

Age Supplement to the Services, Public Functions & Associations Statutory Code of Practice

Draft for consultation

This draft supplementary Code on age discrimination is designed to be read alongside the Equality Act 2010 Statutory Code of Practice on services, public functions and associations. The draft is based on the Equality Act 2012, as amended by the Equality Act 2010 (Age Exceptions) Order 2012.

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Contents

1 Foreword

3 Chapter 1: Introduction

3 Status

3 Scope

4 How to use the supplementary Code

4 Examples

4 References

4 Changes to the law

5 Chapter 2: The protected characteristic of age

5 What is the protected characteristic of age?

7 Who is protected under the ban on age
discrimination and harassment related to age?

7 Who is liable for age discrimination in services,
public functions and associations?

8 Relationships between age and other
protected characteristics

8 Disability

9 Other protected characteristics

10 Chapter 3: Direct discrimination

10 Introduction

10 What the Act says

10 Justifiable less favourable treatment because of age

10 Less favourable treatment

12 Discrimination by association

13 Discrimination by perception

13 Comparators

14 Justification of less favourable treatment
because of age

- 14 Legitimate aim
- 17 What is proportionate?
- 19 Public Sector Equality Duty and justification of less favourable treatment because of age.

- 20 Chapter 4: Indirect discrimination**
- 20 Introduction
- 20 What does the Act say?
- 20 There is a neutral provision, criterion or practice
- 21 One age group is put at a particular disadvantage
- 22 The service user must be put at the same disadvantage
- 23 The provision, criterion or practice cannot be objectively justified
- 23 What is a legitimate aim?
- 23 What is proportionate?

- 24 Chapter 5: Harassment, victimisation and other unlawful acts**
- 24 Harassment
- 25 Victimisation
- 26 Unlawful instructions and aiding contraventions of the Act

- 27 Chapter 6: Positive action**
- 28 Voluntary nature of positive action
- 28 Positive action and objectively justified less favourable treatment
- 28 Positive action and the public sector equality duty

- 29 Chapter 7: Services and public functions**
- 29 What is unlawful discrimination in relation to services?

- 31 What is unlawful discrimination in relation to the exercise of public functions?
- 31 Interaction with the public sector equality duty
- 32 Services provided by schools and other educational institutions
- 32 Services for employees
- 33 Chapter 8: Associations**
- 34 Prohibited conduct by an association
- 34 Direct age discrimination by an association
- 35 Restricting membership to people of a particular age group
- 36 Positive action by associations
- 37 Age exceptions for associations – concessions
- 37 What is a concession by an association?
- 37 Membership and renewal of membership
- 38 Members’ access to a benefit, facility or service
- 39 Invitations as guests
- 39 Guests’ access to a benefit, facility or service
- 40 Chapter 9: Application of general exceptions to the protected characteristic of age**
- 40 Statutory authority
- 40 National security
- 41 Charities
- 41 Care within the family
- 41 Television, radio and on-line broadcasting and distribution
- 42 Chapter 10: Age specific exception: concessionary services**
- 42 What is a concession?
- 44 Limits of the exception

45 Chapter 11: Age specific exception: financial services

- 45 Definition of a financial service
- 46 Scope
- 46 Assessment of risk
- 48 Travel and motor insurance
- 49 Financial services arranged by an employer
- 49 Situations falling outside of this exception

50 Chapter 12: Other age specific exceptions

- 50 Age specific exception: package holidays
- 50 Scope
- 51 Definition of a 'relevant holiday service'
- 51 Written notice
- 51 Exclusivity
- 52 Bringing together people within the same age group
- 52 Composition of the holiday
- 53 Single price
- 53 Holidays falling outside of this exception
- 53 Age specific exception: age restricted services
- 54 Nature of age verification
- 55 Identification and licensed premises
- 55 Identification in other cases
- 56 Activities falling outside this exception
- 56 Age specific exception: residential mobile homes
- 56 When does the exception apply?
- 59 Age specific exception: sport and competitive activities
- 59 Definition of an 'age banded activity'
- 60 Age specific exception: immigration

61 Chapter 13: Enforcement

- 61 Civil courts
- 61 Time limits
- 62 Burden of proof

Foreword

Most people, most of the time, do not need to worry about the legal protections they have in their employment or in the services and products they use. But when something goes wrong it is important we all know how we are protected. The Equality Act 2010 protects people from discrimination in the workplace and in wider society. It replaced previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations. It sets out the different ways in which it is unlawful to treat someone.

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

The Equality and Human Rights Commission has been given powers to enforce the law, for example, by assisting or intervening in individual discrimination cases. However, our first priority is to provide guidance, support and encouragement so that organisations and service providers can get it right first time.

This is why we have published a range of codes and guidance that give individuals, businesses, employers and public authorities the information they need to understand the Equality Act, exercise their rights, and meet their responsibilities.

This document is a draft supplementary code of practice that should be read alongside the Code of Practice on Services, Public Functions and Associations.

This supplementary Code is a comprehensive and technical guide to the law. We hope it will be valuable and helpful to businesses, public authorities, courts, tribunals, lawyers and advocates – everyone who needs to understand the law in depth, or to apply it in practice.

The publication of this draft supplementary Code starts a formal period of consultation. We want to hear your feedback – particularly in response to a number of specific questions about this text, including whether it will have a cost impact for businesses. In doing so we can refine and improve our final product and provide high quality, relevant assistance in complying with the equality laws.

A handwritten signature in black ink that reads "Mark Hammond." The signature is written in a cursive style with a period at the end.

Mark Hammond
Chief Executive, Equality and Human Rights Commission

Chapter 1: Introduction

Status¹

1.1

The Commission has prepared and issued this supplement to the Code of Practice on Services, Public Functions and Associations (“the Code”) on the basis of its powers under the Equality Act 2006. It is a statutory code. This means it has been approved by the Secretary of State and laid before Parliament. This supplement (the supplementary Code) does not impose legal obligations. Nor is it an authoritative statement of the law; only the courts and tribunal can provide such an authority. However, it can be used in evidence in legal proceedings brought under the Equality Act 2010. Courts and tribunals must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

Scope

1.2

This supplementary Code covers age discrimination provisions relating to services and public functions as set out in Part 3 of the Equality Act and relating to associations as set out in Part 7.

1.3

These provisions were brought into force by the Equality Act (Commencement Order Number 9) 2012 on 1 October 2012. The exceptions to the prohibition on age discrimination are set out in a Ministerial Order: The Equality Act 2010 (Age Exceptions) Order 2012 (SI 2012 No.2466) which also came into force on 1 October 2012.

1.4

This supplementary Code applies to England, Scotland and Wales. However, services provided or public functions exercised outside Great Britain may be covered by the Act.

1 Please note that this draft document will not have the status described unless and until it is approved by Parliament.

How to use the supplementary Code

1.5

This supplementary Code should be read alongside the Code of Practice on Services, Public Functions and Associations. Where there is an explanation of legal terms or concepts common to all protected characteristics, a summary with a reference to the Code has been included here. Any such summary is not intended to alter the meaning of the Code. For a full explanation please refer to the Code.

Examples

1.6

Examples of how the provisions are likely to work in a variety of situations are shown in shaded boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples use a variety of contexts relating to services, public functions and associations, in order to demonstrate the breadth and scope of the provisions.

References

1.7

‘The Act’ means the Equality Act 2010. References to particular sections and schedules of the Act are shown in the margins, abbreviated as ‘s’ and ‘Sch’ respectively. References to ‘the Code’ are to the Code of Practice on Services, Public Functions and Associations. Occasionally there are references in the margins to the Explanatory Notes to the Act, to the Code of Practice on Employment (abbreviated as ‘Emp. code’) and to other legislation or regulations where relevant. The Commission’s Technical Guidance on the Public Duty is also referenced (abbreviated as ‘Technical Guidance’).

Changes to the law

1.8

Readers of this supplementary Code will need to keep up to date with any developments that affect the Act’s provisions and should also be aware of the other codes issued by the Commission. Further information can be obtained from the Commission. See below for contact details.

Chapter 2

The protected characteristic of age

What is the protected characteristic of age?

s.5

2.1

Age is defined in the Act by reference to a person's age group. An age group includes people of the same age or people of a particular range of ages.

Employment
Code 2.3 – 2.7

2.2

When the Act refers to people who share the protected characteristic of age, it means that they are in the same age group.

Explanatory
Notes
para. 36 – 37

2.3

Age groups can be wide (for example, 'people under 50' and 'people age 50 and above'). An age group can also be quite narrow (for example, 'people aged 50', 'people in their mid-40s'; 'people born in 1952'). An age group may also be relative (for example, 'younger than A' or 'older than the other club members').

2.4

The meaning of certain age-related terms such as 'youthful' may differ according to the context – for example, a 'young athlete' as compared to a 'young pensioner'. Age groups can also be linked to actual or assumed physical appearance, which may have little relationship with chronological age – for example, 'grey-haired' or 'balding'.

2.5

There is some flexibility in the definition of a person's age group, and everyone can be described as belonging to a number of different age groups. Which age group is relevant in terms of a person sharing the protected characteristic of age will depend on the context.

