

**Response to the UK Government's Consultation on banning age discrimination in services, public functions and associations:  
Proposed exceptions**

**May 2011**

**Introduction**

1. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. Further the Equality Commission has also been designated to act as an 'independent mechanism' jointly with the Northern Ireland Human Rights Commission, to promote awareness of, and monitor the implementation of the United Nations Convention on the Rights of Persons with Disabilities with regard to Government's obligations in relation to Northern Ireland.
3. The Equality Commission welcomes the opportunity to respond to the UK Government's consultation on proposed exceptions to the ban of age discrimination in services, public functions and associations. The Commission has previously responded in

detail to the Government's consultation in 2009 on ending age discrimination in services and public functions<sup>1</sup>.

4. Although the Government has raised a number of questions in its consultation document, the Equality Commission has concentrated on those questions relevant to its own remit and experience.

## **Comments**

### **Question 2 (health and social care exception)**

5. The Government has sought views on whether implementing the ban on age discrimination in relation to health and social care without specific exceptions will have a negative or positive impact on people of a particular age.
6. In general, the introduction of the ban on age discrimination in health and social care will have a positive impact on people, particularly older people, who will be able to challenge unfair less favourable treatment, whilst allowing health and social care organisations to justify age-based treatment, if challenged.
7. The Commission supports the proposal that there is not a specific health and social care exception to the ban on age discrimination and that, in turn, any age-based practices by the NHS and social care must be objectively justified.
8. We recognise, as highlighted in the consultation document, that in certain circumstances in health and social care, age criteria are used for beneficial or justifiable reasons. It is also clear from the findings of the independent review of age discrimination and age equality in health and social care<sup>2</sup>, that there is evidence that age criteria have not been correctly used.
9. We agree that the inclusion of an exception has the potential for permitting harmful age-based practices to continue, as well as

---

<sup>1</sup> ECNI response to GEO consultation on ending age discrimination in services and public functions, 2009, <http://www.equalityni.org/archive/word/ECNIResptoGEOconsultationonagediscrimination280909.doc>

<sup>2</sup> Age Equality in Health and Social Care, 2009, commissioned by the Department of Health

beneficial practices. We have concerns that it would be difficult to capture the wide range of beneficial age-based practices which should be permissible, in a specific health and social care exception.

10. We welcome the proposed approach of the Government in terms of the provision of clear guidance for NHS organisations in order to ensure that they do not adopt an 'age blind approach' and also to ensure clarity on what practices are lawful or not.
11. Further guidance on justifiable or beneficial uses of age in health and social care services can also be provided in the proposed Code of Practice of the Equality and Human Rights Commission (EHRC), as well as in the proposed practical guidance to be issued by the Government Equalities Office.

#### **Question 4 (financial services exception)**

12. The Government has sought views on whether exception 2 (financial services) in the proposed draft of the Equality Act 2010 (Age Exceptions) Order adequately achieves the policy intent described in the consultation document.
13. In general, the Commission supports the proposal that the legislation contains a tailored specific exemption for financial service providers which will permit differences in treatment on the grounds of age, provided it is proportionate to risks and costs.
14. In its policy statement *Equality Bill: Making it work- Ending age discrimination in services and public functions*, the previous Government indicated that it would 'introduce a tailored specific exception allowing age to be used where this is fair and reasonable'. For example, in the pricing of financial services, a price must be a proportionate response to risks or costs associated with age.'
15. The draft paragraph 20(a) makes it clear that age discrimination is permissible in relation to the provision of a financial service provided any assessment of risk is carried out by reference to

information which is relevant to the assessment and from a source from which it is reasonable to rely.

16. The approach appears to differ from that taken in relation to the financial services exceptions contained within Sections 21 and 22 of Schedule 3, Part 5 of the Equality Act 2010, relating to disability and sex respectively.
17. In particular, the exception in Section 22(1) relating to sex states that it is not unlawful to do anything in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk, if '(a) that thing is done by reference to actuarial or other data from a source on which is reasonable to rely, **and** (b) it is reasonable to do that thing.' The added requirement that it must be '**reasonable to do that thing**', is not reflected in the draft exception on age in paragraph 20(a).
18. The exception in Section 21(1) of Schedule 3, Part 5 of the Equality Act 2010 which relates to disability, makes it clear that it is not unlawful to do anything in connection with insurance business if that thing is done by reference to information that is relevant to the assessment of the risk to be insured and from a source on which it is reasonable to rely **and** it must be 'reasonable to do that thing'.
19. In addition, following the transposition of the Gender Directive<sup>3</sup>, Section 22(3) of Schedule 3, Part 5 of the Equality Act 2010, makes it clear that as regards contracts entered into on or after 6 April 2008, the exception in Section 22(1) only applies if the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data; the data is compiled, published and regularly updated in accordance with Treasury guidance; **and** that differences in premiums and benefits are **proportionate** having regard to the data.
20. In summary, **proportionate** differences in individuals' premiums and benefits where the use of sex is a determining factor in the

---

<sup>3</sup> Directive 2004/113/EC

assessment of risk are currently allowed provided they are based on relevant and accurate, actuarial and statistical data.<sup>4</sup>

21. In addition, the draft Equal Treatment Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market<sup>5</sup> permits **proportionate** differences in treatment where, for the product in question, the use of **age** is a key factor in the assessment of risk based on relevant and accurate, actuarial or statistical data.
22. We recommend that the Government clarifies why its proposed approach to the age insurance exception differs from that adopted in relation to the exceptions relating to gender and disability in the Equality Act 2010, or why it proposes to deviate from the standards set out in the draft Equal Treatment Directive.

### **Question 5 (Transparency-financial services)**

23. The previous Government's *Policy Statement: Equality Bill: Making it work- Ending age discrimination in services and public functions* also made it clear that there will 'be a requirement for insurers to make data on some products available at industry level to support the differences in premiums'. It indicated that the scheme will be similar to that currently used for gender; this scheme requires data relating to gender to be published (whether in full or summary form) and regularly updated in accordance with guidance issued by HM Treasury.
24. The exception in Section 22 (3) of Schedule 3 Part 5 of the Equality Act 2010 relating to sex discrimination and financial services, makes it clear that there is a **requirement** that data is compiled, published and regularly updated in accordance with guidance issued by the Treasury.

---

<sup>4</sup> The recent Judgement of the ECJ (case C-236/09) of the 1 March 2011 has declared that this exception is invalid with effect from 21 December 2012 as an exemption from the use of unisex premiums and benefits works against the achievement of the objective of equal treatment between men and women.

<sup>5</sup> 2008/0140 (CNS), permits **proportionate** differences in treatment where, for the products in question, the use of age is a key factor in the assessment of risk based on relevant and accurate, actuarial or statistical data.

25. We note, contrary to the stated policy intention of the previous Government, that the Government has indicated that it is of the view that it is not necessary for this to be a legislative requirement and that it can be dealt with through an industry level agreement.
26. The Equality Commission is of the view that, rather than through an industry level agreement, there should be a **clear requirement** for data to be compiled, published and regularly updated in accordance with guidance issued by the Treasury; in line with the approach adopted in relation to the exception on sex discrimination and financial services, and in line with the previous Government's commitment to introduce such a requirement.
27. Finally, whilst welcoming the steps to achieving greater transparency within the financial services sector through the publication of aggregate data for the insurance industry, it is essential that further steps are taken within the industry in order to promote awareness of the proposed legislation and good practice; for example, through specific guidance for the sector on the legislation, or through targeted training for financial service providers and others.

**25 May 2011**