure that the new law prohibits only harmful or unjustifiable treatment that results in genuinely unfair discrimination because of age. It should not outlaw the many instances of justifiably different treatment.

1.4 The Act already contains provisions to allow certain forms of age-based differential treatment to continue and these will apply in service provision as they already do in the workplace. For example, it is possible to justify treatment that would otherwise be direct age discrimination where it is a proportionate means of achieving a legitimate aim – this is the ‘*objective justification*’ test. Indirect age discrimination is also permitted where the objective justification test can be met. Service providers can also take positive action to alleviate disadvantage experienced by people of particular ages, reduce their under-representation in relation to particular activities or meet their particular needs. Finally, the Act also contains a ‘statutory authority’ exception, which allows differential treatment that would otherwise be considered age discrimination, where it is required by law. For example, exceptions to prescription charges and eyesight tests (based on age) are provided for in legislation as is the age of entitlement for the state pension and concessions such as free bus passes.

- I.5 This consultation now also proposes a set of specific exceptions to allow certain age-differentiated treatment to continue. While such practices would be likely to meet the objective justification test, providing specific exceptions gives legal certainty and avoids such treatment being challenged through the courts.
- I.6 This consultation follows an earlier consultation exercise. A consultation document “*Equality Bill: Making it work – Ending age discrimination in services and public functions*”¹ was issued in June 2009 by the previous Government. It described how proposals were being developed for exceptions from the age discrimination ban and invited views on proposals for exceptions. In response, on 27 January 2010, the Government Equalities Office published a statement², which confirmed that there was broad support for the proposed approach to exceptions to the age discrimination ban but there would need to be further consultation on the specific detail.
- I.7 This Government has considered further the need for exceptions and we have set out our conclusions below. We have also provided a draft Order, which shows how each exception would be framed.
- I.8 Our conclusions are summarised below. They are set out in three categories:
- health and social care;
 - financial services;
 - other general services, public functions and private clubs or associations.

¹ Equality Bill: Making it work – Ending age discrimination in services and public functions – A consultation – <http://www.equalities.gov.uk/pdf/13511%20GEO%20Consultation%206th.pdf>

² Equality Bill: Making it work – Ending age discrimination in services and public functions – Policy statement – http://www.equalities.gov.uk/pdf/GEO_EqualityBillAge_acc.pdf

Health and social care

- 1.9 In the recent *White Paper, Equity and Excellence – Liberating the NHS*³, a key element of the vision for the NHS includes eliminating discrimination and working to tackle inequalities in service provision. It sets out the Government's commitment to implement the ban on age discrimination in NHS services and social care.
- 1.10 When developing our approach for health and social care, our intention has been to eliminate harmful discrimination, whilst preserving the use of age where it is right to do so – for example, treating an individual based on his/her needs and providing age-appropriate services as necessary.
- 1.11 The Department of Health asked Sir Ian Carruthers OBE, Chief Executive of NHS South West, and Jan Ormondroyd, Chief Executive of Bristol City Council, to lead a national age equality review for the health and social care sector. This review identified the following areas where age-based practices were considered justifiable or beneficial:
- Age-based charging and entitlements.
 - Public health programmes.
 - Advice and guidance on policy and practice in health and social care services.
 - Age-appropriate services and facilities.
 - The individual assessment of need.
 - The national resource allocation formulae.
 - Social care.

³ Equity & Excellence: Liberating the NHS – http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

- I.12 The Department of Health has presented the findings to and worked with a variety of health care professionals and organisations as well as equality and patient groups to consider whether *targeted* exceptions are needed in these areas. **They concluded that there should be no specific exceptions to the ban on age discrimination for health and social care.**
- I.13 The legislation will not prevent age being taken into account in decision making, where it can be demonstrated to be a proportionate means of achieving a legitimate aim – in other words, where it meets the objective justification test. Relying on the objective justification test will mean that health and social care organisations would need to consider whether their design and delivery of services could be objectively justified to the satisfaction of a court if challenged.
- I.14 The Consultation seeks views on the UK Government’s approach to age discrimination in the NHS. This will apply to the NHS in England as well as the NHS in Scotland and Wales, as while health is devolved to Scotland and Wales, equalities and discrimination law is not.
- I.15 These issues are discussed in more detail in Chapter 5.

Financial services

- I.16 We know that some people are concerned about the way in which age is used by the financial services industry when pricing products. However, we also know that financial services providers need to take into account a person’s age because it is a relevant risk factor in determining, for instance, the frequency and likely costs of meeting claims under insurance policies or the likely risk of default in relation to a bank loan or mortgage.
- I.17 **The Government has therefore decided that an exception should be provided to allow financial services providers to continue to use age when assessing risk and deciding prices; and the use of age banding and age limits will also be permitted to continue.**

However, any use of age will need to be based on relevant information which is from a source on which it is reasonable to rely.

1.18 The Government is also intending to encourage action to:

- **improve transparency** within the financial services sector so that consumers can be confident that age is not being misused. HM Treasury has asked the Association of British Insurers (ABI) to publish aggregate data for the insurance industry as a whole, which shows how age is used when assessing risk and pricing products, and to make this available for everyone to check.
- **improve access** to insurance products so that if a provider is unable to provide assistance to a person because of their age, it will be obliged to refer that person to a provider who can meet their needs or a dedicated signposting service. This would provide more choice for consumers who have difficulty in obtaining, for example, motor and travel insurance.

1.19 These issues are discussed in more detail in Chapter 6.

General services, public functions, private clubs and other associations

1.20 There are some other age-based practices outside health and social care and financial services for which we have prepared specific exceptions. These are:

- **Age-based concessions.** This exception would allow any service provider in the public or private sector to use age to determine eligibility for concessions or benefits. It would allow retailers to offer commercial discounts, such as 10% off for all those over 65 in DIY stores or cheaper fish and chips for pensioners; and public bodies to offer benefits for particular age groups, such as free access to leisure facilities. It would also allow “associations” such as private golf clubs to offer age-related discounts to certain members.

- **Age-related holidays.** This exception would allow specialist holiday providers to continue to provide holidays for people in particular age groups, for example, Saga holidays and Club 18-30 holidays.
- **Immigration.** This exception would allow the immigration authorities, to continue to treat some people differently because of their age, where this is necessary for them to fulfil their functions. When determining a person's eligibility to enter and remain in the UK, age can be one factor that is given consideration in some applications. To give one example, age is one criterion to determine the eligibility of a young person from a qualifying country to come to the UK on the Tier 5 youth mobility scheme. This is a cultural exchange scheme which allows young people to spend time living and working in the UK for up to 2 years, and is limited to people under the age of 31.
- **Residential park homes.** This exception would allow residential park homes to include age limits in their park admission rules. The Government has never proposed that the age discrimination ban should apply to the management and disposal of premises. This is because the Government believes that housing providers should be able to continue to impose age limits in order to cater effectively for age-related needs and to meet individuals' preference to live among people of a similar age. We do not therefore intend to extend the ban on age discrimination to cover premises. There is, however, uncertainty about whether residential park homes would be considered a 'service' as opposed to 'premises'. We therefore want to provide an exception to provide certainty that this area will remain outside the scope of the ban.
- **Sport.** This exception would allow for the continuation of age-restricted sporting competitions, where the capabilities of 'average' people of the particular age group would put them at a disadvantage compared to 'average' people of another age group as competitors. For example, this would allow under-21s' football competitions and veterans' tennis competitions to continue.

1.21 These issues are discussed in more detail in Chapter 7.

1.22 The draft Age Exceptions Order covering all these proposed exceptions is contained in Annex 1.

Consultation process

1.23 We would like this to be an active consultation and look forward to receiving many comments. We want to ensure that the Age Exceptions Order that the Government lays before Parliament in due course accurately reflects the aim of ensuring the legislation is transparent, accountable, proportionate, consistent and targeted.

2. About this consultation

Purpose of this consultation

- 2.1 We would like to hear your views on a draft Order setting out exceptions to the ban on age discrimination in the provision of services and the exercise of public functions, and by private clubs and other associations, contained in the Equality Act 2010 (“the Act”).
- 2.2 The exceptions set out specific circumstances where differential treatment on the basis of a person’s age would remain lawful.

Intended audience

- 2.3 This consultation will be of particular interest to:
 - a. public bodies that provide services, especially those operating in the field of health and social care;
 - b. private and voluntary sector service providers, especially financial services providers;
 - c. private clubs (such as golf clubs) and other associations; and
 - d. organisations interested in how service providers deliver equality.

Comments from other interested parties are also welcomed.

Territorial scope

- 2.4 These proposals will apply in Great Britain.

Duration of this consultation

This consultation **begins:** **3 March 2011**

This consultation **ends:** **25 May 2011**

- 2.5 Any views received after the closing date may not be considered or reflected in our analysis.

How to respond

- 2.6 Please use the response form. An electronic version of the form is available for download from the Government Equalities Office website at: www.equalities.gov.uk

- 2.7 Responses should be sent to:

Email: age@geo.gsi.gov.uk

Post: Age Discrimination Consultation Responses
 C/O Mark Reed
 Government Equalities Office
 Zone J10, 9th Floor Eland House
 Bressenden Place
 London SW1E 5DU

- 2.8 Ensure that your response reaches us by **25 May 2011**.

- 2.9 Please tell us whether you are responding as an individual or whether you are representing the views of an organisation. If you are responding on behalf of an organisation please tell us whom the organisation represents and, where possible, how the views of members have been sought.