Example: A woman aged 25 could be seen as sharing the protected characteristic of age with people in a number of different age groups, including ‘25 year olds’; ‘the under 30s’; ‘the over 20s’; and ‘young adults’.

Example: A man of 86 could be said to share the protected characteristic of age with people in the following age groups: ‘86 year olds’; ‘over 80s’; ‘over 65s’; ‘pensioners’; ‘senior citizens’; ‘older people’; and ‘the elderly’.

2.6

An age group may be identified by external factors which by their nature apply only to persons of a particular age group – for example, ‘people born after the Second World War’ will mean any person born after 2 September 1945 or ‘people entitled to free TV licences’ will mean anyone age 75 or above.

2.7

Code
4.21 – 4.30

Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which a comparison should be made. It could be everyone outside the person’s age group but, in many cases, the choice of comparator age group will be more specific. This will often be led by the context and circumstances.

Example: The man of 86 might, depending on the circumstances, compare himself to ‘those 85 and under’, the ‘under 86s’, the ‘under 80s’, non-pensioners, or younger people.

2.8

More detail on how to identify a comparator in cases of direct discrimination is set out in the Code and in Chapter 3 below.

Who is protected under the ban on age discrimination and harassment related to age?

2.9

In relation to services and in the exercise of public functions, the ban on age discrimination and harassment related to age only protects people who are aged 18 or above. In relation to the treatment by associations of current or potential members, associates and guests, the ban protects all age groups including those under the age of 18. Where an association is providing a service to members of the public, under 18s are not protected by the ban.

s.28
(1)(a)

s.29

Who is liable for age discrimination in services, public functions and associations?

2.10

As for prohibited conduct relating to other protected characteristics, providers of services, persons exercising public functions and associations are liable for age discrimination, age-related harassment and victimisation.

Code
3.30 – 3.38

2.11

Unless they have taken all reasonable steps to prevent discrimination, a service provider will be legally responsible for age discrimination by their employees in the course of their employment, and a principal will be liable for age discrimination by their agents while acting under the principal's authority. This is explained more fully in Chapter 3 of the Code.

Section 109

Code
3.30 and 3.32

2.12

As the Code explains, in most cases individual employees may be held be personally liable for their acts of discrimination, whether or not the service provider has a defence against liability. An employee may have a defence if they can reasonably show they relied on a statement by the service provider that doing such an act would not be discrimination. Agents may be held personally liable for their (or their employees') acts of age discrimination, whether or not the principal condoned their acts, unless they can also show a similar defence.

3.35

2.13

The Act permits age discrimination in specified circumstances, as discussed in Chapters 9 to 12 below. If an exception applies to something done by a service provider, person exercising a public function or an association, it will also apply to their employees and agents.

Example: A café gives a concession to customers age 60 and above who can enjoy a cream tea at one-third the usual price once every month. This concession is permitted by an exception under the Act. The monthly teas become so popular that the cafe employs additional agency staff. The agency and its employees acting under the authority of the cafe are also covered by the exception for concessionary services.

Relationships between age and other protected characteristics

2.14

Where the Act allows exceptions to be made for people in a particular age group, such exceptions would apply to all people within that age group regardless of their sex, ethnicity, any disability they may have, religion or belief, sexual orientation, gender identity or pregnancy or maternity. Age-specific exceptions only permit differential treatment in relation to age; service providers, persons exercising public functions and associations must ensure that they do not discriminate because of any of the other protected characteristics.

Disability

2.15

A significant proportion of people in older age groups may be disabled – that is, they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Please see Chapter 7 of the Code for more detailed guidance on how disability is defined by the Act.

2.16

A service provider may be able to justify less favourable treatment because of age (see Chapter 3 below), but the Act does not allow less favourable treatment because of disability to be justified.

2.17

A service provider must make reasonable adjustments for disabled people, but does not have an equivalent duty towards people simply because they are in a particular age group. Older people may, however, benefit from a reasonable adjustment made for disabled people – for example, ramp access to a shop or information printed in large-size font. Chapter 7 of the Code gives more information about reasonable adjustments.

Other protected characteristics

2.18

A person's age combined with another protected characteristic may give rise to stereotypes resulting in particular types of treatment. For example, younger women may be more likely to be subjected to harassment than older women or men.

2.19

Where a person considers that they have been discriminated against or harassed because of age and another protected characteristic, they would need to bring two separate claims at the same time.

Chapter 3

Direct discrimination

Introduction

3.1

s.13 (1)
Code 4.3

This chapter discusses direct age discrimination in the context of services, public functions and associations. It summarises the meaning of direct discrimination and should be read with Chapter 4 of the Code. The summary is not intended to alter the meaning of the Code.

What the Act says

3.2

Emp. code
3.2 – 3.3

Direct discrimination occurs where a service provider treats a person less favourably than they treat or would treat others because of age, and the service provider cannot show objective justification for it. In what follows, the term ‘direct age discrimination’ is used to refer to unjustified less favourable treatment because of age.

Justifiable less favourable treatment because of age

3.3

s.13 (2)
Emp. code
3.36

Compared with other protected characteristics, a different approach applies to age, because some age-based rules and practices are seen as justifiable. Less favourable treatment of a person because of age is not direct discrimination if the service provider can show that the treatment is a proportionate means of achieving a legitimate aim.

Less favourable treatment

3.4

The term ‘treatment’ includes one-off actions or omissions. It also includes rules and practices and their application in a particular case.

Example: A bartender refuses to admit a man aged 65 saying, “Sorry, you are too old”. This is a one-off act, and is less favourable treatment of the man because of his age. However, if the bar never admits anyone who is, or appears to be, over 60, this would be an age-based rule or practice. By applying the rule to the man, it would still amount to less favourable treatment because of age.

3.5

To decide whether a service provider has treated a service user ‘less favourably’, a comparison must be made with how they have treated other service users or would have treated them in similar circumstances.

Code
4.5 – 4.6

3.6

Under the Act, it is not possible for the service provider to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, by offering an alternative service at a discount.

Code 4.7

Example: An orthopaedic surgeon decides that it will be inappropriate to give a hip replacement operation to a particular patient who is over 85, simply because of her age. The surgeon would be prepared to operate on a younger patient. The less favourable treatment is not eliminated by the surgeon recommending to the patient that she seeks a referral to a different hospital. Unless the doctor can objectively justify the decision to refuse the operation, it would be direct discrimination because of age.

3.7

Treatment can be ‘because of age’ if the characteristic of age is a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

Code 4.12

3.8

In some cases the link between age and the treatment will not be clear and it will be necessary to look at why the service provider treated the service user less favourably to determine whether this was because of age.

Example: A man of 50 wearing jeans tries to enter a club which generally attracts a much younger clientele. The person on the door turns the man away stating that he does not meet the club's dress code. It later emerges that on the same evening a 25 year old man in jeans was allowed in by the same person. This is evidence that the reason why the 50 year old was excluded was not primarily because of his dress but because of his age.

Code 4.16 **3.9** Direct age discrimination also includes unjustified less favourable treatment of a person based on a stereotype relating to age, whether or not the stereotype is accurate.

Example: The organiser of a cycling race assumes that no one over the age of 55 will be able to complete it within the maximum allowed time and, without doing any research, excludes those over 55 from the race. The race organiser uses a stereotype based on assumptions about this age group's physical capability, without having any evidence. The organiser's treatment of service users over 55 will be unlawful unless it can be objectively justified.

For a fuller discussion of less favourable treatment, please see Chapter 4 of the Code.

Discrimination by association

Code 4.18 – 19 **3.10** If a service provider treats a service user less favourably because they associate the service user with someone who belongs to a particular age group, the treatment is likely to be unlawful unless the service provider can justify it. So the service user who experiences less favourable treatment does not need to belong to this age group themselves.

Example: Having had trouble with some younger clubbers, the club owner bans groups which include individuals under 25. If a 27 year old woman is refused entry because she is part of a group that consists mainly of under 25s, she is being treated less favourably because of age owing to her association with the under 25s.

Discrimination by perception

3.11

If a service provider treats a service user less favourably because they mistakenly think that the service user is a particular age or belongs to a particular age group, the treatment is likely to be unlawful unless the service provider can justify it.

Code 4.20

Example: In the previous example, it is likely to be direct age discrimination if the club which bans under 25s refuses to admit a man age 30 because from his appearance they (wrongly) assume he is under 25.

Comparators

3.12

In most circumstances, direct age discrimination requires a comparator. The concept of comparators is covered in paragraphs 4.21 to 4.28 in the Code.

s.13 (1)

Code

4.21 – 28

3.13

In summary, the service user has to show that they have been treated less favourably than the way the service provider treats, has treated or would treat another service user to whom the age characteristic does not apply. This other person is referred to as a ‘comparator’. Another way of looking at this is to ask, “But for the protected characteristic of age, would the service user have been treated in that way?”

s.23 (1)

Code 4.22

4.28

Example: An 18 year old woman enrolls on a business course with an independent provider. She is at least 10 years younger than most of the other students. She arrives 10 minutes late for the first three classes. The college manager tells her that her late arrival disrupts the concentration of the other students, and that if she arrives late again she will have to leave the course. However, an older woman has arrived late on several occasions and was not given a similar warning. If the younger woman thinks that this less favourable treatment is because of her age, she would be able to refer to the older student as an appropriate comparator.

s.13 (2) Justification of less favourable treatment because of age

3.14

The protected characteristic of age is unique in that less favourable treatment because of age is not unlawful if the treatment can be objectively justified.

