



Equality and Human Rights Commission
Consultation on Draft Age Supplement to
Services, Public Functions & Associations Code of Practice

Response by the Discrimination Law Association

Note: This consultation required responses to a tightly structured on-line form, with the same, or nearly the same, questions with multiple-choice answers for each chapter. The Discrimination Law Association (DLA) responded in detail to a limited number of questions only. Set out below are those questions to which DLA submitted substantive replies or comments.

Chapter 1: Introduction

Q4. Are there any other comments that you would like to make about Chapter 1? (Where relevant please mention paragraph numbers. We welcome both positive and negative comments)

Your response:

Chapter 1 should include a paragraph similar to para 1.23 of the Code explaining the use within this supplementary Code of the term 'service provider' to refer to all legal persons with responsibility under the Equality Act for services, public functions and associations and accordingly other terms, eg 'service user' also to be understood to have wider meanings.

Para 1.8 should give clearer guidance re future changes to the Act and to the possible effect of other legislation and decisions of the courts as in para 1.25 of the Code.

Chapter 2: The protected characteristic of age

Q1. Having read this Chapter of the draft code, how clearly do you think you now understand the relevant law?

Your response:

Neither clearly nor unclearly

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

Your response:

Para 2.9 final sentence is unclear.

Para 2.11 - either repeat/refer to comment re Chapter 1 that term "service provider" is used to refer to service provider, person exercising public functions and associations OR mention all three types of persons.

Q3. Were all the definitions you need to understand this Chapter included?

Your response:

Yes

Q8. Do you think that this Chapter of the Age Supplement is:

Your response:

About right

Chapter 3: Direct Discrimination

Q8. Do you think that this Chapter of the Age Supplement is:

Your response:

About right

Chapter 4: Indirect discrimination

Q1. Having read this Chapter of the draft code, how clearly do you think you now understand the relevant law?

Your response:

Unclearly

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

Your response:

Para 4.7 would be clearer if redrafted along the following lines: "Where there is a clear link between a disadvantage and age there will be no need to produce statistical evidence. However, such evidence can be helpful in establishing justification, as well as assisting service providers to devise appropriate strategies and to monitor change as a result of positive action or other developments"

Q3. Were all the definitions you need to understand this Chapter included? Your response:

Your response:

No

Q4. If no, please tell us what terms were missing or unclear?

Your response:

"provision, criterion, practice", "particular disadvantage", "proportionate"; re "proportionate the supplement could cross refer to Chapter 3 paras. 3.25 and 3.26.

Q5. Where examples illustrate the text, were there:

Your response:

Too few

It would be preferable to use the same examples to illustrate the four requirements referred to in paragraphs 4.3 to 4.10

Q8. Do you think that this Chapter of the Age Supplement is:

Your response:

Too short

Q9. Are there any other comments that you would like to make about Chapter 4? (Where relevant please mention paragraph numbers. We welcome both positive and negative comments)

Your response:

If this supplementary Code includes text and examples to explain aspects of indirect discrimination which are the same for all protected characteristics including AGE (see paras. 4.3 to 4.9) then should there not be fuller text and further examples to explain how the test for justification for indirect discrimination differs from the test of justification that applies in relation to direct age discrimination. While it is stated in para 4.11 that the range of aims which can justify indirect discrimination is wider than the range of aims that can justify direct discrimination (putting to one side that in Chapter 3 - direct discrimination -- care is taken to say it is not direct discrimination if it can be justified) the examples of legitimate aim in para 5.30 of the Code include 5 of the 8 in para. 3.9 of this supplementary Code and none that are not in the para 3.9 list. How are readers to understand the statement re "wider" range of aims in para 4.11?

Chapter 5: Harassment, victimisation and other unlawful acts

Q3. Were all the definitions you need to understand this Chapter included?

Your response:

No

Q4. If no, please tell us what terms were missing or unclear?

Your response:

Para 5.4 Victimisation is never "related to age" or related to any other protected characteristic; it is related to a protected act.

Q5. Where examples illustrate the text, were there:

Your response:

Too few

It would be helpful to have an example of instructions to discriminate - a situation likely to occur within services and exercise of public functions.

Chapter 6: Positive Action

Q1. Having read this Chapter of the draft code, how clearly do you think you now understand the relevant law?

Your response:

Unclearly

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

Your response:

The DLA is disappointed that this chapter fails to explain positive action and how it differs from justified less favourable treatment related to age. The concepts and the realisation of these two provisions have different purposes and should have different outcomes. Under the Equality Act 2010 a service provider, person exercising public functions or an association can take any action if they think any one of the conditions stated in s.158 exists and the action is a proportionate means of achieving one of the three specified aims. None of those aims, which are intended to overcome historic disadvantage, exclusion and unmet needs, is among the examples suggested as justifying less favourable treatment in para 3.18. If positive action is successful then within a particular area of activity people of particular ages who previously had not been able to participate on equal terms will be able to do so. This is qualitatively different from, for example, excluding customers under 21 so that older customers can enjoy a quieter time in a country hotel.

We would strongly recommend that this chapter is re-drafted so that it enables readers to appreciate the very different triggers for positive action, that it could be a one-off event or short-term, and often needs to be time limited, as it would cease to be lawful if the aim has been achieved. Unlike justified less favourable treatment, positive action could involve measures to meet one of the statutory aims with respect to two protected characteristics, for example aspects of health needs of older men.