Queries about this document

2.10 Any queries about this document should be directed to:

Mark Reed

Telephone: 0303 444 3038

E-mail: age@geo.gsi.gov.uk

2.11 We will consider any reasonable request for **alternative accessible formats** of this document. Please send your request to:

Email: age@geo.gsi.gov.uk
(Please state “Accessible format request” in the subject line)

Post: Age Discrimination Consultation – Accessible formats
Government Equalities Office
Zone J10, 9th Floor Eland House
Bressenden Place
London SW1E 5DU

Telephone: 0303 444 3038

After the consultation

2.12 We will publish a summary of the results of this consultation on the Government Equalities Office website.

2.13 The ban on age discrimination in the provision of services and public functions, and by associations, is intended to come into force in April 2012. This will allow time for private businesses and clubs, public sector bodies and other interested parties to prepare for commencement and for a statutory Code of Practice and practical guidance to be produced by the Equality and Human Rights Commission and others prior to implementation.

Freedom of information

- 2.14 We may need to share any information you send us with colleagues in the Government Equalities Office, or to pass it on to other Government Departments, and we may also need to publish your response.
- 2.15 All information you provide in your response, including personal information, may be subject to publication or disclosure if someone requests it under the Freedom of Information Act 2000 (FOI Act) or the Data Protection Act 1998. If you want the information you provide to be treated as confidential, please be aware that the FOI Act has a Statutory Code of Practice that we have to comply with which sets out our obligations on confidentiality. Because of this it would be helpful if you tell us why you want the information to be treated as confidential. If someone does then ask us to disclose the information we will be able to take into account your reasons for confidentiality, but we cannot guarantee that confidentiality can be maintained in all circumstances. Automatic confidentiality disclaimers generated by your IT system on emails will not of themselves be regarded as binding on the Government Equalities Office.

Code of Practice on Consultation

- 2.16 This consultation complies with the Code of Practice on Consultation⁴ produced by the Department for Business Innovation and Skills (BIS).

⁴ Code of Practice on Consultation – <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>

3. Background and context

The Equality Act 2010

- 3.1 The Equality Act 2010 replaced previous discrimination legislation with a single Act (“*the Act*”), simplifying the law and strengthening it in important ways to help tackle discrimination and inequality.⁵
- 3.2 A key element of the Act is the extension of the ban on age discrimination to cover the provision of services (which includes goods and facilities)⁶, the exercise of public functions and the membership and activities of private clubs and other associations.
- 3.3 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. A three-year-old would usually need to be treated differently from a teenager, for example.

Previous consultations

- 3.4 A consultation document “*Equality Bill: Making it work – Ending age discrimination in services and public functions*”⁷ was issued in June 2009 by the previous Government. It described how proposals were being developed for exceptions from the age discrimination ban. It invited views on proposals for exceptions and on when the ban should be brought into force. On 27 January 2010, the Government Equalities Office published a statement⁸ which confirmed that there was broad support for the proposed approach to exceptions to the age discrimination ban but said there would need to be further consultation on the specific detail.

⁵ The Equality Act 2010 – <http://www.legislation.gov.uk/ukpga/2010/15/contents>

⁶ Section 31 of the Equality Act 2010 – <http://www.legislation.gov.uk/ukpga/2010/15/contents>

⁷ Equality Bill: Making it work – Ending age discrimination in services and public functions: A consultation – <http://www.equalities.gov.uk/pdf/13511%20GEO%20Consultation%206th.pdf>

⁸ Equality Bill: Making it work – Ending age discrimination in services and public functions – Policy statement – http://www.equalities.gov.uk/pdf/GEO_EqualityBillAge_acc.pdf

3.5 In 2009, Sir Ian Carruthers OBE, Chief Executive of NHS South West, and Jan Ormondroyd, Chief Executive of Bristol City Council, undertook a review of age discrimination and age equality in the health and social care sector⁹. The review analysed evidence about the nature, extent and variability of age discrimination in health and social care services. Following the review, a public consultation took place on the possible steps to be taken to prepare the health service and social care for the age requirements in the Act that affect the provision of services and exercise of public functions. The results of this consultation have shaped the approach we have taken towards ending unjustifiable age discrimination in health and social care¹⁰. In addition the recent NHS White Paper¹¹ set out the Government's long-term vision for the future of the NHS, including promoting equality and tackling inequalities in access to healthcare. The consultation ended on 11 October 2010 and the Government's response to this, *Liberating the NHS: Legislative framework and next steps*¹² was published on 5 December 2010. This describes how the Government has developed its plans in the light of consultation and gives further detail on the NHS reforms and a timetable for implementation.

⁹ Age equality in health and social care – http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_1107278

¹⁰ Age equality in health and social care: A report on the consultation – http://collections.europarchive.org/tna/20100509080731/http://dh.gov.uk/en/Consultations/Responsestoconsultations/DH_1113733

¹¹ NHS White Paper, Equity and excellence: Liberating the NHS – http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_1117353

¹² Liberating the NHS: Legislative framework and next steps – <http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm>

Areas where the ban would apply

- 3.6 The ban on age discrimination, which currently applies in the areas of work and further and higher education, would be extended to cover:
- The provision of services (including goods and facilities);
 - The exercise of public functions; and
 - The activities of private clubs and other associations.
- 3.7 The types of activities classified as the provision of services would include, for example: providing accommodation and meals in a hotel; providing banking products such as grants, loans, credit or finance; providing facilities for entertainment, recreation or refreshment; retail services; and transport provision.
- 3.8 The exercise of public functions would cover, for example, regulatory and law enforcement functions; licensing functions; local authority activities in relation to providing care services; and government consultation exercises.
- 3.9 Private clubs and other associations covered by the Act are defined as organisations which have 25 or more members and admission to membership of which is controlled by rules and involves a selection process based on genuine criteria. For example, clubs that require applicants for membership to make a personal application, or to be sponsored by other members, would come within the definition of an association. This includes, for example: private golf clubs, political parties, ex-forces clubs and proprietary drinking clubs.

How the ban would be enforced

- 3.10 If an individual felt they had been discriminated against because of their age, they would have a right to take a case to the county court. If the court decided that the service provider was liable, it could award the individual compensation, including for injury to feelings.

Role of the Equality and Human Rights Commission

- 3.11 The Equality and Human Rights Commission (EHRC) is considering how best to update its guidance and Code of Practice on the services, public functions and association provisions of the Act. The Commission would consult on any proposed updated Code of Practice before issuing it.
- 3.12 Once the ban came into force the Commission would have a role in ensuring people are aware of their rights and responsibilities and encouraging good practice. The Commission has a range powers enforcement powers including to conduct investigations into unlawful acts, to issue unlawful act notices and to assist victims of discrimination to bring legal proceedings.

4. Our approach

General

- 4.1 Our approach to considering how and which exceptions should apply to the ban on age discrimination in the provision of services, exercise of public functions and by private clubs and other associations is a practical one. We want to ensure people are treated fairly and that services are in place, which meet the needs of people of all ages and help individuals achieve their aspirations for better later lives for themselves and their families. However, we also want it to be possible to treat people differently because of their age, where it is justifiable or beneficial to do so. The legislation therefore needs to take into account how people of different ages live and their different needs, as well as how businesses and other organisations operate, in order to avoid disproportionate burdens and unintended consequences. We believe that legislation is the best approach to achieve our aims, as it provides individuals who have been discriminated against with a right to redress through the courts and ensures that age discrimination is taken as seriously as other types of discrimination.
- 4.2 We have considered carefully how to ensure that the legislation complies with the 5 principles of better regulation (see paragraph 1.2). In particular the extent to which justifiable or beneficial age-based practices should be able to continue once a ban is in place; and how the law should provide for this. This means considering the balance between general provisions allowing differential treatment; and specific exceptions.

General provisions allowing differential treatment

- 4.3 The Act already contains provisions to allow some age-based differential treatment to continue in certain circumstances. The objective justification test in section 13(2) of the Act means that it would be possible to justify treatment that would otherwise be direct age discrimination, *where it is a proportionate means of achieving a legitimate aim*. The same test in section 19(2) of the Act applies to treatment that would otherwise be indirect

age discrimination. In addition, the positive action provisions in section 158 of the Act would enable service providers to take proportionate action to alleviate disadvantage experienced by people of a particular age group, reduce their under-representation in relation to particular activities or meet their particular needs. Finally, the Act also contains a ‘statutory authority’ exception, which would allow differential treatment that would otherwise be considered age discrimination, where it is required by law. These concepts are explained in more detail below.

Objective justification

- 4.4 Objective justification allows differential treatment to be justified in particular circumstances. Unlike all other types of direct discrimination (race discrimination, sex discrimination, etc), direct age discrimination is capable as a matter of law of being objectively justified.
- 4.5 Objective justification is the test that service providers would have to meet if they want to continue with age-based practices not covered by a specific exception. *The objective justification test is met where a service provider can show that the treatment complained of is a proportionate means of achieving a legitimate aim.* This test is the standard by which a court would consider any challenge to an age-based practice.
- 4.6 A wide variety of aims may be considered legitimate, but they would have to correspond with a reasonable need on the part of the service provider. Economic factors such as business needs and efficiency may be legitimate aims, but the fact that it could be more expensive not to discriminate is not by itself a valid justification. If challenged, it would be for the service provider to show that the aim is legitimate in any particular case and for the courts to decide whether that is so.

- 4.7 The treatment in question must be proportionate, it must be an appropriate way to achieve the legitimate aim, and it must also be necessary in order to achieve it. Thus if, for example, the legitimate aim could reasonably be achieved by less discriminatory or non-discriminatory means, or if the service provider could not show that the discriminatory effect of the treatment was sufficiently outweighed by the importance and benefits of its legitimate aim, then the action or measure in question would not be capable of objective justification.
- 4.8 In practice, if any particular age-related action or measure was challenged in court, the service provider would need to provide evidence to demonstrate all the elements discussed above. The service provider's assertions alone would not be sufficient. The court would consider these questions on the basis of the evidence and in light of all relevant circumstances.
- 4.9 The concept of objective justification in discrimination law is not new, it is a widely understood concept. It is a test that has previously been applied in other areas of discrimination law in relation to indirect discrimination as well as in cases of direct age discrimination in the workplace, so there is in existence a body of potentially relevant case law. Firms will therefore already have experience in how to objectively justify a practice which should reduce challenges and unintended consequences.