3.15

Emp. code 3.36 – 41 Whether less favourable treatment, because of age, including an age based rule or practice, is ‘objectively justified’ depends on whether it is an appropriate and reasonably necessary means of achieving a legitimate aim. This question should be approached in two stages:

3.16

- First, is the aim of the rule or practice legal and non-discriminatory, and one which represents a real, objective consideration (‘legitimate aim’).

3.17

- Second, if the aim is legitimate, is the means of achieving it appropriate and reasonably necessary (that is, ‘proportionate’) in all the circumstances?

Legitimate aim

3.18

If the treatment is less favourable to certain age groups then it can only be justified if it has a legitimate aim. In the context of direct discrimination, legitimate aims should be outcomes that are socially positive or in the public interest. The range of aims which can justify direct age discrimination is narrower than the range of aims that can justify indirect discrimination.

Although reasonable business needs and economic efficiency may be legitimate aims, there would normally need to be wider social factors too.

3.19

The following are examples of aims that are likely to be legitimate:

- Enabling people of particular age group(s) to socialise together
e.g. outings, events, concerts.
- Enabling people of particular age groups to enjoy activities together
e.g. hiking, sports.
- Enabling people of certain age groups to enjoy peace and quiet or enabling them to enjoy music at high volume.
- Ensuring the fair exercise of powers.
- Ensuring the health and safety of those using the provider's service, or others, provided risks are clearly specified.
- Preventing fraud or other forms of abuse or inappropriate use of services provided by the service provider.
- Ensuring the wellbeing or dignity of those using the service.
- Ensuring that services and benefits are targeted at those who most need them.

Code 5.30

Example: A local rambling club sets up regular weekend walks for under 25s. The club wants to promote a healthy lifestyle for members of this age group, as well as giving them an opportunity to socialise with people of a similar age. These aims would be legitimate.

Example: A local authority develops a contract specification to commission a day centre service which will primarily, but not exclusively, benefit people aged 75 and over. Evidence suggests people in this age group are more likely to benefit from the centre because of social isolation and physical or mental health conditions. Ensuring that appropriate services are available for this age group would be a legitimate aim.

Code 5.29

3.20

A service provider solely aiming to reduce costs cannot expect to satisfy the test. For example, the service provider cannot simply argue that to discriminate is cheaper than not to discriminate.

Example: The manager of a mobile phone shop decides that the shop will no longer deal with retired customers. This age group tends to need more support and guidance from staff when they buy phones, and the manager wants to cut back on staff numbers to reduce overheads. The aim of reducing costs alone would not be a legitimate one.

3.21

The aim of less favourable treatment should not be based on a stereotype about age. Sometimes a service provider may have some aims that are legitimate mixed with aims that are illegitimate, such as those linked to stereotypes.

Example: A fairground concessionaire believes that people over 70 have memory problems. This belief leads the concessionaire to ban them from the centrifuge ride because he thinks they will not remember safety instructions. While the aim of reducing health and safety risks is legitimate, the concessionaire's belief about this age group is based on a stereotype rather than on supporting evidence. Therefore the aim of reducing safety risks for this age group cannot be a legitimate one.

3.22

An aim will not be a legitimate one if it disregards fundamental principles of human dignity and self-determination.

Example: A local authority operates a rule under which anyone aged 65 and over needing home care is allocated fewer and shorter home care visits than people under 65. This age-differentiated policy is based on an assumption that older people only need basic personal care, and do not require support in maintaining relations with family and friends, or getting out of their house. The assumption does not respect the dignity and independence of older service users and would not provide a legitimate aim for the local authority's rule

3.23

At the time of the treatment, the service provider is not required to have in mind the aim that they put forward in justification. However, a court will give greater weight to a justification which had been carefully thought through before or at the time of the treatment in question.

It is good practice for the service provider to keep a record of their aim and justification for it at the time they adopt any rule or practice which treats certain service users less favourably than others because of age.

Example: Following agreement with the Department of Health and NHS England, Public Health England conducts an immunisation programme for a particular disease. In announcing the programme, they explain that its aim is to maximise health protection in the population as a whole. This aim would be a legitimate one, as it is clearly in the public interest to control the prevalence of disease. Recording the aim will give it greater weight if the programme is challenged.

What is proportionate?

3.24

Even if the aim is a legitimate one, the means of achieving it must be proportionate. The greater financial cost of using a less discriminatory approach cannot by itself provide a justification for less favourable treatment because of age.

Code 5.31

3.25

Deciding whether the means used to achieve the legitimate aim are proportionate involves examining whether those means are appropriate and reasonably necessary for achieving that aim. This may include considering the proposed age threshold. It involves a balancing exercise and a court will evaluate the discriminatory effect of the less favourable treatment against the service provider's reasons for applying it, taking into account all the relevant facts.

Example: In the example above, Public Health England has access to research findings that indicate a slower and lower response to the vaccination against the disease in people over 50. Offering the vaccine only to those aged 50 and under is supported by the evidence and is likely to be a proportionate means of achieving the legitimate aim of maximising health protection. A summary of this evidence is published, giving it greater weight if the age focus of the programme is challenged.

Example: With the aim of providing safe flying lessons, a flying club picks 59 as an upper age limit. The club will need to be able to show that the age of 59 was appropriate and necessary to achieve the legitimate aim of safety. As the aircraft used for the lessons are dual control machines and people taking lessons are accompanied by an instructor, the means adopted are unlikely to be appropriate or reasonably necessary to achieve the aim of maintaining safety.

3.26

The service provider will also need to show that the specific less favourable treatment is appropriate and necessary to achieve the legitimate aim and that it brings benefits that outweigh any disadvantageous effects. It is the treatment itself that must be justified.

Example: A guest house owner charges twice her normal rates for people under 21. The owner wants to deter under 21s from booking rooms, because in the past rooms have been damaged by some people of that age group. However genuine the owner’s concern about the risks posed by under 21s, the higher rates are unlikely to be a proportionate means of achieving the aim of discouraging damage to rooms. It would be less discriminatory to ask for a deposit: this approach would also be more likely to achieve the aim.

Public sector equality duty and justification of less favourable treatment because of age

3.27

A significant factor in determining whether a public authority is able to justify less favourable treatment because of age is the extent to which the authority has complied with the public sector equality duty.

s.149

3.28

As explained in the EHRC Technical Guidance on the Public Sector Equality Duty, to comply with the duty a relevant body needs to have sufficient evidence of the impact of its policies and practices on people with different protected characteristics – including age. Having a reliable evidence base allows a body subject to the duty to consider whether there are ways of mitigating any adverse impact that the evidence identifies.

Technical
Guidance
paras. 5.15 –
5.20

Chapter 4

Indirect discrimination

Introduction

4.1

This chapter discusses indirect age discrimination in the context of services, public functions and associations. It summarises the meaning of indirect discrimination and should be read with Chapter 5 of the Code. The summary is not intended to alter the meaning of the Code.

What does the Act say?

4.2

s.19
Code 5.4 Indirect discrimination may occur when a service provider applies an apparently neutral provision, criterion or practice which puts persons sharing the characteristic of age at a particular disadvantage.

4.3

Code 5.5
Section 19 (2) For indirect discrimination to take place, four requirements must be met. These are summarised below.

There is a neutral provision, criterion or practice

4.4

Code 5.6 First, the service provider must apply (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular service user.

Example: A bookshop gives a loyalty discount to customers who have bought more than 10 books online in the last year. This condition is a provision, criterion or practice and it is neutral because it applies to everyone, regardless of age.

Example: A service provider gives a loyalty discount to anyone who can show that they have been using the service regularly for 20 years. This condition is a provision, criterion or practice. It is neutral because it does not refer to any particular age group and it applies to all customers, regardless of age.

4.5

The provision, criterion or practice is neutral if it is applied to everyone, regardless of age. A condition which expressly excludes people of a particular age or age group will not be neutral in this way and is likely to amount to direct discrimination. The less favourable treatment will need to be justified using the justification test for direct age discrimination, rather than the test for justifying indirect discrimination.

Code 5.7

Example: A variety theatre performance restricts admission to people who can remember what life was like during the Second World War. It claims this is a neutral requirement. The reality is that only people who were alive during the War will gain admission. This policy could amount to direct age discrimination against those too young to satisfy the requirement, unless it can be objectively justified.

One age group is put at a particular disadvantage

4.6

The provision, criterion or practice must put (or would put) people who share the service user's age characteristic at a particular disadvantage when compared with people who do not have that characteristic.

Example: An optician allows customers to pay for their glasses by instalments but restricts eligibility to those in work. A pensioner points out that this puts pensioners, including her, at a disadvantage as they are less likely to be working. This is likely to be indirect age discrimination, unless it can be justified.