Q3. Were all the definitions you need to understand this Chapter included?

Your response:

No

Q4. If no, please tell us what terms were missing or unclear?

Your response:

“equality outcomes” - Use of this expression which is neither in s.158 nor in the Code is confusing and the definition in EHRC Technical Guidance does not assist in respect of positive action. It would be far clearer simply to set out the aims stated in s.158.

We consider the term “consequential barriers’ to be inappropriate with respect to positive action; positive action is intended to overcome/remove the barriers which are the cause/source of the disadvantage, different unmet needs, low level of participation not the consequence. These barriers may be institutional, organisational, structural, attitudinal and/or derived from established practices.

Q5. Where examples illustrate the text, were there:

Your response:

Too few

Q6. Overall do you find the use of examples helpful / appropriate?

Your response:

No

We do not find the single example in this chapter helpful for increasing understanding of positive action. In the example the college could take a range of lawful measures to meet the needs of students over 60 with regard to basic IT skills, including a) running separate training for over 60’s which is more intensive, more one-to-one support; b) offering over 60’s extra training sessions; c) offer one-to-one tutorials for over 60’s in first week of the academic year alongside regular training sessions for all ages.

We suggest that it would be helpful to have at least one further example linked to the statement in para 6.8 regarding the use of positive action to assist bodies comply with the PSED. For example, this could be an example of a measure to meet the different health needs of members of a particular age group which are not met under existing health care services such as health screening at venues appropriate for the particular age group.

Q8. Do you think that this Chapter of the Age Supplement is:

Your response:

Too short

Q9. Are there any other comments that you would like to make about Chapter 6? (Where relevant please mention paragraph numbers. We welcome both positive and negative comments)

Your response:

There should be cross reference to paragraphs 8.14 and 8.15 positive action by associations.

Chapter 7: Services and Public Functions

Q1. Having read this Chapter of the draft code, how clearly do you think you now understand the relevant law?

Your response:
Unclearly

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

Your response:
As a minimum should indicate that services may be provided by private sector, public sector and voluntary sector organisations.

Q3. Were all the definitions you need to understand this Chapter included?

Your response:
No

Q4. If no, please tell us what terms were missing or unclear?

Your response:
Para 7.4 refers to exercise of public functions; it should mention that public functions may be carried out by public, private and voluntary sector organisations.

It would be preferable for the examples of what are public functions to be those more likely to involve age discrimination.

Q9. Are there any other comments that you would like to make about Chapter 7? (Where relevant please mention paragraph numbers. We welcome both positive and negative comments)

Your response:
Para 7.11 the end of the first sentence should refer to the ban on age discrimination in services and public functions.

Possibly this chapter should mention that age not limited to 18+ is a relevant protected characteristic for the PSED, so that public authorities and others carrying out public functions need to have due regard to the aims in s.149 (1)(b) and (c) re age for persons of all ages.

Chapter 8: Associations

Q4. If no, please tell us what terms were missing or unclear?

Your response:
This chapter should include the definition of "association"

Q5. Where examples illustrate the text, were there:

Your response:
Too few

This chapter should include an example of positive action by an association in addition to the example re positive action by a political party.

Q8. Do you think that this Chapter of the Age Supplement is:

Your response:
About right

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

Q5. Where examples illustrate the text, were there:

Your response:

Too few

There should be at least one example for each exception.

The example following para 9.4 should be altered to say that the charity has evidence that local over 65's experience considerable problems with social isolation and poor diets and therefore provides nourishing meals in congenial setting. Evidence is not needed to show that providing a meal improves poor diets (this relates to the point at 4.7)

Chapter 10: Age Specific Exception: Concessionary Services

Q1. Having read this Chapter of the draft code, how clearly do you think you now understand the relevant law?

Para 10.12 is unclear in its reference to harassment.

Q5. Where examples illustrate the text, were there:

Your response:

Too few

There should be examples of concessions in public sector services.

The example following para 10.7 is not very clear that it is an "age" concession.

It is unclear how the example following para 10.10 squares with the example following para 10.8

Chapter 11: Age specific exception: financial services

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

Your response:

Para 11.5 for accuracy should say "...in connection with the provision of a financial service"

Q3. Were all the definitions you need to understand this Chapter included?

Your response:

Yes

Q5. Where examples illustrate the text, were there:

Your response:

Second example following 11.6 does not seem very relevant to the exception.

Second example following para 11.10 would appear to be more about disability than age.

Chapter 12: Other age specific exceptions

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

Your response:

In the first part of this Chapter re Package Holidays there are no references to the relevant provisions of the Act. It should say in the margin Sch.3 Part 7 para 30B

Q5. Where examples illustrate the text, were there:

Your response:

Too few

In the example re the exception for certain authorised immigration functions, there is no reference to a 'relevant authorisation' being in place. Further s.29 does not prohibit age discrimination for people under 18, while in this example the less favourable treatment is given to a girl age 17. If that was the case then the entry clearance officer would have been able to interrogate her rigorously without the need for the exception in the Act. The reference to immigration rules inserted at the end is confusing when readers will be expecting an explanation relating to an exception to age discrimination under the Equality Act. We suggest the facts need to be changed and the example re-drafted.

Chapter 13: Enforcement

Your response:

No response

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