Positive action

- 4.10 Positive action is a form of exception allowing special treatment for certain people. Positive actions provisions ensure that it is not unlawful discrimination against others to take such special measures. Under section 158 of the Act, a service provider can, in certain limited circumstances, take positive action which is a proportionate means of alleviating disadvantage experienced by people who share a protected characteristic (such as age), reducing their under-representation in relation to particular activities or meeting their particular needs.

- 4.11 The extent to which positive action measures are proportionate will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them.

Statutory authority

- 4.12 In exceptional cases, people may have to discriminate in order to comply with a requirement of another piece of law, such as health and safety regulations. The 'statutory authority' exception in section 191 of the Act therefore allows differential treatment that would otherwise be considered discrimination, where it is required by law. For example, exceptions to prescription charges and eyesight tests (based on age) are provided for in legislation as is the age of entitlement for the state pension and concessions such as free bus passes.

Specific exceptions

- 4.13 There are, however, some justifiable or beneficial uses of age for which we want to provide specifically in the legislation through specific 'exceptions'. The main advantage of having specific exceptions is that it provides legal certainty for service providers and service users. This means that it avoids particular practices within the exception being challenged through the courts, with the associated risks and costs of an adverse judgment, and the opportunity costs involved in ensuring that the practice is and remains capable of passing the objective justification test.
- 4.14 We have set out below specific exceptions where differential treatment on the basis of age would continue to be lawful. They would help to ensure that service providers will not end justifiable or beneficial practices or withdraw services out of concern about possible legal challenge, or about the process of objective justification undermining their ability to continue to provide the service or function on an economic basis or at all.

4.15 The areas where we considered whether specific exceptions from a ban on age discrimination were necessary fall into three categories:

- Health and social care;
- Financial services; and
- General services, public functions and private clubs and other associations.

4.16 Our conclusions for each area of activity are set out in Chapters 5, 6 and 7 below.

5. Health and social care

Introduction

- 5.1 During 2009, Sir Ian Carruthers OBE, Chief Executive of NHS South West, and Jan Ormondroyd, Chief Executive of Bristol City Council led a detailed review into age equality in health and social care on behalf of the Department of Health.
- 5.2 The review's report, *Achieving Age Equality in Health and Social Care*¹³ (the Age Review), was published on 22 October 2009. It identified a number of areas where age discrimination was most likely to occur within the NHS and social care, and made recommendations about how the ban on age discrimination could best be implemented. These recommendations are now being implemented.
- 5.3 The July 2010 NHS *White Paper, Equity and Excellence – Liberating the NHS*¹⁴, highlighted this Government's commitment to implementing the ban on age discrimination in NHS services. This was underpinned by a wider objective to tackle inequality in health commissioning and delivery as a key strand throughout the Government's vision for the NHS. This consultation ended on 11 October 2010 and the Government's response to this, *Liberating the NHS: Legislative framework and next steps*¹⁵ was published on 15 December 2010. This describes how plans have developed in the light of consultation and gives further detail on the NHS reforms and a timetable for implementation.

¹³ *Achieving Age Equality in Health and Social Care* – http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_107278

¹⁴ *White Paper, Equity and Excellence – Liberating the NHS* – http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

¹⁵ *Liberating the NHS: Legislative framework and next steps* – <http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm>

- 5.4 In considering how the ban on age discrimination should be implemented across the NHS and social care, the Government's aim is to eradicate harmful discrimination, while at the same time allowing service providers to treat people of different ages differently where this is beneficial or justifiable. When services deal with individuals, they should focus on the individual, taking account of his or her age where it is appropriate to do so.
- 5.5 The Consultation seeks views on the UK Government's approach to age discrimination in the NHS. This will apply to the NHS in England as well as the NHS in Scotland and Wales, as while health is devolved to Scotland and Wales, equalities and discrimination law is not. The same principles and considerations in relation to age discrimination in the health service will apply to England, Scotland and Wales. The position in relation to the devolved administrations is explained in paragraph 5.50 below.

Scale and scope of health and social care sector

- 5.6 The health and social care sectors are among the largest areas of Government spending (see the recent spending review details given in the Impact Assessment). The services provided are wide-ranging and include, for example: specialised medical and psychiatric interventions in hospital and community settings; intensive short or long-term packages of health and social care support for adults; and services for people with complex physical, sensory and learning disabilities. The scale of interventions within health and social care is approximately 300 million consultations in general practice, 17 million finished consultant episodes and 16 million A&E attendances per year, and approximately 2 million clients receiving packages of social care over the last year.¹⁶

¹⁶ See accompanying impact assessment for further details

Ensuring justifiable and beneficial uses of age continue

5.7 The Government is keen to ensure that positive uses of age in health and social care can continue once the ban on age discrimination comes into force. There is also a commitment to ensure that harmful discrimination is eradicated. We have explored two options for how this aim could be achieved:

- **Having no exceptions** (other than those already in the Act, such as the objective justification test, positive action and the statutory authority exception). The test of whether any age-based treatment was lawful would then be that of objective justification;
- **Having some targeted exceptions**, specifically for health and social care, in the areas indicated below.

What would relying on objective justification alone mean in health and social care?

5.8 Relying on objective justification would mean that any age-based decision made by an individual or organisation could be challenged in court as unlawful age discrimination. This could be a decision taken by **an individual practitioner, an NHS local authority or private sector provider, an NHS or local authority commissioner or, in a few cases, the Department of Health**. It would be for the service provider or practitioner to justify their approach if challenged (see paragraphs 4.4–4.9 above).

- 5.9 When preparing for the ban on age discrimination to come into effect, health and social care organisations would need to consider whether their design and delivery of services could successfully be objectively justified if challenged.

What would be considered a ‘bad’ use of age in health and social care services?

5.10 Examples where age might be used incorrectly include:

- making assumptions about whether an older patient should be referred for treatment based solely on their age, rather than on the individual need and fitness level;
- not referring certain age groups for a particular treatment or intervention (such as those not of working age) that are considered mainly, but not exclusively for working age adults; and
- not considering the wellbeing or dignity of older people using the service.

What would be considered a ‘justifiable or beneficial’ use of age in health and social care services?

5.11 Examples of legitimate aims include:

- ensuring that services and benefits are targeted at those who most need them (for example, the targeting of public health programmes at particular age groups based on clinical evidence);
- ensuring the health and safety of those using the service or others;
- ensuring the wellbeing or dignity of those using the service; and
- responding to a legitimate desire for people to mix with their own age group, for example for reminiscence therapy¹⁷.

¹⁷ More information – Draft Code of practice – services, public functions and associations code – http://www.equalityhumanrights.com/uploaded_files/EqualityAct/services_code_-_06.10.10.pdf

- 5.12 Any use of age to meet these legitimate aims must be proportionate.
- 5.13 However, these may still be challenged in the courts and decisions will be made by the courts looking at all the circumstances of the individual case.

What would having some targeted exceptions mean in health and social care?

- 5.14 Exceptions to the ban on age discrimination would mean that for the matter described in the exception the decision-maker would be protected from a legal claim of age discrimination. The person who took the decision, whether at a national or local level, would not be required to demonstrate that the decision was objectively justified. An exception might minimise the risk that service providers would adopt an ‘age blind’ approach (for example, not taking age into account at all, even where relevant, in order to ensure compliance with the legislation), rather than satisfying themselves that the use of age as a factor in decision making could be objectively justified in the event of a challenge.
- 5.15 An exception would, however, prevent complaints of age discrimination in relation to **all** matters that are covered by the exception even if a particular use of age is not ‘beneficial’, no matter how carefully the exception was worded. Local decision-makers would not be required to demonstrate that the decision was objectively justified if challenged.

How age is currently used in health and social care

5.16 The Age Review and the subsequent consultation identified certain circumstances in the NHS and social care where age criteria are used for beneficial or justifiable reasons. For example, age can be used to help tailor an individual's diagnosis, treatment or care; or so that services can be designed and delivered to better meet the needs of people of a particular age. We have considered these in more detail below and how age is used as a criterion, what the evidence is for using it, and whether its use could be objectively justified.

Age-based charging and entitlements (statutory provisions)

How age is currently used

5.17 People of different ages currently pay different charges for services. For England, NHS prescriptions and sight tests are currently free to those aged 60 or over, those aged under 16, or those aged between 16–18 and who are in full-time education. NHS dental care is free to those aged under 18, or under 19 if they are in full time education. NHS optical vouchers and wigs and fabric supports are also free to those under 16 or aged 16–18 and in full-time education.

What we found

5.18 The Equality Act 2010 contains a statutory exception so that where age-based charging mechanisms are set out in the law they are exempted from the provisions in the Equality Act (please see paragraph 4.12). Exceptions to prescription charges and eyesight tests (based on age) are provided for in legislation. Nothing further is necessary therefore to allow these practices to continue. Any other age-based charging and entitlements regime that does not come within this statutory exception will need to be objectively justified.

Public health programmes

How age is currently used

5.19 A number of public health programmes, which have age-based targeting have been explored – including (for England):

- **Breast screening** – Women aged 50–70 are invited every three years for breast screening by mammography. This is currently being expanded to women aged 47–73. Women aged over 70 are able to self refer every three years if they wish.
- **Cervical screening** – Women aged 25–49 are invited for a cervical screening test every three years, women aged 50–64 are invited every five years. Women aged over 64 are invited if they have never been screened or if any of their last three tests showed abnormalities.
- **Bowel cancer screening** – This programme has started by inviting men and women aged 60–69 to participate every two years and enabling men and women aged 70 and over to self refer every two years. This is currently being extended to men and women aged up to 75. It was announced in October 2010 that flexible sigmoidoscopy screening for men and women in their 50s will be piloted from 2011–12.
- **Chlamydia screening programme** – This programme targets women and men aged under 25 years who are sexually active (age group 15–24 are monitored).
- **Seasonal flu vaccination** – people aged 65 and over are able to receive seasonal flu vaccination (other criteria apply for people under 65).