Code 5.12 – 4.7
5.14 The link between age and the disadvantage might be obvious but sometimes statistics, evidence or expert evidence may help to show how people in an age group are put (or would be put) at a disadvantage.

Example: A gym imposes a fitness test involving 30 press ups for people wanting to join. A 70 year old man provides statistical evidence from a reputable source that people in his age group are unlikely to be able to do 30 press ups as upper body strength decreases with age. If the gym cannot objectively justify the requirement, it will be unlawful.

s.19 (2) (b) 4.8
s.23 (1) Once group disadvantage is established, the next stage is to make a comparison between the impact of the provision, criterion or practice on service users within the relevant age group and those outside the group. This involves establishing a ‘pool for comparison’. The way a comparison is carried out will depend on the circumstances.
Code 5.16

Example: A local authority provides information about its mobile library service by distributing leaflets to day centres. These are normally used by people over 65. A 55 year old resident complains that the method of distribution indirectly discriminates against those under the age of 65. The pool for comparison is those living in the local authority’s area who prefer to have information in a leaflet and who may be interested in using the mobile library. It is not the national population or the population of the local authority in general.

The service user must be put at the same disadvantage

Code 5.8 and 4.9
5.23 The provision, criterion or practice must put – or would put – the individual service user at the same disadvantage as the people who share the service user’s age group.

Example: A magazine gives a discount to loyal customers, who have had a subscription for 20 years. This is likely to disadvantage people under 40 who could not have subscribed for that length of time. They could claim that they suffer a particular disadvantage compared with those over 40. Each individual would suffer the disadvantage personally even if they have not yet requested and been refused the discount.

The provision, criterion or practice cannot be objectively justified

4.10

If the service provider can show that the provision, criterion or practice is objectively justified as a proportionate means of achieving a legitimate aim, then it will not amount to indirect discrimination. This objective justification test applies to indirect discrimination for all protected characteristics.

Code 5.25

What is a legitimate aim?

4.11

The aim of the provision, criterion or practice must be legal and non-discriminatory, and one that represents a real objective consideration. The range of aims which can justify indirect discrimination is wider than the range of aims that can justify direct age discrimination. It is not limited to aims that are socially positive or in the public interest.

4.12

The concept of a legitimate aim, with examples, is explained in detail at paragraphs 5.28-5.30 of the Code.

Code
5.28 – 30

What is proportionate?

4.13

The means used to achieve that aim must be proportionate – that is, appropriate and necessary in all the circumstances. The approach to proportionality is explained in detail in the Code.

Code
5.31 – 35

Chapter 5

Harassment, victimisation and other unlawful acts

Harassment

5.1

As for other protected characteristics, harassment related to age is always unlawful and is not permitted by any of the exceptions in the Act.

Harassment is explained in Chapter 8 of the Code. This summary is not intended to alter the meaning of the Code.

5.2

s.26 Harassment occurs when a service provider engages in unwanted conduct related to age, which has the purpose or effect of:

Code
Chapter 8

- violating the service user's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the service user.

5.3

Code
8.8 – 8.14

The conduct does not have to relate to the service user's own age. It is only necessary that the conduct relates to age and that it has either the purpose or the effect set out above.

Example: A young carer of a group of older people is upset by ageist gestures and jokes by supermarket employees whenever he helps the group do their shopping. Even though the remarks were not directed at him, he was upset by the offensive environment that they created. This could amount to harassment related to age.

Example: A woman in her 50s looks older due to past illness. When she applies for membership of a local social club, the membership secretary makes comments to her such as, “This club isn’t suitable for pensioners” and “Members wouldn’t feel comfortable with someone of your age at club events”. The woman finds these remarks deeply humiliating and they could amount to harassment related to age – even though she has been wrongly perceived as belonging to an older age group.

Victimisation

5.4

As for other protected characteristics, victimisation related to age is always unlawful and is not permitted by any of the exceptions in the Act.

Victimisation is explained in Chapter 9 of the Code.

s.27

5.5

Victimisation occurs where a service provider subjects a person to a detriment because the person has carried out – or may carry out – a ‘protected act’. A ‘protected act’ includes bringing proceedings under the Act, giving evidence in connection with such proceedings, or making an allegation that someone has breached the Act.

s.27 (1)
and (2)

Code
9.2 – 9.6

Example: An 18 year old tennis player complained of age discrimination when her tennis club excluded members under 21 from all their social events. Her 16 year old brother, also a club member, supported the complaint. Because of this, the manager of the club excluded him from a tournament in which he was expecting to compete. The brother could complain of victimisation.

Unlawful instructions and aiding contraventions of the Act

5.6

- s.111 Chapter 9 of the Code explains the circumstances in which the Act makes it
Code 9.15 – unlawful to instruct, induce or cause someone to discriminate against, harass
9.24 or victimise another person because of a protected characteristic. These
provisions now also apply to age. Chapter 9 also explains that it is unlawful to
aid contraventions of the Act.

Chapter 6

Positive action

6.1

This Chapter summarises the positive action provisions in the Act and should be read with Chapter 10 of the Code. The summary is not intended to alter the meaning of the Code.

s.158

Chapter 10

6.2

The Act contains provisions which enable service providers to take proportionate action to achieve fuller and more effective equality outcomes for members of groups – including particular age groups – that are socially or economically disadvantaged or excluded, or who otherwise face the consequences of past or present discrimination or disadvantage. These are known as ‘positive action’ provisions.

Code 10.3

6.3

The EHRC Technical Guidance on the PSED defines an ‘equality outcome’ as the results that individuals or groups actually achieve and are able to benefit from.

Technical
Guidance
Appendix 5

6.4

Chapter 10 of the Code explains the statutory conditions that must be met for positive action measures to be lawful. In summary, for the protected characteristic of age a service provider must reasonably think that a particular age group:

s.158 (1)

- shares a disadvantage connected to their age, or
- has needs that are different from those of other age groups, or
- has disproportionately low participation in an activity compared to that of other age groups.

6.5

If one or more of these conditions is met, under the positive action measures it is lawful for a service provider to take proportionate steps with the aim of overcoming the consequential barriers experienced by the particular age group.

s.158 (2)

Example: A college has monitoring data which indicates that prospective students over 60 are more likely to request training in basic IT skills than people outside this age group. It would be lawful for the college to provide training sessions primarily targeted at the over 60s.

Voluntary nature of positive action

6.6

Code 10.8 Positive action is optional, not a requirement. However, by taking positive action, organisations will often derive broader benefits to their business, the quality and take-up of services or improve the effectiveness and quality of public functions; associations can strengthen their membership base and improve the benefits and services they provide to all of their members.

Positive action and objectively justified less favourable treatment

6.7

Positive action measures are designed to achieve fairer equality outcomes for groups sharing protected characteristics that face disadvantage or exclusion. Such measures are lawful provided they are a proportionate means of meeting one or more of three aims specified by the Act: reducing disadvantage; meeting needs; or increasing participation. In contrast, as explained in Chapter 3, for less favourable treatment because of age to be lawful, the aim only has to be a legitimate one.

s.149 – 150 Positive action and the public sector equality duty

6.8

Code 10.28 Public authorities and those carrying out public functions who are subject to the public sector equality duty may wish to consider using positive action to help them to comply with the duty.

s.149 (1)
and (3)

Technical
Guidance
paras 3.11 –
3.15

Chapter 7

Services and public functions

7.1

This chapter explains how the provisions of Part 3 of the Act relating to services and public functions apply to the protected characteristic of age. Exceptions to the ban on age discrimination are set out in Chapters 9 to 12.

7.2

As set out in the Code, Part 3 applies to a wide range of services and 11.3 of the Code gives examples of the services that are covered.

Code 11.3

7.3

The disposal and management of premises and education are addressed by other parts of the Act (parts 4 and 6 respectively). Protection against discrimination in relation to premises does not apply to the protected characteristic of age. For education, protection against discrimination in relation to age does not apply to schools, except when they are providing services to members of the public (Part 6 Chapter 1).

Code 11.38

7.4

Part 3 of the Act also applies to anyone exercising a public function. The term ‘public function’ may cover a wide variety of actions and 11.16 of the code gives examples of functions that are covered, such as planning and licensing matters.

What is unlawful discrimination in relation to services?

7.5

The Act says that it is unlawful for a service provider to discriminate, directly or indirectly, against a person requiring (or seeking to obtain or use) a service by not providing that person with the service.

s.29 (1)
and 31 (6)

Code 11.18

s.31 (7)

7.6

Discrimination in relation to services is explained in Chapter 11 of the Code. In summary, a reference to a service provider not providing a service to a person includes:

- the service provider refusing to provide the service
- the service provider not providing the service of the quality that is usually provided to the public
- the service provider not providing the service in the manner or on the terms that it is usually provided to the public.

Example: NHS guidelines on the treatment of breast cancer suggest that surgical treatment should be made available to patients regardless of their chronological age. A hospital trust operates an unwritten policy that women over 85 will only be offered chemotherapy or hormone treatment. Unless this age based rule can be objectively justified, it amounts to direct age discrimination by the service provider.

