

# Implementing a ban on age discrimination in the NHS – making effective, appropriate decisions

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<b>Contact Details</b>	Catherine Davies E&I, HI&P - SCLGCP Quarry House, Quarry Hill Leeds LS2 7UE 0113 2546602	
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# Implementing a ban on age discrimination in the NHS – making effective, appropriate decisions – contributing organisations

This briefing has been developed by NHS Employers with the support of the Department of Health, the NHS Commissioning Board Authority, the Equality and Human Rights Commission, the Local Government Association, Age UK, the Care Quality Commission, the National Institute for Health and Clinical Excellence, both the Welsh and Scottish Governments and the NHS Confederation.

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# Executive summary

From 1 October 2012, the Government will fully implement the ban on age discrimination enshrined in the Equality Act 2010, giving protection against age discrimination in services, clubs and associations and in the exercise of public functions. This is one of the last parts of the Act to come into force in England, Wales and Scotland.

This briefing gives a short overview of the ban on age discrimination. It is specifically aimed at those who plan, commission or provide NHS services, whether in the NHS, voluntary or private sectors.

From 1 October 2012, it will be unlawful for service providers and commissioners to discriminate, victimise, or harass a person because of age. A person will be protected when requesting, and during the course of being provided with, goods facilities and services. If a member of the public aged 18 or over believes that they have been treated less favourably because of age, they will be able to take organisations or individuals to Court – and may be awarded compensation. A case could be taken against health organisations (such as hospitals or commissioning bodies), individual clinicians (e.g. consultants, GPs or allied health professionals) or others working in the health sector (such as managers).

Age can play a part when professionals make decisions about the care and treatment that patients receive and in some cases this will be wholly appropriate. What is not acceptable practice, and could also be viewed as unlawful by the Courts, is where a professional acts or makes a decision based on a stereotypical view of age and how that individual lives their life. Age must not be used as a proxy for the proper assessment of individual need.

Age discrimination is unfairly treating people differently because of their age. The ban is only intended to prevent harmful uses of age. Positive use of age in providing, commissioning and planning services will be able to continue. The Act does not prevent differential treatment where this is objectively justified. Policy makers, commissioners, providers and individuals working in health and social care should continue to take into account someone's chronological age when it is right and beneficial to do so.

# Introduction and background

***“...chronological age must not be used as a substitute for an individual assessment of a person’s needs.”<sup>1</sup>***

1.1. This briefing gives a short overview of the ban on age discrimination in connection with the provision of services and the exercise of public functions. The ban comes into force on 1 October 2012. This briefing is specifically aimed at those who plan, commission or provide NHS services, whether in the NHS, voluntary or private sectors.

## Introduction

1.2. From 1 October 2012, the Government will fully implement the ban on age discrimination enshrined in the Equality Act 2010 (the Act), giving protection against age discrimination in services (provided by the public, private and third sectors), clubs and associations and in the exercise of public functions. This is one of the last parts of the Act to come into force in England, Wales and Scotland. The provisions prohibiting age discrimination in the field of employment have been in force since October 2006 and are not dealt with in this guidance.

### The Equality Act 2010

The Equality Act 2010 brings together the various strands of anti-discrimination law into one single Act. It has helped remove existing inconsistencies in the law and has strengthened it in important respects. The Act was passed in April 2010, though it has come into force in stages.

The Act protects people based on nine protected characteristics – age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation and marriage or civil partnership<sup>2</sup>.

From 1 October 2012, the Government will fully implement the ban on age discrimination in services enshrined in the Equality Act 2010. This will be one of the last parts of the Act to come into force and will prohibit service providers (or those exercising a public function) from discriminating against the public, or sections of the public, on the basis of age<sup>3</sup>. The provisions relating to age will apply in England, Scotland and Wales to people aged 18 and over. A ban on age discrimination in clubs and associations – which applies to people of all ages – will also be implemented on 1<sup>st</sup> October 2010

<sup>1</sup> Equality Act 2010: Banning age discrimination in services, public functions and associations  
Government response to the consultation on exceptions (GEO, 2012)

<sup>2</sup> For marriage and civil partnership, only the duty to eliminate discrimination, harassment and victimisation applies

<sup>3</sup> The provisions prohibiting age discrimination in the field of employment are already in force.