- **Vaccination for Swine Flu** – the first phase targeted the vaccination programme towards those judged as being at highest risk – individuals aged between six months and up to 65 years in the current seasonal flu vaccine clinical at-risk groups; all pregnant women; household contacts of immuno-compromised individuals; people aged 65 years and over in the current seasonal flu vaccine clinical at-risk groups.
- **NHS Health Checks** – this programme is aimed at people between 40–74 years old at risk from coronary heart disease, stroke, diabetes and kidney disease.

What we found

5.20 Decisions taken about eligibility for screening and vaccination programmes are based on the best evidence available, on a population basis, and are regularly reviewed. The evidence often demonstrates that the intervention for specific age groups is more beneficial and effective than for other age groups, and this is analysed by medical experts and others who will then advise accordingly. For example, in relation to **cervical cancer screening**, the age criterion developed by the Advisory Committee on Cervical Screening (ACCS) and endorsed by the World Health Organisation is based on the incidence of cervical cancer at different ages in the general population. For the **Chlamydia screening programme**, the Chief Medical Officer's expert advisory group on Chlamydia concluded in 1988 that there was sufficient evidence to target screening at under 25s who are sexually active in order to detect and treat the infection, prevent onward transmission, and reduce associated reproductive health complications. For the **seasonal flu vaccination and vaccination for Swine Flu programme**, the Joint Committee on Vaccination and Immunisation (JCVI) considered the scientific and epidemiological evidence and, defined the vaccination clinical at-risk groups and age cut-off points accordingly.

5.21 Individuals who are outside the age limit for a particular programme, but who are worried about one of the illnesses covered by a programme can visit their local primary medical practitioner (GP), who will undertake a consultation and decide on further treatment based on the clinical symptoms presented. Therefore, although an individual outside the selected age band may not necessarily receive the same testing as an individual inside the age band, they do experience an equivalent outcome. It is unlikely therefore that an individual who is not in the target population for a screening or health check programme will be denied access to diagnosis tests on the basis of their age alone.

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

How age is currently used

5.22 At national level, age is considered as part of the development of policy and practice for health and social care services. In some circumstances, guidance issued by the Department of Health and the National Institute for Health and Clinical Excellence (NICE) may include explicit reference to age – either in recommending (or not recommending) interventions at specific ages or as advice for particular stages in life. The use of age is normally accompanied by an evidence base as to why this criterion is included.

What we found

5.23 Advice and guidance is usually produced by a thorough process involving a range of experts and is based on the published evidence. The Department of Health and NICE are public bodies, so will be subject to the public sector Equality Duty under the Equality Act 2010, which will require them to have due regard to the needs to eliminate unlawful age discrimination and advance equality for people of different ages.

Age appropriate services and facilities

How age is currently used

5.24 Some services are designed and delivered to meet the needs of people who have particular conditions which are likely to be more prevalent in a particular age group. The Age Review found that traditionally some age-based services have been of poor quality (usually services for older people have been inadequate compared to those for working adults). However, there was general consensus that broad age-based services can be of value and that where they are of high quality and are focused on the genuine needs of specific age groups, they should be retained. For example, care of the elderly/geriatric medicine can provide a useful co-ordination role to ensure high quality care for patients if they have a variety of different ailments that are being dealt with by different departments.

What we found

5.25 Age should not be used as a proxy for need. Each person's needs must be assessed individually. However, this does not prevent services being designed for people with a particular group of needs who may generally be within a particular age range or who may benefit by the provision of services in a particular way. For example, younger people with dementia are more likely to be at work at the time of diagnosis, have dependent children and a mortgage, have a rarer form of dementia and/or face particular difficulties in rationalising skill loss at a young age. They require specialised services to meet their particular circumstances. If a person's age is relevant because they will benefit from services which are delivered in an age appropriate manner, this should be objectively justifiable. Commissioners and providers should not be discouraged therefore from providing age appropriate services and facilities.

The assessment of an individual's needs

How age is currently used

Health

- 5.26 When assessing an individual's needs and circumstances a health and social care professional may need to consider an individual's age in relation to which potential interventions and care packages would work best, as age can be a risk factor for many conditions.

Social care

- 5.27 The Age Review found that there were significant variations in the provision of care and support to different age groups between different local government providers. These included different provisions for direct payments, differences in the cost of care packages and differences in the amount of care and support offered to different age groups.
- 5.28 Qualitative evidence of the different experiences people of various ages have had when accessing social care was considered, some of which might be considered to indicate discrimination, but many negative experiences were more about poor quality services more generally. In particular, older people have expressed concern that they have in the past had less comprehensive assessments of their needs, particularly in terms of social and emotional issues, resulting in restricted packages of support. Evidence suggests this to be largely the result of prevailing attitudes amongst staff rather than "official" policies of organisations.

What we found

Health

- 5.29 The assessment of an individual's needs and circumstances by health and care professionals may need to consider the individual's age as a factor in discussing potential interventions and care packages (for example, people of different ages may be physiologically different – a 90-year-old is more likely to have a number of health problems compared to a 20-year-old). Any decisions taken on the basis of this assessment will need to be capable of being objectively justified, if challenged in court.
- 5.30 The professional regulatory bodies have codes of conduct that prohibit discrimination and these guide the actions of individual health and care professionals. Maintaining good record keeping (why a particular intervention or care package was chosen and, if the person's age was a factor in that decision making process, why it was necessary to factor this in) will provide clinicians with a basis of evidence in relation to any claims.

Social care

- 5.31 In social care, age should not be used as a proxy for need. There are many different factors that affect need such as lifestyle, aspirations, and background – the individual assessment of a person should not involve the use of age as a substitute for exploring these factors. If someone's age is significant because the individual has preferences for age-related activities or organisations, this will be discussed as part of an overall assessment. Appropriate age-related services would need to be objectively justified. Therefore, no exceptions would be needed.

The national resource allocation formulae

How age is currently used

Health

5.32 There is a well established relationship between the age profile of the population and the use of health services. Age is used in the funding formula to determine Primary Care Trust (PCT) revenue allocations as a proxy for need. The funding formula uses five-year age bands to 85+ for Hospital and Community Health Services and to 75+ for prescribing.

Social care

5.33 The Age Review also looked at the allocation process, which determines how much local organisations receive for their populations to provide social care services in a particular area. It asserted that different levels of spending between age groups are not, in themselves, proof of discrimination but they do indicate the need for further analysis and challenge. It recommended that the Department of Health review the balance between the funding formulae for social care in the calculation of the Communities and Local Government formula grant. There are two separate relative need formulae (RNF) for adult social care, one for younger adults (aged 18–64) and a second for older people (aged 65+). These formulae are used to distribute between local authorities several Department of Health grants and are used in the distribution of the Communities and Local Government Formula Grant.

What we found

Funding health care

- 5.34 NHS revenue allocations are currently made to PCTs. They are based on a national weighted capitation formula which is used to determine each PCT's target share of available resources, to enable them to commission services to meet the healthcare needs of the local populations they serve. Since the late 1970s, the development of the weighted capitation formula has been continually overseen by an independent committee. Since 1997, this role has been undertaken by the Advisory Committee on Resource Allocation (ACRA). ACRA makes recommendations to Ministers on possible changes to the formula, prior to each round of revenue allocations to PCTs. ACRA's membership comprises GPs, academics and NHS managers.
- 5.35 Changes to the current allocation of resources were set out in the White Paper, *'Equity and Excellence: Liberating the NHS'*. The majority of the PCT commissioning function is to be transferred to GP consortia. The remainder will be commissioned by the new independent NHS Commissioning Board, which is to take over responsibility for commissioning guidelines and the allocation of resources from the Department of Health. The way in which funds are distributed to the consortia will be a matter for the Board. However, ACRA has been asked by the Secretary of State to continue to provide advice on the equitable distribution of NHS resources during the transition period.
- 5.36 Population is the starting point for the allocation of resources but the make-up of that population is also critical. People do not have identical needs for health care. In particular, the very young and elderly, whose populations are not evenly distributed across the country, tend to make more use of health services than the rest of the population. The formula therefore takes into account the different age structures of local populations.

5.37 Statistical modelling by academics has examined the relationship across small geographical areas between the utilisation of health services, socio-economic characteristics, health status and measures of the existing supply of health services. These models have been used to decide which characteristics to include in the formula as indicators of need, and with what relative weights.

Funding social care

5.38 It is important to take account of how much of a local population is made up of adults under 65 and how much by adults over 65 when distributing resources between local authorities because:

- these age groups have different levels of risk in terms of the likelihood of needing to use social services;
- the scale of user contributions for those services differs between those aged under and over 65; and
- the drivers of future demand for social services differ between these age groups. For example, there is evidence that the prevalence of severe disability rises with age increasing demand for particular services.

5.39 The Formula Grant calculation does not dictate spending targets in local areas. In addition, the funding formulae do not map directly to councils' grant calculations, because the calculation of formula grant takes account of many, sometimes conflicting, factors.