7.7

Discriminating against a person also includes providing a service on different terms, terminating the service, or subjecting the person to any other detriment. The term ‘detriment’ is explained in the Code.

Example: A young man who wants to book a restaurant table for his 21st birthday party is asked to pay a 50% deposit because the restaurant owner believes that younger customers are less likely to honour the booking. This is likely to be direct age discrimination in the terms of service, unless it can be justified.

7.8

Code 11.20 –
11.22

These provisions may overlap so that, for example, rude or offensive behaviour towards a customer or potential customer of a particular age will constitute a lower standard of service or a detriment. Discrimination in the terms of service could include charging more for goods or services, or imposing extra conditions for using a facility or service.

What is unlawful discrimination in relation to the exercise of public functions?

7.9

The Act prohibits discrimination in the exercise of a public function. The provision is a broad one and would cover, for example, refusing to allow someone to benefit from the exercise of a function, or treating someone in a worse manner in the exercise of a function. An example could be rejecting an application for a discretionary welfare benefit because of age.

Code 11.26

Example: A couple in their early 20s bought a market stall from the previous owners who were retiring after 50 years. The local authority street trading service begins to make unannounced visits to the stall because they believe young people are more likely to break street trading laws. These visits affect the couple's business reputation. This treatment is likely to be direct age discrimination unless it can be objectively justified.

7.10

Harassment and victimisation related to age are also prohibited under the services and public function provisions.

Code 11.34 –
11.36

Interaction with the public sector equality duty

7.11

Public authorities and those carrying out public functions that are subject to the public sector equality duty may find it easier to show they have met the requirements of the duty if they take account of the requirements relating to the ban on age discrimination in services. Conversely, complying with the public sector equality duty will help them to meet their obligations under the services and public functions provisions relating to age discrimination.

Code 11.62

Services provided by schools and other educational institutions

7.12

Code 11.40

Protection against age discrimination does not apply to schools when they are providing education (Chapter 1, Part 6 of the Act). However, as explained in the Code, certain activities and functions of governing bodies and proprietors of schools and institutes of further and higher education fall under the services and public functions provisions in Part 3 of the Act and so are subject to the ban on age discrimination. These could include non-educational activities, such as hiring out their facilities.

Example: A secondary school has a swimming pool which it allows members of the public to use at weekends when pupils are not at school. When a man in his 80s wants to use the pool, the school's life guard refuses to let him do so because he thinks the man will swim so slowly that he will get in the way of other pool users. This is likely to amount to direct age discrimination by the school, unless it can be objectively justified.

Services for employees

7.13

s.31(5)

Code 11.46 –
11.49

As explained in Chapter 11 of the Code, where an employer arranges with another person to provide services to their employees, it is the person providing the service, rather than the employer, who is the 'service provider'. Under such arrangements the employees are protected by Part 3 of the Act as 'service users'. Examples of these services might include medical check-ups, catering facilities, retirement planning and lunch-time keep fit classes.

Example: An employer arranges for a contractor specialising in fitness training to provide lunchtime sessions for their employees. The contractor informs the employer that employees over 60 will not be included in this programme. Several employees over 60 complain about this. Unless it can be shown that excluding this age group is objectively justifiable, this is likely to amount to direct age discrimination by the contractor.

Chapter 8

Associations

8.1

Chapter 12 of the Code explains how the Act applies to associations, including what is meant by the term ‘association’ and what is unlawful under the Act in relation to members, people seeking to become members, associates, guests and people seeking to become guests of an association.

Part 7

Code
Chapter 12

8.2

This Chapter explains how the provisions of the Act relating to associations apply to the protected characteristic of age. It also explains the age-related concessions that an association may lawfully offer to its members, potential members and guests.

8.3

The Act says it is unlawful for an association with at least 25 members to discriminate against, harass or victimise its members, potential members, associates, guests and potential guests.

Code 12.15
and 12.17

8.4

The ban on discrimination, harassment and victimisation by an association applies to people of any age. This contrasts with the ban on age discrimination by service providers and persons exercising a public function which applies only to individuals aged 18 or above.

8.5

An association may restrict its members to people of a particular age group. It can also take positive action measures under the Act to benefit people of a particular age group.

Part 7

Chapter 12
s.158

8.6

An association can also be a provider of services to non-members, for example by opening its restaurant to the public. When acting as a service provider, an association must comply with the prohibition on age discrimination and age-related harassment under the Act in respect of any person age 18 or above. As a service provider, an association may also be able

s.28 (1) (a)
and s.29

Code 12.10

to provide age-related services by relying on the exceptions discussed in Chapters 9 – 12 below.

Prohibited conduct by an association

8.7

Code 12.19 –
12.42

The Code explains the circumstances in which the Act makes it unlawful for an association to discriminate against, harass or victimise a member, a person seeking to become a member, an associate, a guest or a person seeking to become a guest.

Direct age discrimination by an association

8.8

As discussed in Chapter 3, to treat a person less favourably because of age is direct discrimination unless the treatment can be objectively justified as proportionate means of achieving a legitimate aim.

Example: A motorcycle club has recently introduced an upper age limit of 55 for new members. The club's experience suggests that some older members lack the stamina to manage the club's famous two day events. A 56 year old man who is rejected for membership points out that the club is not planning to take away membership from its members over 55 who joined when they were younger. As this age limit is unlikely to be objectively justified it could amount to direct age discrimination.

8.9

Indirect age discrimination is discussed above in Chapter 4 and in Chapter 5 of the Code.

Example: A social club with members spanning a wide range of ages insists that all applications for membership are submitted online, through the club's website. This places at a disadvantage many club members over 75, who are less likely to feel confident using the internet to make payments. This arrangement could be indirect age discrimination, unless the club is able to objectively justify it.

8.10

Harassment related to age is summarised in Chapter 5 and explained more fully in Chapter 8 of the Code.

Example: A woman brings her 85 year old mother to a large bridge club. The club's organiser makes loud and rude remarks about the mother being forgetful and playing badly because of her age. She has impaired hearing and does not hear these remarks but her daughter does and is very upset. This is likely to be age-related harassment as the unwanted conduct is related to a particular age group – even though not to the daughter's own age group.

8.11

Victimisation when the protected act concerns prohibited conduct because of or related to age is summarised in Chapter 6 and explained more fully in Chapter 9 of the Code.

Example: A man who recently joined a club complains that the way the club nominated members for its committee amounted to indirect age discrimination. As result of this complaint, his membership is terminated. Terminating his membership in these circumstances would amount to victimisation.

Restricting membership to people of a particular age group

8.12

As discussed in the Code, the Act permits associations, other than political parties, to restrict their membership to people who share a protected characteristic which now includes age. So it is lawful to have a travel club for people over 50 or an association of young gardeners for people under 16.

Sch. 16
para. 1(1)

Code
12.46 – 12.51

8.13

Sch. 16
para. 1(2) If an association restricts membership to people of a particular age group, then that association may:

- Sch. 16
para. 1(3)
- restrict the access by associates to benefits, facilities or services to associates of that age group, and
 - invite as guests or permit to be invited as guests only people of that age group.

Positive action by associations**8.14**

s.158 The Act permits two forms of positive action by associations:

- Positive action to overcome disadvantage, low participation of people of a particular age group or to meet their different needs. This is explained in the Code and discussed above in Chapter 6.
- Positive action by political parties.

8.15

s.104
Code 12.54 –
12.62 The Code explains the ways in which a registered political party may make arrangements to select its candidates to achieve greater equality in the party's representation in specified elected bodies including parliament and a local authority. Such arrangements may be used to reduce inequalities related to age.

Example: A political party has no elected councillor under 25 on a local authority. In this situation, it could:

- adopt special procedures to identify party members under 25 who might wish to be nominated for election
- offer training for members under 25; and/or
- reserve 15% of places on its candidate short list for members under 25

Age exceptions for associations – concessions

8.16

The Act makes it lawful for an association to give age-based concessions on admission to membership, members' access to benefits, facilities or services, invitations as guests or access by guests to benefits, facilities or services. It will not be age discrimination for an association to give any one of these four types of concessions.

Sch. 16
para. 1(2)

What is a concession by an association?

8.17

In relation to associations, a concession is a way of doing something which gives a benefit to potential members, members, potential guests or guests, or places them in a more advantageous position. Compared to the way in which (or the terms on which) an association usually does something, a concession takes a more favourable approach for a particular age group, or a group defined by length of membership.

Sch. 16
para. 1A (6)

Example: A golf club offers discounted membership fees to people over 60. Another golf club discounts its fees for people who have been members for five years or more. A third club offers a similar concession to people of any age who have been members for over 10 years. All three concessions would be lawful under the age exception for associations.

8.18

Please see paragraphs 10.5 to 10.7 for a fuller explanation of a concession.

Membership and renewal of membership

8.19

Under the Act, an association may give a concession on admission to membership or renewal of membership.

Sch. 16
para. 1A (1)

Example: An association normally operating a six month waiting time between application and acceptance as a member reduces this waiting time to three months for applicants over 60. This would be lawful as a concession under the Act. But if the association decided to increase the waiting time for people under 60, this would not qualify as a concession, since a concession must involve doing something more favourably for the benefit of a particular age group.