Conclusion – implementing the ban on age discrimination in health and social care

- 5.40 The Department of Health has worked with external organisations and other interested parties (including respondents to previous consultations) to consider whether targeted exceptions in some key areas outlined by the Age Review are appropriate to help services take age into account when it is right and appropriate to do so. The work also considered whether to have no exceptions and instead requiring every instance of age differentiation to be subject to the objective justification test, if challenged.
- 5.41 Following this consideration the Government believes there should be **no specific health and social care exceptions to the ban on age discrimination – any age-based practices by the NHS and social care should be objectively justified. Therefore, the draft Age Exceptions Order in Annex I does not contain any such exceptions.**
- 5.42 Exceptions would risk permitting ‘bad’ uses of age (for example, those highlighted by the Age Review) to continue. Where harmful age-based practices are occurring that are not objectively justifiable, these practices should not continue and it is right that any such practice should be open to challenge. The legislation will not prevent age being taken into account in decision-making where it can be demonstrated to be a proportionate means of achieving a legitimate aim. This means that it must be the least discriminatory method possible of achieving the legitimate objective.
- 5.43 Relying on the objective justification test will incentivise individuals and organisations to consider their practices in relation to age discrimination. A thorough assessment based on the individual’s needs will be necessary to enable practitioners to demonstrate that their decisions meet the test, should a decision be challenged.

5.44 Commissioners and providers of NHS and social care services should not be discouraged from taking account of age when it would be right to take it into account. We believe that having no specific exceptions will allow a person's age to be taken into account where it is right to do so, but not where it is not.

The risks associated with our approach

5.45 One of the risks associated with our approach of having no specific exceptions is the potential for costly litigation. The Impact Assessment sets out our thoughts on this in more detail. How we intend to mitigate this risk is set out below in paragraphs 5.47–5.49.

5.46 Aside from the risk of litigation, there is also a risk that providers may take an age-blind approach and not provide services that take account of and provide appropriately for age-related needs, rather than risk having to objectively justify age-based treatment or services. Exceptions might have minimised this risk of service providers shying away from providing age based services, but for the reasons explained above, we are not proposing to provide such exceptions. Instead, alternative proposals on how we intend to minimise this risk are set out below in paragraphs 5.47–5.49.

What the NHS and social care can do to prepare for the ban on age discrimination

5.47 We have identified a number of risks to implementing the ban on age discrimination. To mitigate these risks, and as part of the Age Review, a resource pack to help local authorities and NHS organisations prepare for the legislation has been produced by health and care organisations. The pack has been developed with support from NHS staff in the South West and national experts. It has three component parts:

- **A self assessment toolkit** that health and social care organisations can use to work with their local stakeholders to identify what actions they need to take to end age discrimination and promote age equality. This will help them prepare an action plan to meet the age requirements of the Equality Act.
- **A guide for NHS commissioners and providers** that helps local NHS organisations identify the actions they need to take in order to implement the recommendations from “Achieving Age Equality”.
- **A guide for social care** that has been produced by the Social Care Institute for Excellence (SCIE) to help local authority Adult Social Care Departments and providers achieve age equality in the delivery of local care services.

5.48 The pack is available on-line at: <http://www.southwest.nhs.uk/age-equality.html>

5.49 Work is under way with the National Mental Health Development Unit to launch an action-learning network focusing on promoting age equality in mental health. This will involve testing the self assessment toolkit referred to above in mental health services in some localities, with the aim of capturing and disseminating examples of best practice and exploring whether lessons learnt should feed into any additional help or guidance for the NHS and social care.

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

Question 2: Do you think implementing the ban on age discrimination in relation to health and social care without specific 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?

Scotland and Wales

5.50 The age discrimination ban applies to all of Great Britain. The Scottish Government and Welsh Assembly Government will therefore be taking similar action to the Department of Health to ensure that their health and social care sectors are able to comply with the prohibition. The funding, the age limits for public health programmes and architecture of the NHS in Scotland and Wales may be different; but the issues dealt with in this consultation are the same.

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

6. Financial services

- 6.1 Many financial service providers will take into account a person's age when pricing products such as insurance, mortgages and loans. This is because a person's age is relevant to risks and costs. For example, travel insurance data show that older people make more claims and that these are also more expensive for insurers to settle, thus older people are often charged more for travel insurance.
- 6.2 We are, however, aware that some older and younger people feel that the premiums they are charged for some financial service products do not fairly reflect the underlying risk they present in respect of age; and there is further concern that some financial service providers refuse to provide them with a product at all if they are over or under a certain age.
- 6.3 In order to determine the extent of age discrimination occurring in the financial services industry, the previous Government set up a stakeholder working group to look at this issue. The working group found that the availability of reasonably priced motor and travel insurance was an area of concern to older people in particular.
- 6.4 To further understand the main areas of concern, the Government Equalities Office commissioned independent research by Oxera¹⁸, one of Europe's foremost independent economics consultancies. This was published in June 2009 and found that financial services products are available to all age groups, although some age groups have more to choose from than others; and that only a very small proportion of consumers are turned down or unable to find products because of their age. Prices appear to be broadly fair, based on the risks (how likely you are to claim) and the costs (how much you claim). However, the research also found that there was considerable mistrust regarding how age was used when calculating risks; and that therefore, transparency needed to

¹⁸ The use of age based practices in financial services – <http://www.equalities.gov.uk/pdf/The%20use%20of%20age-based%20practices%20in%20financial%20services%20Final%20report.pdf>

be improved. The research also showed that access could be improved by providing a sign-posting/referral system to help people who are refused a quote because of their age, to find an alternative.

- 6.5 Overall, the Oxera report indicated that there would be little economic benefit in restricting the use of age as a criterion in designing financial services products. Any resulting changes to underwriting processes, product offerings and pricing structures would impose additional costs on product providers, which would be passed on to customers.

Proposed exception

- 6.6 Having looked at the evidence in the Oxera Report and from the working group as well as all the evidence from the previous consultations, the Government has decided to provide an exception that will allow financial service providers to continue to use a person's age as a criterion in designing financial services products. However, the exception will make clear that all risk assessments must, so far as they involve a consideration of age, be done by reference to information which is both relevant to the assessment of risk and from a source on which it is reasonable to rely.
- 6.7 Such an exception will ensure that financial service providers will be able to continue to use age when assessing risk and deciding the prices of products. They will also be able to continue to use age banding. We believe this is the right approach, because restricting the extent to which the financial services industry can base prices on risks and costs would distort the market, leading to increased costs and higher prices, with the possibility of some companies leaving the market altogether.

- 6.8 The use of age limits will also be able to continue. Financial service providers will not therefore be forced to participate in sectors in which they have no experience. We recognise that providers need to have credible data on age groups in order to serve them. This helps to ensure costs are kept to a minimum, which is beneficial for both providers and consumers. Providers will continue to be able to specialise in providing products only to certain age groups. For example, SAGA specialises in providing for the over 50's.
- 6.9 However, individuals will still be able to challenge a financial service provider if they think a risk assessment is arbitrarily based on their age rather than on the basis of relevant information which is from a source on which it is reasonable to rely.
- 6.10 Draft wording for this exception is provided in the draft Age Exceptions Order at Annex 1.

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

Improving transparency

- 6.11 The Government is keen to improve transparency within the financial services sector so that consumers can be confident that age is not being misused. HM Treasury has therefore asked the Association of British Insurers (ABI) to publish aggregate data for the insurance industry as a whole which show how age is used when assessing risk and pricing travel and motor products, and to make these data available for everyone to check.

6.12 The Government does not believe that it is necessary for this to be a legislative requirement, however. Instead, it will be dealt with through an industry level agreement. This agreement would be similar in nature to that signed for the genetics moratorium¹⁹, which requires that insurance providers do not ask customers to disclose the results of any predictive genetic test. The ABI's members have fully complied with this agreement (which is monitored by the Genetics and Insurance Committee who conducts annual reviews).

Question 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?

Improving access

- 6.13 The Government is also keen to improve access to financial services products, so that if a provider is unable to provide assistance to a person because of their age they should refer that person to a provider who can meet their needs or refer them to a dedicated signposting service. This would provide better access and also more choice for consumers who have difficulty in obtaining the products that they want. In particular, it would help improve access to motor and travel insurance for older people.
- 6.14 HM Treasury set up a Signposting Steering Committee to take forward work on improving access. Members of the Committee include Age UK, WHICH, the Financial Services Authority, the Equality and Human Rights Commission, the British Insurers Brokers Association (BIBA) and the Association of British Insurers (ABI). The Committee discussed the principles of a viable system that would deliver for consumers.

¹⁹ Concordat and Moratorium on Genetics and Insurance – <http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=24850>

- 6.15 The BIBA already provide a signposting/referral service which matches the principles discussed by the Signposting Steering Committee. HM Treasury therefore intends to ask BIBA and the ABI to build on this system so that anyone who has been refused a financial service product because of their age is referred to a supplier that can help them.
- 6.16 Again the Government has decided that this should not be a regulatory requirement, but instead provided for through an industry level agreement. A Code of Practice would be produced by the ABI that would accompany this agreement, with which all members of the ABI would need to comply.

Question 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?

Customer service

- 6.17 Besides ensuring the right result for financial services in relation to design through to delivery of products, transparency and access, the Government is keen to ensure that people of all ages are treated fairly when accessing financial services. The Government is aware of concerns that older customers, in particular, feel they are not always treated in a way that is fair: for example, where an older person may be asked to bring a younger companion when discussing financial services products. The financial services industry is already heavily regulated with regard to the way it deals with consumers, with safeguards available under both the Financial Services Agency (FSA) and Financial Ombudsmen Service (FOS), and any such treatment may be due to other customer service principles by which the firm is required to operate, such as requirements about how firms deal with potentially vulnerable people.

6.18 However, the Government is keen to test whether customer experience is an area of concern outside the current safeguards which should be addressed.

Question 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, access already addressed) causes concerns? Are existing safeguards adequate? If not, what would be a helpful and proportionate way to address these?

Review and guidance

- 6.19 Consumer safeguards are currently available under existing regulation through the Financial Ombudsman Service (FOS) and the Office of Fair Trading (OFT). In addition, the Equality Act contains a power to amend the proposed exception at any time; this can be used if circumstances change and swift action is needed.
- 6.20 The Government is keen to keep these arrangements under review. We are intending to commission an independent external body to review the use of age in financial services three years after the age discrimination ban comes into effect. This review will look at whether circumstances have changed from the position detailed in the Oxera research and if any further action is needed to safeguard consumers. For example, consideration will be given to the introduction of a reasonableness test, if the review shows evidence of market failure arising from discrimination. This could include an age group being excluded from the market completely or systematically overcharged. This will form part of a more general post implementation review planned for the Equality Act 2010 as a whole taking place 3–5 years after commencement.

7. General services, public functions and private clubs and other associations

- 7.1 A number of other age-based practices are used in areas of service provision and public functions outside health and social care and financial services that the Government considers beneficial or justifiable. This is because taking account of people's ages is a valid way to target or provide those services. Providing specific exceptions would help to ensure that service providers do not end these beneficial or justifiable services out of concern that they may be open to legal challenge.
- 7.2 Applying the reasoning above and the 5 principles of good regulation (referred to in paragraph 1.2 above), the Government has decided to provide the following specific exceptions.

Age-based concessions

- 7.3 Many service providers offer age-based concessions or limited preferential access to specific age groups. For example, some retailers offer discounts to people under or over a specified age during off-peak hours, clubs offer cheaper membership rates to particular age groups, and public sector organisations provide age-targeted benefits, such as free bus passes for the over 60s.
- 7.4 These types of age-based concessions can be justifiable or beneficial because they can help to attract new customer groups, boost trade during quiet periods and ensure greater participation in society and the economy by young and old alike. The evidence suggests that very few people object to age-based concessions and benefits being provided. Indeed, a British Market Research Bureau survey²⁰ of 2,004 adults found that 93% do not object to goods and services being offered at a discount to people of a particular age.

²⁰ British Market Research Bureau Survey – http://www.bmrb.co.uk/index_working.php/news/category/over50s/P336/

In addition, 96.3% of those who responded to the consultation conducted by the previous Government thought it would be a good thing if legislation continued to allow companies to offer discounts on goods and services to people on the basis of their age. Only 1.9% thought it was a bad thing and 1.9% of respondees were neutral on this question. This Government has therefore decided to provide an exception to the ban on age discrimination so that public, private and voluntary sector organisations can continue to offer these types of concessions.

- 7.5 The exception would allow any service provider in the public or private sector to use age to determine eligibility for concessions. It would allow, for example, retailers to offer commercial discounts such as 10% off for all those over 65 in DIY stores, hairdressers or fish and chip shops; and local authorities to offer benefits such as free or cheaper access to leisure facilities to certain age groups. Such concessions can be offered for commercial reasons or to fill spare capacity and there would be no requirement to have a social policy aim or to address disadvantage or under-participation.
- 7.6 There would be no restriction on the nature of the concession. Service providers may wish to offer discounts on the price of goods, tickets etc. They may wish to offer benefits in kind such as a free meal or drink. Or they may wish to offer enhanced services such as higher interest rates on savings accounts. There would be no limit on the type of goods or services to which the concession would apply. Hairdressers, cinemas, theatres, retailers and transport providers are examples of service providers who currently offer concessions for particular age groups and who would continue to be able to do so under the exception.

- 7.7 The exception will not, however, allow concessions to be a deterrent to people who do not qualify for them or unreasonably to inhibit access to the service concerned by those outside the target age group. It is not the intention that the exception should allow service providers to make access to or use of their service by a particular age group impossible.
- 7.8 There is also a separate exception which would allow any private club or association to use age to determine eligibility for concessions. It would allow for example, a golf club to offer concessionary pricing based on a person's age or allow them to offer free access to facilities at certain times to certain age groups. This allows clubs and associations to take proportionate steps to encourage membership among under-represented age groups, or to help people overcome their disadvantages, or to meet their needs.
- 7.9 Draft wording for the exception allowing service providers to provide age-based concessions is provided in the draft Age Exceptions Order at Annex 1. Draft wording for the corresponding exception for associations, including private clubs, is provided in article 7 of the draft Order.

Question 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 not sure, please explain why.

Age-related holidays

- 7.10 A small number of tour operators provide holidays for people who wish to holiday with other people of a similar age. For example, there are holidays exclusively for the over 50s and those aimed at people aged 18–30. Such holidays form a very small percentage of the holiday market as a whole.
- 7.11 Age-related holidays provide a space in which people can come together and associate with people of a similar age to themselves. The Government does not see any harm in allowing holiday companies to continue to meet individuals' preference to holiday among people of a similar age and intending to provide an exception accordingly.
- 7.12 The exception could only be used for holidays whose main purpose is to bring together people of a particular age range. It could not therefore be used to restrict access to general package holidays. Instead any age limits on these holidays would have to be objectively justified. In addition, this exception could only be relied on if the eligible age range for the holiday was clearly stated in the promotional material issued by the company, and if the holiday came within the scope of Council Directive 90/314/EEC which defines what is meant by package travel, package holidays and package tours.
- 7.13 If a tour operator which provides age-related holidays decided to provide its services to someone who is not in the age group usually eligible to receive the service, it could do so, but not on worse terms.
- 7.14 Draft wording for this exception for age-related holidays is provided in the draft Age Exceptions Order at Annex I.

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

Immigration

- 7.15 There are occasions when the UK Border Agency needs to treat some people differently because of their age. Examples of the use of age by the immigration authorities include:
- As one criterion to determine entry as a spouse or a dependent relative. The minimum age at which someone could sponsor, or be sponsored, for settlement in the UK as a spouse is set out in the immigration rules. Parents, grandparents and other dependent relatives of persons present and settled in the United Kingdom may gain indefinite leave to enter or remain in the UK, with differing criteria applying to different age groups.
 - As one criterion to determine the eligibility of a young person from a qualifying country to come to the UK on the Tier 5 youth mobility scheme. This is a cultural exchange scheme, which allows young people to spend time living and working in the UK for up to two years. It is limited to people under the age of 31.
- 7.16 The exception is intended therefore to ensure that immigration policy is delivered effectively. It could be relied on where the action in question is set out in a ministerial authorisation or in one of the relevant Immigration Acts (or an instrument made under or by virtue of those Acts). Differential treatment because of age is integral to so many immigration functions that this exception is required to avoid the necessity in every case of objectively justifying such treatment.
- 7.17 Draft wording for this exception for immigration is provided in the draft Age Exceptions Order at Annex 1.

Question 10: Does exception 1 (immigration) in the proposed draft Order in annex 1 adequately achieve the policy intent described in paragraphs 7.15–7.17 above? If not, or you are not sure, please explain why.

Residential park homes

- 7.18 Residential park homes are predominantly used by people over 50 years of age. In line with their core market and to ensure that sites retain the character and qualities that appeal to a certain age profile, residential park rules often stipulate a lower age limit for residents.
- 7.19 The Government has never proposed that the age discrimination ban should apply to the management and disposal of premises. This is because the Government believes that housing providers should be able to continue to impose age limits in order to cater effectively for age-related needs and to meet individuals' preference to live among people of a similar age. The consultation exercises conducted by the previous Government did not reveal any instances of harmful age discrimination in the management and disposal of premises which would require the introduction of prohibitions. The ban on age discrimination will not therefore cover the management and disposal of premises.
- 7.20 There is, however, uncertainty about whether residential park homes would be considered a 'service' as opposed to 'premises'. We therefore want to provide a specific exception to remove any doubt that such age limits are permitted, to ensure that residential park homes can continue to include age limits in agreements with residents or in their park admission rules.
- 7.21 The exception would permit park owners to set, maintain or amend age limits to restrict the owning or rental of park home units to people of a certain age, on condition that this requirement is set out clearly in the agreement covering the use of a mobile home or in park rules. These could include both upper and lower age limits. The ability to operate such age limits would be open to all park home providers, whether in the private or public sectors.

- 7.22 The exception would not, however, allow age restrictions to be imposed on people visiting the residential park homes. Nor would it permit age discrimination in the provision of services on the site once residents have been admitted to a residential park home site.
- 7.23 The exception would only cover the arrangements for deciding who should become a resident. If, however, a residential park home which has an age-limit policy decided to provide a park home unit to someone who is not in the age group usually eligible to become a resident, it could do so, but not on worse terms.
- 7.24 If the site also contains holiday units (not permanent residence units) then these are not covered by the exception, as these should be open to all regardless of age.
- 7.25 Draft wording for this exception for residential park homes is provided in the draft Age Exceptions Order at Annex I.

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

Sport

- 7.26 Currently age limits and age bands are used in numerous sporting events, leagues or training sessions. These age limits or bands are often necessary in order to:
- secure fair competition;
 - secure the safety of competitors; or
 - comply with rules determined at a national or international level or by Sports Governing Bodies.

- 7.27 The Government has decided to provide an exception which allows these practices to continue. The exception would apply to any sport, game or other activity of a competitive nature in which the physical strength, stamina, physique, mobility, maturity or manual dexterity of “average” people of a particular age group (such as 40–65) would put them at a disadvantage compared to average people of another age group (such as 18–40) as competitors in events involving the activity. It would apply to all sporting levels, from grass-roots to elite and amateur to professional.
- 7.28 The exception refers to “average” people, because it would not be practical for sporting competition organisers to have to assess potential competitors’ abilities on an individual basis in every case (particularly mass-participation events such as marathons).
- 7.29 The exception could be used by any organisation or individual involved in organisation or administration of sporting activities; the provision of training or facilities to support such activities; and others participating in an official role in those activities such as coaches, umpires and referees, etc.
- 7.30 The exception would allow:
- Great Britain to continue to host age-restricted national and international sporting events (such as the Olympics or the under-21’s football World Cup) where the use of age is necessary to comply with rules determined at a national or international level or by Sports Governing Bodies.
 - age limits and banding to be used when setting eligibility criteria to compete as well as in selection arrangements for teams; and
 - age limits to be used to determine the provision of training, facilities and other support to competitors where this ultimately relates to participation in a sporting activity of a competitive nature.