8.20

Concessions on admission to membership, or renewal of membership may be given only to

- people of a particular age, or
- people who have been members of the association for a specified period

8.21

Such concessions could include:

- waiver of a club membership fee, for example waiving the fee for the first two months for people under 25
- reduced fee for membership renewals for people with long standing membership

Members' access to a benefit, facility or service

8.22

Sch. 16
para. 1A (2)

Under the Act an association may give a concession on access to a benefit, facility or service. Such concession may only be given to

- members of a particular age group; or
- people who have been members of the association for a specified period.

8.23

Concessions for members could include:

- individuals who have been members for more than 10 years to have first choice for the club's summer outings
- members under 12 to be given two free lessons
- members over 60 to be given at-table service in the members' bar

- allowing reduced price use of facilities at certain times, for example half price use of a golf club's driving range for members under 20 on Wednesday evenings

Invitations as guests

8.24

Under the Act, an association may give a concession for people of a particular age group being invited as guests.

Example: A dance club normally allows members to invite only one guest to each social event. For a forthcoming event, it allows members to invite two guests under 30. This would be a lawful concession.

Sch. 16

para. 1A (3)

s.102 (1)

Guests' access to a benefit, facility or service

8.25

Under the Act, an association may give guests of a particular age group a concession on access to a benefit, facility or service.

Example: A tennis club which normally charges guests for coaching sessions could offer one free session to each guest over 60. The club could also permit guests over 18, accompanied by their host, to continue to use the bar after 10pm. Both these concessions would be lawful.

Sch. 16

para. 1A (4)

s.102 (2)

Chapter 9

Application of general exceptions to the protected characteristic of age

Code Chapter 13
 9.1 In addition to the age-specific exceptions discussed in Chapter 8 and in Chapters 10 – 12, the Act contains exceptions that apply to all or most protected characteristics. These exceptions permit discrimination that would otherwise be unlawful in the provision of services, exercise of public functions or the activities of associations. Chapter 13 of the Code explains these general exceptions in more detail and they are summarised below. The summary is not intended to alter the meaning of the Code.

Statutory authority

Sch. 22.
 para. 1
 Code 13.10 – 13.14
 9.2 For the protected characteristic of age it is not a breach of the Act as it applies to services, public functions and associations to do anything that is required under another law.

Example: The Concessionary Bus Travel Act 2007 requires English local authorities to issue concessionary bus passes to older people of eligible age. A younger person excluded from this scheme would not be able to claim that this was age discrimination.

National security

s.192
 Code 13.17 – 13.21
 9.3 The Act permits a service provider to take proportionate action to safeguard national security, even if this would otherwise amount to age discrimination.

Charities

9.4

A charity will not breach the Act by providing benefits only to people of a particular age group if this is in accordance with its charitable instrument and is either:

- a) a proportionate means of achieving a legitimate aim, or
- b) for the purpose of preventing or compensating for a disadvantage linked to that age group.

Example: A local charity that is established to provide support to vulnerable people of all ages in a particular area organises a twice-weekly luncheon club for people over 65. The charity has evidence that providing a nourishing meal in a congenial setting can help people in this age group to overcome the physical and mental health disadvantages arising from social isolation and poor diets.

s.193 and 194

Code 13.31 –
13.40

Care within the family

9.5

It is not age discrimination for a person to take only individuals of a particular age group into their home to provide them with care, whether such care is for payment or not.

Sch. 3
para. 15
Code 13.102

Television, radio and online broadcasting and distribution

9.6

The Act does not prohibit age discrimination, harassment or victimisation in decisions relating to the content or scheduling of television or radio programmes, the depiction of people of a particular age group or the people selected to take part in a television or radio programme.

Sch. 3
para. 31 (1)
Code 13.105

Chapter 10

Age specific exception: concessionary services

10.1

Sch. 3
Part 7
para. 30A

The Act provides an exception to the ban on age discrimination for what are called concessionary services.

10.2

s.25

For the purpose of this exception, the term ‘age discrimination’ means direct age discrimination and indirect age discrimination. The exception does not apply to harassment or victimisation, which are always unlawful.

10.3

The Act says that it will not be age discrimination for a service provider or a person exercising public functions to give a concession to people of a particular age.

10.4

Because the Act does not prohibit age discrimination in access to services and functions by people under 18, there is no restriction on service providers giving concessions to people under 18 in any age group (for example, everyone under 18, or children aged 10 to 16).

What is a concession?

10.5

Sch. 3
para. 30A (2)

The Act says that a concession is a benefit, right or privilege making the manner in which the service is provided more favourable than the way it is usually provided to the public or section of the public.

10.6

It is also a concession to offer a benefit, right or privilege making the terms on which a service is provided more favourable than the terms on which it is usually provided to the public or section of the public. This means that a service provider can offer more favourable treatment to people of particular age groups.

10.7

‘Benefit’ might include reduced costs. ‘Rights and privileges’ cover entitlements as well as preferential treatment afforded to service users.

Example: A health spa offers students two hours’ massage therapy for the price of a one hour treatment. This is preferential treatment which is lawful because of the exception for concessionary services. Because students are more likely to be in younger age groups, this might otherwise amount to indirect age discrimination.

10.8

‘Manner’ is the way in which the service is provided. An example of a concession relating to the manner in which a service is provided might be ‘out of hours’ provision for certain age groups, such as later than usual in the evening, or earlier in the morning.

Example: A leisure centre opens its swimming pool early on Friday mornings for people over 65. This out of hours provision for a particular age group would qualify as a concessionary service.

10.9

The ‘terms’ on which a service is provided refer to what is agreed between the service provider and the service user as to the provision of the service. The terms will include the conditions of the service and the charge to the service user.

Example: A hairdresser offers reduced rates for pensioners on Tuesdays. This falls within the exception for concessionary services, so a younger customer cannot complain about direct age discrimination in the terms of service because of not being offered a reduced rate for their haircut.

Limits of the exception

10.10

This exception does not apply to a refusal of service. This means that a service provider cannot refuse to serve an individual because they are not part of a particular age group.

Example: In the hairdresser example above, a woman aged 40 asks for an appointment on a particular Tuesday when appointments are still available. As she is not a pensioner, she is refused. This refusal to provide the service falls outside the exception for concessions. It will amount to direct age discrimination unless the treatment can be justified as being a proportionate means of achieving a legitimate aim.

10.11

The exception does not apply to harassment.

Example: A bar wishing to attract young customers offers under 25s their first drink free of charge and at-table service. These are lawful concessions. However, when an older couple ask for at-table service, the security staff ask them to leave in an aggressive and abusive manner, emphasising that their custom is not wanted by the bar. This creates a hostile and degrading environment for the couple. The treatment is likely to amount to harassment related to age and would be unlawful.

10.12

A service provider may give such favourable treatment to one age group that a different age group is effectively excluded from receiving this service. The concession exception permits what would otherwise be direct or indirect discrimination, and so such treatment may be lawful. However, if it amounts to harassment it would not be permitted by the exception for concessions.

Chapter 11

Age specific exception: financial services

11.1

The Act provides an exception from the age discrimination provisions for financial services.

Sch. 3
Part 5
para. 20A(1)

11.2

For the purpose of this exception, the term ‘age discrimination’ means direct age discrimination and indirect age discrimination only. The exception does not apply to harassment or victimisation, which are always unlawful.

Definition of a financial service

11.3

The Act defines a financial service as including those of a banking, credit, insurance, personal pension, investment or payment nature.

Sch. 3
Part 5
para. 20A (3)

11.4

Mortgages, annuities, current accounts, savings accounts, cheque cashing services, loans, bank overdrafts, credit cards, charge cards, debt advice, debt management services, e-money services, equity release, fraud scoring used by financial services companies, spread betting services and investment advice all fall within the exception.

Example: An accountancy firm completes its customers’ VAT returns, charging less to customers over 50. This VAT service is within the scope of the exception for financial services as it is of a payment nature. The same accountancy firm charges less to customers over 50 for advice on restructuring their businesses. This activity is not of a banking, credit, insurance, personal pension, investment or payment nature, so the price reduction is not covered by the financial services exception. However, it is very likely to fall within the exception for concessionary services.

Sch. 3
Part 5
para. 20 A (1)

Scope

11.5

The Act says that it will not be age discrimination for a service provider to do anything in connection with financial services.

11.6

This means that the exception will apply to all actions or omissions by any financial service provider – although the provider cannot rely on the exceptions in defending claims of victimisation or harassment.

Example: For customers aged 60, a high street bank offers a ‘silver saver’ account with higher interest than other saving products. This will be lawful as the bank can rely upon the exception for financial services. A woman in her 40s complains to the bank that their ‘silver saver’ account amounts to age discrimination. Even though she is incorrect, because of her complaint the bank refuses to allow her to open an ordinary current account. This amounts to victimisation and would not be covered by the financial services exception.

Example: A woman in her 70s believes that there are unauthorised purchases on her credit card statement. She tells her credit card provider that she suspects her card has been cloned. The provider tells her she is probably just being ‘forgetful’ and that she should contact them via a younger relative. The woman feels humiliated by her treatment. This is likely to amount to harassment related to age and would not be covered by the financial services exception.