7.31 The exception would not allow:

- Age limits or bands which are applied purely for historical or social reasons, which do not meet the requirements of the proposed exception. For example, local bowling club competitions that restrict competitors to people over the age of 70. This is because a restriction of this type would not be necessary to ensure fair competition or the safety of competitors, or to comply with the rules of a national or international competition. These age restricted events could still be lawful, however, if they can be objectively justified as a proportionate means of achieving a legitimate aim. A legitimate aim could include, for example, enabling certain age groups to meet, avoid isolation and keep healthy. Alternatively they could be a positive action measure if they are necessary to alleviate disadvantage experienced by people of the same age group, reduce their under-representation in relation to particular activities and/or meet their particular needs.
- Sporting events to be advertised as if they are open to all but reveal age cut-offs only when prospective participants apply to take part.

7.32 Draft wording for this exception for sport is provided in the draft Age Exceptions Order at Annex I.

Question 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.

The draft Age Exceptions Order – Annex I

7.33 The draft Order covers all the specific exceptions discussed in Chapters 6 and 7. It works by amending and adding to the relevant provisions of the Equality Act 2010, thus incorporating the exceptions directly into the Act. The intention is for the draft Order to come into force on the same day that the Act's prohibition on age discrimination in services and public functions, clubs and other associations is commenced – the proposed date is 6 April 2012. Before coming into force, the draft Order will need to be debated and approved by both Houses of Parliament.

Question 13: Do you have any further comments about the draft Order (Annex I), over and above any comments you have already made about the exceptions it covers?

8. Some examples of areas where age-based practices not covered by specific exceptions could be objectively justified

- 8.1 The objective justification test is met where a service provider can show that the treatment complained of is a proportionate means of achieving a legitimate aim. A more detailed explanation of how this test is met is provided in paragraphs 4.4–4.9 above.
- 8.2 We show below a number of examples of how objective justification could work in practice, in areas not covered by specific exceptions in the draft Age Exceptions Order at Annex I. These areas were brought to our attention in earlier consultations with stakeholders who are keen to understand more fully how objective justification might work.
- 8.3 **Challenge 25 Policy** – This policy encourages retailers to ask anyone who appears to be under the age of 25 to show ID to prove that they are over 18 when buying age-restricted products, such as alcohol. This scheme has proven itself to be an effective tool to combat under-age drinking and the Government would want to see this practice continue. We believe that these schemes can be objectively justified. By challenging a person who appears to be under the age of 25 to show ID, a service provider can ensure that they are not selling alcohol and other age restricted products to anyone under age, which is of course a legal responsibility. This is a proportionate response as it simply requires customers to produce ID to ensure that they are an appropriate age to purchase an age-restricted product.
- 8.4 **Holiday accommodation** – Some holiday accommodation providers are reluctant to rent their properties to young adults. This is because they are concerned that there is a greater risk that these age groups will damage property due to anti-social behaviour. However, damage to accommodation can be caused by guests of all ages. Organisations representing holiday

accommodation providers have been unable to provide robust statistics and evidence on the particular risks posed by younger adults. The Government does not want young adults to be excluded from accessing holiday accommodation purely on the basis of negative stereotypes; this would go against the purpose of the age discrimination ban. To allow a blanket ban on certain age groups using holiday accommodation would be a disproportionate response to the concerns raised about some young adults' behaviour. However, we do believe that the objective justification test could be relied upon to enable some holiday accommodation providers to refuse to rent properties to certain age groups in certain areas, if they can show evidence of problems they have had with that age group in the past or during large events such as festivals when large groups of younger people tend to gather. This is then likely to be a proportionate means of achieving the legitimate aim of ensuring that the property is not damaged and other guests and neighbours are not unduly disturbed. Providers will also still be able to refuse to accommodate large groups, such as hen parties, stag parties and young adults on spring break. In addition, the age discrimination ban in services does not apply to people under 18 years of age.

- 8.5 **Vehicle rental** – Some vehicle rental companies decline to rent vehicles to older and younger drivers because these age groups are more likely to have accidents. This could, in turn, have an impact on the company's insurance premiums, the reserves it needs to hold to make repairs and road safety. These are all valid concerns and the Government recognises the need of the vehicle rental industry to manage them appropriately. However, fair access to vehicle rental improves people's opportunities in life, enabling greater freedom of mobility and choice for younger and older drivers. If a person has qualified for a driving licence they should not be

denied access to a service purely because of their age. The Government does not, therefore, consider that a specific exception should be provided to enable vehicle rental companies to deny services to older and younger drivers. However, we consider it is likely that vehicle rental companies should be able to objectively justify the following practices as proportionate ways of achieving the legitimate objective, for instance, of retaining a high proportion of the company's vehicle fleet as roadworthy and available for other customers to rent:

- Requiring a minimum level of driving experience to rent a car, because inexperience is a key issue in the likelihood of accidents. For example, a customer may be required to have held a full driving licence for at least 12 months;
- Not renting cars to people with motoring convictions, points on their licence or who have had accidents within a certain time period, from a risk exposure and road safety standpoint; and
- Charging higher prices, deposits and excesses to people in age groups which are statistically more likely to have accidents, in order to reflect higher insurance premiums and the cost of repair if the car is involved in an accident.

9. Ensuring effective implementation

- 9.1 We are keen to ensure that businesses and organisations have time to familiarise themselves with how the Act's provisions banning age discrimination in services, public functions and associations work, and to prepare for what a ban would mean in practice. We are not therefore intending to bring the provisions into force before April 2012.
- 9.2 Ahead of this date we are keen to ensure that:
- People with rights under the provisions understand their rights and how to assert them; and
 - People with responsibilities under the provisions understand their responsibilities and how to comply with them.
- 9.3 To this end the Equality and Human Rights Commission expects to produce an updated draft statutory Code of Practice, which will cover the new age discrimination provisions. It is intended that an updated Code would be published in draft for consultation and would then be finalised and issued at least 3 months before a ban came into force.
- 9.4 Working with key delivery partners, the Government Equalities Office will also produce straightforward practical guidance on the new age discrimination provisions, so that organisations are aware of their new responsibilities and individuals are aware of their new rights.

9.5 To aid us with this work we welcome your feedback on the following questions:

Question 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?

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

Question 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?

10. Impact assessments

Regulatory impact assessment

- 10.1 The Impact Assessment relating to this consultation sets out the estimated main benefits and costs to business, the public sector and individuals of commencing the age discrimination ban with and without the exceptions outlined above.
- 10.2 We propose to use this consultation to test our assumptions further and gather additional information, so that a final impact assessment can be produced ahead of the draft Order being laid before Parliament.
- 10.3. At this stage we do not have detailed benefits and costs for all areas. In particular, we would like more information about the impact in health and social care, although we have tried to highlight the areas in which we expect these benefits and costs to fall. We welcome any further information and views you have on the assumptions we have made and the estimates shown.
- 10.4 It is always very difficult to calculate the monetary value of the economic benefits resulting from reducing discrimination. We have tried to do this in the impact assessment, for example for financial services. However, we would welcome any views you have on the assumptions we have made and the estimates shown.

Question 17: Can you provide any data on costs and benefits, which have not already been included in the impact assessment? Do you have any comments on the assumptions or estimates we have made? Please give details of the sector(s) to which you are referring.

Question 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.

Equality impact assessment

10.5 The Equality Impact Assessment considers the impact on each of the equality groups of the policy to prohibit age discrimination against those aged 18 and over in the provision of services and public functions and by associations. We would welcome any views you have on this.

Question 19: Does the equality impact assessment properly assess the implications for each of the equality target groups? If not, please explain why.

11. Next steps

- 11.1 The consultation will last twelve weeks, until 25 May 2011. Following the consultation, Government Equalities Office officials will analyse the responses and Ministers will consider them. We then intend to publish a summary of the responses received to the consultation, setting out what people thought of our plans.
- 11.2 We intend the ban on age discrimination in the provision of services and exercise of public functions, and by private clubs and other associations, to come into force in April 2012. We therefore intend to lay the relevant Order before Parliament in 2011 for approval by both Houses to ensure that businesses and organisations have sufficient time to familiarise themselves with how the new provisions will work before they come into force in April 2012.

Annex I. Draft Order

Equality Act 2010 (Age Exceptions) Order

The Secretary of State, in exercise of the powers conferred by sections 197(1) [and 207(4)(b) and (6)] of the Equality Act 2010 ⁽²¹⁾, makes the following Order:

Citation, commencement and interpretation

1.—(1) This order may be cited as the Equality Act 2010 (Age Exceptions) Order 2011 and comes into force on [6 April 2012].

(2) In this Order “the Act” means the Equality Act 2010.

Exception 1 – Immigration

2.— In Part 4 of Schedule 3 to the Act (Immigration), before paragraph 16 insert—

“Age

15A.—(1) This paragraph applies in relation to age discrimination.

(2) Section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment.

(3) A relevant person is —

(a) a Minister of the Crown acting personally, or

(b) a person acting in accordance with a relevant authorisation.

²¹ 2010 c.15

- (4) A relevant authorisation is a requirement imposed or express authorisation given —
 - (a) with respect to a particular case or class of case, by a Minister of the Crown acting personally;
 - (b) with respect to a particular class of case, by a relevant enactment or by an instrument made under or by virtue of a relevant enactment.
- (5) The relevant enactments are —
 - (a) the Immigration Acts,
 - (b) the Special Immigration Appeals Commission Act 1997,
 - (c) a provision made under section 2(2) of the European Communities Act 1972 which relates to immigration or asylum, and
 - (d) a provision of European Union law which relates to immigration or asylum.
- (6) The reference in sub-paragraph (5)(a) to the Immigration Acts does not include a reference to —
 - (a) sections 28A to 28K of the Immigration Act 1971 (powers of arrest, entry and search, etc.), or
 - (b) section 14 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (power of arrest).”