Assessment of risk

11.7

Sometimes a financial services provider undertakes a risk assessment which takes into account the age of the service user – for example, deciding what premium to charge a customer for motor or travel insurance.

11.8

When this type of risk assessment is undertaken a service provider will only be able to rely on the exception for financial services if:

- the information used for the risk assessment is relevant and
- the information comes from a source on which it is reasonable to rely.

11.9

Information which might be relevant to the assessment of risk includes actuarial or statistical data or a medical report. It cannot include untested assumptions, stereotypes or generalisations in respect of age.

11.10

The following additional factors may be relevant to determining whether the information comes from a source on which it is reasonable to rely:

- the information is current
- where data is involved, the method of collection is suitable
- the information is representative
- the information is credible, for example, it is generally accepted by the scientific or actuarial community

Example: A 19 year old man in stable, full-time employment applies to a finance company for a short term car loan. Believing that people under 21 are less reliable, the company only offers him a loan at a significantly higher rate of interest than would be charged to older motorists. This conclusion is not based on an assessment of risk using data or other relevant information relating to the man's age. In these circumstances, charging the higher rate of interest is unlikely to come within the financial services exception and would therefore be unlawful.

Example: A 65 year old woman applies for travel insurance for a one year ‘round the world’ trip to celebrate her retirement. She declares several health problems which are in remission, and shows the insurance company a medical report which states that, because of her age, the conditions are likely to recur. In refusing the travel insurance, the insurance company has made an assessment of risk based on relevant information from a source on which it is reasonable to rely. Consequently it can rely on the financial services exception to refuse cover.

Travel and motor insurance

11.11

The Government, the Association of British Insurers (ABI) and the British Insurance Brokers’ Association (BIBA) have reached a voluntary agreement that applies when service providers refuse travel and motor insurance to a service user because their age falls above the upper age limit for the product. The agreement obliges service users to:

- refer the service user to another company that can help, or
- direct the service user to a signposting system which should be able to identify more suitable service providers

11.12

The BIBA signposting service can be contacted as follows:

Telephone: 0879 950 1790 (9.00am – 5.00pm Monday to Friday).

Online: www.biba.org.uk/

11.13

Signposting a service user does not mean that an insurer will have complied with their obligations under the Act, that they will have been justified in refusing to provide a service or that they can avoid liability for breaches of the Act.

11.14

The voluntary agreement between the Government and the insurance industry also includes a transparency measure which requires publication of data on the impact of age on motor and travel insurance. The ABI publishes annual aggregate data showing claims costs under motor and travel insurance broken down by age ranges. The data on which this is based

includes, but is not limited to, publicly available data such as Government and commercially available statistics, published research and material such as proprietary company research, claims and other data. The data may be from UK or non-UK sources.

The published aggregate data can be found on:

http://www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx

Financial services arranged by an employer

11.15

This is addressed in the Services Code.

Situations falling outside of this exception

11.16

If a financial services provider cannot rely on this exception, they may be able to rely on the exception for concessionary services or may be able to objectively justify any less favourable treatment because of age.

Sch. 3
Part 5
para. 20 (1)

Code
para. 13.90

Chapter 12

Other age specific exceptions

12.1

Five other age-specific exceptions are discussed in this Chapter. As with the age-specific exceptions discussed above, the term ‘age discrimination’ means direct age discrimination and indirect age discrimination only. These exceptions do not apply to harassment or victimisation which are always unlawful.

Age specific exception: package holidays

12.2

The Act provides an exception from the age discrimination provisions for a ‘relevant holiday service’ provided to people of a particular age group.

12.3

Holiday companies, hotels, owners/letting agents of holiday cottages/chalets may be covered by this exception if they provide holiday services.

12.4

A local authority providing holidays for particular age groups might also fall within this exception.

Scope

12.5

The Act says that it will not be age discrimination for a service provider to provide a ‘relevant holiday service’ to people of a particular age group.

12.6

This exception only allows direct or indirect age discrimination in relation to a decision about whether or not to allow a person to enjoy a ‘relevant holiday service’. It does not extend to other related matters such as the terms on which the service is provided or a decision to terminate it.

Example: A holiday company providing accommodation and travel requires 18 to 25 year olds to pay a higher damage deposit for self-catering rentals, believing this age group to be less responsible. This practice would fall outside the exception for package holidays because it relates only to the terms on which the accommodation is provided. As it involves less favourable treatment of a particular age group, it would only be lawful if it can be objectively justified.

Definition of a ‘relevant holiday service’

12.7

A ‘relevant holiday’ service means a service where:

- a service user pays a single price for at least two of the following: travel; accommodation; access to activities or services forming a significant part of the service or its cost
- the holiday is for more than 24 hours or includes overnight accommodation
- the holiday is provided only to people in a certain age group and
- an essential feature of the holiday is bringing together people in that age group with a view to facilitating their enjoyment of facilities or services designed with particular regard to people of that age group

The different elements of this definition are explained in more detail below.

Written notice

12.8

The exception will only apply if the service provider provides the service user with a written statement before the start of the holiday to explain that the holiday service is only available to people of a particular age group.

Exclusivity

12.9

The service provider must provide the holiday only to service users of a particular age group.

Example: A tour operator has promoted a weekend of guided country walks exclusively for people over 55. The operator extends the holiday to the 21 year old daughter of one of the travellers in the tour group. Two weeks later, another tour member asks if his 30 year old son can join the trip but the operator refuses. If the man and his son complain, the tour operator would not be able to rely on the exception for holiday services because it has not provided the holiday exclusively for one age group.

Bringing together people within the same age group

12.10

An essential element of the holiday must be that people in the same age group are brought together:

- with the intention of helping them to enjoy facilities or services, and
- in circumstances where those facilities or services have been designed in light of the needs or requirements of that age group

Example: An operator opens up a package holiday resort exclusively for people over 60. However, the services and facilities on offer within the resort have not been tailored to this age group. In fact, they are identical to services and facilities in the company's other resorts which were designed for younger adults and their children. The operator cannot show that the facilities and services on offer have been designed in light of the needs or requirements of the target age group and so could not rely on the exception for holiday services.

Composition of the holiday

12.11

The holiday must include at least two of the following:

- travel (even if there is an option for the service user to make alternative travel arrangements)
- accommodation, or
- access to activities or facilities not ancillary to travel or accommodation which form a significant part of the service or its cost.

Example: A hotel provides accommodation restricted to people under 35 along with optional horse riding lessons. No other services or facilities are provided. The lessons are not ancillary to the travel or accommodation. However, the hotel could not rely on the exception for holiday services because the lessons are not a significant part of the service or its cost.

Single price

12.12

To fall within the exception, the service user must pay a single price for the holiday as a package.

Example: A holiday company only provides cheap hotel accommodation and does not provide any other services. It follows that none of its holidays fall within the exception for holiday services. Once at the hotel, a customer can choose to pay extra for tours of local villages and transfers back to the airport. The exception still does not apply because at the time of booking, the customer only paid for accommodation.

Holidays falling outside of this exception

12.13

If a holiday falls outside this exception, the provider may still be able to justify any less favourable treatment because of age. Because the ban on age discrimination in the provision of services does not extend to under 18s, excluding children from holidays is lawful.

Age specific exception: age restricted services

12.14

The Act provides an exception to the ban on age discrimination for services provided to members of the public which are age-restricted by legislation, for example selling alcohol, cigarettes and fireworks where certain conditions are met.

Sch. 3
Part 7
para. 30C

12.15

It can be difficult accurately to assess the age of customers. For this reason, all providers of age restricted services should ensure that they adhere to the Act by asking for age verification when it appears to them that a customer may be under the legal age limit.

Nature of age verification

12.16

It will not be age discrimination where a service user is denied an age-restricted service in the following circumstances:

- it appears to the service provider, its employees or agents that the service user is under-age for the service.
- the service user is not able to provide satisfactory identification proving otherwise and
- there has been an age warning.

12.17

An 'age warning' means that the service provider has done the following:

- displayed a statement at the premises where the age-restricted service is provided and
- the statement explains that, in the absence of satisfactory identification, the age-restricted service will not be provided to individuals who appear to the service provider, its employees or agents to be under the age of 18 or any higher age that is specified in the service provider's age verification policy.

12.18

The display must be readily and easily visible to service users in a public area.

Sch. 3
Part 7
para. 30C
(1) (b)

Example: An off-licence adopts an age verification policy which requires individuals who appear to be under 25 to produce satisfactory identification before selling them alcohol. It displays a sign warning that customers who appear to be under 25 will be asked to show appropriate identification proving that they are old enough to buy alcohol. This would qualify as an ‘age warning’ under the exception for age restricted services. On the other hand, if the sign were to be almost completely obscured by a row of wine bottles, the off licence would not be able to rely on the exception as the age warning is not readily and easily visible in a public area.

Identification and licensed premises

12.19

If the age-barred service relates to licensed premises within the meaning of s.19A of the Licensing Act 2003, then a satisfactory identification means a document which includes the service user’s:

- photograph,
- date of birth, and
- a holographic mark

A passport or driving licence would fall into this category.

Identification in other cases

12.20

In all other cases, a satisfactory identification means a document which includes a photograph of the service user and proves that they are not under-age. A Citizen Card would fall into this category.

12.21

An identification document will only be satisfactory if a reasonable person would consider it to be satisfactory in the circumstances.

12.22

The exception applies to the actual provision or refusal of a service but does not extend to other related matters such as the manner in which the service is provided.

19A of the
Licensing Act
2003

The Licensing
Act 2003
(Mandatory
Licensing
Conditions)
Order 2010
schedule

Sch. 3
Part 7
para. 30C (4)
(b) (ii)

Example: The owner of a newsagent shop makes aggressive demands for age verification to all customers who appear to be under age when they try to buy alcohol. This relates to the manner of providing the service and so goes beyond what is permitted by this exception. It could also amount to harassment.

Activities falling outside this exception

12.23

Where a service provider asks for age verification in circumstances that fall outside this exception, it may still be possible for them to justify any less favourable treatment because of age.

Age specific exception: residential mobile homes

12.24

The Act provides an exception to the ban on age discrimination in relation to residential mobile homes.

When does the exception apply?

12.25

The exception applies in relation to the owners of 'protected sites' within the meaning of the Mobile Homes Act 1983. It covers situations where mobile homes are brought onto a protected site or are rented out by the owner of the protected site. In addition, it applies to the rules of mobile home parks.

12.26

A 'protected site' is any site other than one occupied by a local authority or one for which the planning consent or site licence permits holiday use alone, or prohibits the stationing of mobile homes for residential use all year round.

Sch. 3
part 7
para. 30D

12.27

The Act says that it will not be age discrimination for the owner of a protected site (the owner) to:

- enter into a mobile home agreement with someone that entitles only people who have reached a particular age to station and occupy a mobile home on the site, or
- refuse to allow a person to assign their mobile home agreement with the owner to anyone who has not attained a particular age

Sch. 3
Part 7
para. 30D (1)

12.28

A ‘mobile home agreement’ means an agreement to which the Mobile Homes Act 1983 applies. This includes any agreement permitting a person to station a mobile home on a ‘protected site’ and to occupy the mobile home as their only or main residence.

Sch. 3. Part 7
para. 30D (5)

12.29

It is also an exception to the ban on age discrimination for the owner to:

- enter into a mobile home rental agreement with a person which imposes a requirement that the mobile home in question may be occupied only by people who have attained a particular age, or
- refuse to permit assignment by the person renting the home to anyone who has not reached a particular age

Sch. 3
para. 30D (3)

12.30

A ‘mobile home rental agreement’ means an agreement that entitles a person to occupy a mobile home on the ‘protected site’ as their residence in exchange for the payment of money and the performance of other obligations. The agreement may be for a specified period or for successive periods of a specified duration. An arrangement to occupy a mobile home for a holiday does not qualify as a mobile home rental agreement.

Sch. 3
Part 7
para. 30D (5)

12.31

However, if the owner wishes to rely on either of these two provisions, they must provide the person concerned with a written statement which specifies that the mobile home may be occupied only by people who have reached the relevant age.

Sch. 3
Part 7
para. 30D (4)

12.32

The exception also covers situations where the owner imposes a requirement in park rules that mobile homes stationed on the site and occupied under

Sch. 3
Part 7
para. 30D (2)

mobile home agreements may be occupied only by people who have reached a particular age.

12.33

Sch. 3
Part 7
para. 30D (5)

‘Park rules’ refer to rules applying to residents of mobile homes on the protected site which, under the mobile home agreement or the mobile home rental agreement, must be observed.

Example: A couple in their 60s put their mobile home up for sale. Another couple in their 30s want to purchase it. The home is on a mobile home park where the park rules forbid occupiers under 60. In this situation, it would be lawful for the site owner to refuse to allow the younger couple to occupy the mobile home on that site. If the couple do purchase it, they will need to move it to another mobile home park which does not operate the same age restriction.

Example: A couple in their 70s want to place their mobile home on a site. The owner enters into an agreement with the couple which states that they can place their mobile home upon his site on condition that they and any future occupants of the mobile home are over 65. He gives them in advance a written statement to this effect. This would be lawful as it falls within the residential mobile homes exception.

12.34

The exception only covers the use of minimum ages in mobile home agreements and park rules. It does not permit treatment that would amount to age-related harassment.

Example: The couple in the previous example have two sons, both in their 20s, who use the on-site bar when visiting their parents. The bar staff ignore the sons’ requests to be served and subject them to repeated comments about being too young to be on the site, making them feel uncomfortable and unwelcome. This is likely to amount to age-related harassment and, if so, will be unlawful as harassment falls outside all the age specific exceptions.

Age specific exception: sport and competitive activities

12.35

The Act provides an exception to the ban on age discrimination for service providers doing anything in relation to the participation of a person in competitive activities that are ‘age banded’.

Section 195
(7)

12.36

The exception can be used by any individual or body involved in any aspect of the competitive activity, for example coaching, umpiring, refereeing, organising or training.

12.37

The action taken by the individual or body in relation to the participation of a competitor must be necessary in order to:

- secure a fair competition
- ensure the safety of competitors
- comply with the rules of a national, or international competition, or
- increase participation in that activity

12.38

The requirement that it be necessary for one of these four purposes is central to the operation of this exception.

Definition of an ‘age banded activity’

12.39

An ‘age banded activity’ means competitive activities where the physical or mental strength, agility, 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.

Example: A running club wishes to increase the participation in 10 kilometre events of local men and women over 50. To achieve that aim, it organises age-banded races as follows: under 18s, 19 to 49, 50 plus. The age banding of these races would fall within the exception and would therefore be lawful.

Age specific exception: immigration

12.40

Sch. 3
Part 4
Para. 15A
Code 13.91
Code 13.95 –
13.97

The Act provides an exception from the ban on age discrimination for service providers carrying out certain immigration functions.

12.41

The exception relating to age discrimination mirrors the exception in the Act relating to nationality and ethnic and national origins. It applies to anything done

- by a Minister acting personally, or
- a person acting under a relevant authorisation in the exercise of functions under a ‘relevant enactment’: these include UK and EU immigration legislation (excluding provisions providing powers of arrest, entry, search etc.) listed in the Act and in the Code

12.42

Sch. 3
Part 4
para. 15A (4)

A relevant authorisation is a requirement imposed or an express authorisation with respect to a particular case or class of cases given by a Minister of the Crown acting personally or by a relevant enactment or a statutory instrument made under a relevant enactment.

Example: An entry clearance officer interviews a seventeen year old girl who wishes to be given indefinite leave to enter the UK to live with her parents. He rigorously questions her about her age. This questioning will come within the exception and will not be unlawful discrimination because under the immigration rules for dependent children she cannot join her parents in the UK unless she is under 18.

Chapter 13

Enforcement

13.1

Chapter 14 of the Code explains how the Act is enforced. Anyone who believes that they have experienced age discrimination, harassment related to age, victimisation or other unlawful act in services, public functions or associations can pursue a claim through the civil courts using the mechanisms outlined in the Code.

s.114

Civil courts

13.2

Civil proceedings take place in the county court in England and Wales and the sheriff court in Scotland (the civil court) and the rules of civil procedure relating to the civil court should be followed before and during proceedings.

s.114

Code 14.2

Time limits

13.3

Court action must be started within six months (minus a day) of the alleged unlawful act. The civil courts have discretion to hear a claim outside these time limits if they consider it just and equitable to do so.

s.118

Code

14.16 – 18

13.4

The Code discusses when the time period begins, which in most cases is the date on which the unlawful act occurred – for example, the day when a service provider refused to provide a service to a person of a particular age group.

Code 14.19

13.5

The Code explains how the time period is defined when the unlawful act involves a failure to act, when there is a continuing state of affairs or where the unlawful act is carried out under a continuing policy.

14.20 – 14.23

Burden of proof

13.6

s.136
Code 14.32 – 36

As the Code explains, the initial burden of proof falls on the claimant or pursuer to prove facts from which the court could draw an inference that age discrimination, victimisation or harassment has occurred. If the claimant or pursuer can do this, the burden of proof then shifts to the defendant or defender.

13.7

s.115, s.117
Code 14.38 – 49

The use of judicial review procedures in the courts, the special rules relating to immigration cases and to national security matters are explained in the Code.

13.8

s.119
Code 14.50 – 58

Remedies which the civil court can award are explained in the Code.

13.9

Sections 20 – 32
Code 14.60 – 64

The Commission has enforcement powers in relation to unlawful acts under the Act which are discussed in the Code.

This publication is a draft for consultation. Visit **<https://agecodeconsultationehrc.dialoguebydesign.net>** by 2 May 2014 to provide your feedback. The Commission appreciates your feedback.

If you would like specific advice, information or guidance on any of the equality, discrimination or human rights issues covered in this publication, please contact the Equality Advisory and Support Service, a free and independent service.

Website www.equalityadvisoryservice.com

Telephone 0800 800 0082

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