Exception 2 – Financial Services

3. In Part 5 of Schedule 3 to the Act (Insurance, etc), after paragraph 20, insert—

“Age

20A.—(1) It is not a contravention of section 29, so far as relating to age discrimination, to do anything in connection with the provision of a financial service, provided that any assessment of risk carried out for the purposes of providing the financial service must, so far as it involves the consideration of a person’s age, be carried out by reference to information which is relevant to the assessment and from a source on which it is reasonable to rely.

(2) In this paragraph, “financial service” includes a service of a banking, credit or payment nature.”

Exception 3 – Concessionary services

4.—(1) In the title of Part 7 of Schedule 3 to the Act for the words after “SEPARATE” substitute “, SINGLE AND CONCESSIONARY SERVICES”.

(2) After paragraph 30 insert—

“Concessions

30A.—(1) A person (P) does not contravene section 29, so far as relating to age discrimination—

- (a) by providing a concession on a service when providing it to persons of a particular age group, or
- (b) by otherwise providing a service to persons of a particular age group on terms that are more favourable than the terms on which P provides the service to other persons.

- (2) For the purposes of sub-paragraph (1), providing a concession on a service includes providing a service for a limited time.
- (3) Sub-paragraph (1) applies only in so far as the concession, or more favourable term—
 - (a) does not have the effect of preventing persons of other age groups from requiring the service, and
 - (b) is reasonable.
- (4) Subparagraph (1) does not apply where P relies on paragraph 20A (Age) in Part 5 of Schedule 3 (Insurance, etc).²²

Exception 4 – Holidays

5. In Part 7 of Schedule 3, after paragraph 30A insert paragraph 30B—

“Age related holidays

30B.—(1) A person (P) does not contravene section 29, so far as relating to age discrimination, by providing a holiday package, the main purpose (or one of the main purposes) of which is to bring together persons of a particular age group.

- (2) In sub-paragraph (1) “holiday package” has the same meaning as “package” in Council Directive 90/314/EEC on package travel, package holidays and package tours⁽²²⁾.
- (3) P may not rely on sub-paragraph (1) unless P includes in a prominent position in all of P’s promotional material relating to the holiday package a statement that the holiday package is provided in accordance with this paragraph.

²² OJ L158, 23.6.1990 pages 59–64.

- (4) A statement under sub-paragraph (3) must specify the age group for which the holiday package is provided.”

Exception 5 – Residential Mobile Homes

6. In Part 7 of Schedule 3, after paragraph 30B, insert paragraph 30C—

“Residential mobile homes

30C.—(1) The owner of a protected site does not contravene section 29, so far as relating to age discrimination, by entering into mobile home agreements that entitle only persons of a particular age group to station and occupy a mobile home on land forming part of the site.

(2) The owner of a protected site does not contravene section 29, so far as relating to age discrimination, by imposing a requirement in park rules that mobile homes stationed on land forming part of the site and occupied under mobile home agreements may be occupied only by persons of a particular age group.

(3) The owner of a protected site must include in all notices, advertising or publicity in relation to admittance to the protected site as a resident a prominent statement that the owner operates a limitation as to age in respect of the protected site.

(4) “Mobile home agreement” means an agreement to which the Mobile Homes Act 1983 applies; and “owner”, “protected site” and “mobile home” have the same meaning as in that Act.

(5) “Park rules” means rules applying to residents of mobile homes on the protected site and required to be observed by a term in the relevant agreement.”

Exception 6 – Associations – Concessions

7. In Schedule 16 (Associations: exceptions) insert after paragraph 1—

“Age

1A.—(1) An association does not contravene section 101(1), so far as relating to age—

- (a) by providing a concession on admission to membership for persons of a particular age group, or
- (b) by otherwise admitting persons of a particular age group to membership on preferential terms.

(2) An association does not contravene section 101(2) or (3)—

- (a) by providing a concession on access to a benefit, facility or service for members of a particular age group, or
- (b) by otherwise affording members of a particular age group access to a benefit, facility or service in a way that is more favourable than the way in which the association affords other members access to the benefit, facility or service.

(3) An association does not contravene section 102(1) by—

- (a) providing a concession on invitations of persons of a particular age group as guests, or
- (b) by otherwise inviting persons of a particular age group, or permitting such persons to be invited, as guests on terms that are more favourable than the way in which the association permits other persons to be invited, as guests.

- (4) An association does not contravene section 102(2) by—
- (a) providing a concession on access to a benefit, facility or service for guests of a particular age group, or
 - (b) by otherwise affording to guests of a particular age group access to a benefit, facility or service in a way that is more favourable than the way in which the association affords other guests access to the benefit, facility or service.
- (5) For the purposes of this paragraph affording only persons of a particular age group access to a benefit, facility of service for a limited time is to be regarded as a concession.
- (6) Sub-paragraph (1), (2), (3) or (4) applies only in so far as the concession, or more favourable term—
- (a) does not have the effect of preventing persons of other age groups from requiring the service, and
 - (b) is reasonable.”

Exception 7 – Sport

8. In section 195 of the Act insert after sub-section (6)—

- “(7) A person does not contravene this Act, so far as relating to age, only by doing anything in relation to the participation of another as a competitor in an age-banded activity if it is necessary to do so —
- (a) to secure in relation to the activity fair competition or the safety of competitors, or
 - (b) to comply with the rules of a national or international competition.

(8) An age-banded activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina, physique, mobility, maturity or manual dexterity of average persons of a particular age group would put them at a disadvantage compared to average persons of another age group as competitors in events involving the activity.”.

Signatory text

Name

Secretary of State for the Home Department

[Date]

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under s.197 Equality Act 2010 (c.15) and will come into force on the same day as the provisions of Part 3 of and Schedule 3 to the Act are commenced in respect of the protected characteristic of age. Part 3 provides for prohibition of discrimination, harassment and victimisation in respect of the provision of services (including for these purposes the provision of goods and facilities). It provides for exceptions from the application of the prohibition in Part 3 in relation to age in respect of a number of areas.

Exceptions are created in respect of

- The use of age in respect of certain matters relating to immigration control in Part 4 of Schedule 3;
- The use of age in financial services in Part 5 of Schedule 3;
- Concessions and preferential treatment in Part 7 of Schedule 3;
- Holiday packages in Part 7 of Schedule 3;
- Occupation of mobile homes as a person's only or main residence in Part 7 of Schedule 3;
- Age limitations in sporting competitions (article 8) by adding age to provisions in s.195 of the Act; and
- Membership of associations (article 7).

Annex 2. Order-making Power (Section 197, Equality Act 2010)

(1) A Minister of the Crown may by order amend this Act to provide that any of the following does not contravene this Act so far as relating to age—

- (a) specified conduct;
- (b) anything done for a specified purpose;
- (c) anything done in pursuance of arrangements of a specified description.

(2) Specified conduct is conduct—

- (a) of a specified description,
- (b) carried out in specified circumstances, or
- (c) by or in relation to a person of a specified description.

(3) An order under this section may—

- (a) confer on a Minister of the Crown or the Treasury a power to issue guidance about the operation of the order (including, in particular, guidance about the steps that may be taken by persons wishing to rely on an exception provided for by the order);
- (b) require the Minister or the Treasury to carry out consultation before issuing guidance under a power conferred by virtue of paragraph (a);
- (c) make provision (including provision to impose a requirement) that refers to guidance issued under a power conferred by virtue of paragraph (a).

(4) Guidance given by a Minister of the Crown or the Treasury in anticipation of the making of an order under this section is, on the making of the order, to be treated as if it has been issued in accordance with the order.

(5) For the purposes of satisfying a requirement imposed by virtue of subsection (3)(b), the Minister or the Treasury may rely on consultation carried out before the making of the order that imposes the requirement (including consultation carried out before the commencement of this section).

(6) Provision by virtue of subsection (3)(c) may, in particular, refer to provisions of the guidance that themselves refer to a document specified in the guidance.

(7) Guidance issued (or treated as issued) under a power conferred by virtue of subsection (3)(a) comes into force on such day as the person who issues the guidance may by order appoint; and an order under this subsection may include the text of the guidance or of extracts from it.

(8) This section is not affected by any provision of this Act which makes special provision in relation to age.

(9) The references to this Act in subsection (1) do not include references to—

(a) Part 5 (work);

(b) Chapter 2 of Part 6 (further and higher education).

Annex 3. Consultation questions

The following is a summary of the consultation questions.

The responses to the questions should be made on the proforma, which is available for download from the Government Equalities Office website at www.equalities.gov.uk

Health and social care

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

Question 2: Do you think implementing the ban on age discrimination in relation to health and social care without specific 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?

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

Financial services

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

Question 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?

Question 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?

Question 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, access already addressed) causes concerns? Are existing safeguards adequate? If not, what would be a helpful and proportionate way to address these?

General services, public functions and private clubs or associations

Question 8: Does exception 3 and 6 (concessionary services and associations – concessions) in the proposed draft Order in Annex I adequately achieve the policy intent described in paragraphs 7.3–7.9 above for both service providers and associations? If not, or you are not sure, please explain why.

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

Question 10: Does exception 1 (immigration) in the proposed draft Order in annex I adequately achieve the policy intent described in paragraphs 7.15–7.17 above? If not, or you are not sure, please explain why.

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

Question 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.

Question 13: Do you have any further comments about the draft Order (Annex 1), over and above any comments you have already made about the exceptions it covers?

Implementation

Question 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?

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

Question 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?

Impact assessments

Question 17: Can you provide any data on costs and benefits, which have not already been included in the impact assessment? Do you have any comments on the assumptions or estimates we have made? Please give details of the sector(s) to which you are referring.

Question 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.

Question 19: Does the equality impact assessment properly assess the implications for each of the equality target groups? If not, please explain why.

Alternative formats

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Government Equalities Office
Zone J10, 9th Floor Eland House
Bressenden Place
London
SW1E 5DU