***For general information on the Equality Act 2010 and the Public Sector Equality Duty, please see the list of online resources at the end of this document.***

## 2. What you need to know

2.1. From 1 October 2012, it will be unlawful for service providers and commissioners to discriminate, victimise, or harass a person because of age. A person will be protected when requesting, and during the course of being provided with, goods facilities and services. If a member of the public aged 18 or over believes that they have been treated less favourably because of age, they will be able to take organisations or individuals to Court – and may be awarded compensation. A case could be taken against health organisations (such as hospitals or commissioning bodies), individual clinicians (e.g. consultants, GPs or allied health professionals) or others working in the health sector (such as managers).

### What is age discrimination?

2.2. Age discrimination is unfairly treating people differently because of their age. The law is focused on banning discriminatory behaviour which is *harmful*.

#### Definitions of harassment, victimisation and discrimination

##### *Discrimination*

**Direct discrimination** is where someone is treated less favourably in comparison with another e.g. where an older person is refused access to a particular service simply because of their chronological age.

**Indirect discrimination** is where an apparently neutral rule or practice applies to everyone, but puts a particular group at a disadvantage. For example if services are provided in a way that puts some people at a disadvantage, and makes it more difficult for them to access those services. This is particularly relevant to commissioners and planners and the decisions they make in relation to commissioning services for their local populations. Indirect discrimination will be unlawful unless it can be objectively justified.

##### *Harassment*

Harassment is unwanted conduct, which violates the service user's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the service user. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings, or other physical behaviour. There is no justification for this type of treatment.

*Victimisation*

Victimisation of someone who has made a complaint of discrimination or harassment or supported someone else's complaint will be unlawful. As with harassment, there is no justification for this type of treatment.

## Why is it important?

2.3. Identifying and tackling age discrimination is not just about legal compliance and 'ticking boxes'. It is fundamentally about providing fair and dignified healthcare for all people regardless of their age.

2.4. Age can play a part when professionals make decisions about the care and treatment that patients receive and in some cases this will be wholly appropriate. What is not acceptable practice, and could also be viewed as unlawful by the Courts, is where a professional acts or makes a decision based on a stereotypical view of age and how that individual lives their life. Age must not be used as a proxy for the proper assessment of individual need.

2.5. A review into age equality in health and social care was published in 2009<sup>4</sup>. In summary, it found that:

- age discrimination remains an issue for the health and social care system;
- patients, their families and carers are likely to suffer a detriment and lose confidence in the system when they experience age discrimination;
- professional standards and training need to challenge narrow assumptions around age/ageing and how they lead to discrimination within healthcare.

2.6. The effect of unfair treatment and discrimination is second-rate, poor quality patient care leading ultimately to variation and harm to the patient. Strong clinical and managerial leadership that conveys a zero-tolerance approach towards age discrimination and promotes positive ageing is essential and cannot be demonstrated by 'box ticking' alone. It requires clear commitment, engagement, education and role-modelling.

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<sup>4</sup> 'Achieving Age Equality in Health and Social Care', a report to the Secretary of State for Health (Sir Ian Carruthers OBE and Jan Ormondroyd, 2009)

## When can I use age as a basis for making decisions?

2.7. Age discrimination is **unfairly** treating people differently because of their age. The ban is only intended to prevent harmful uses of age. Positive use of age in providing, commissioning and planning services may be able to continue because the Act does not prevent differential treatment where this is objectively justified. Policy makers, commissioners, providers and individuals working in health and social care should continue to take into account someone's chronological age when it is right and beneficial to do so, for example by:

- ensuring that services and benefits are targeted at those who most need them;
- age appropriate provision for the benefit of the individual, for example responding to a legitimate desire to mix with their own age group.

## General Exceptions, positive action and the “objective justification” test

### General exception to age discrimination in services

2.8. The Equality Act 2010 provides a general statutory exception to the provisions on age discrimination where other legislation allows people of different ages to be treated differently, for example aged based charging for prescriptions and eligibility for NHS eye sight tests. However, it is important to note that if an NHS body has an age-based charging or entitlement regime that is not set out in legislation, it will need to be objectively justified (see below).

### Positive action

2.9. Commissioners and planners of services already practise positive action when taking proportionate steps to compensate for disadvantage or under-representation among particular age groups. This is still permitted.

2.10. Positive action covers action being taken which:

- prevents or compensates for disadvantages experienced by a particular age group;
- meets the particular needs of certain age groups;
- encourages people from particular age groups to take advantage of opportunities when their under representation has been identified.

- 2.11. Positive action must be “objectively justified”. You must therefore be able to show that the action is a **proportionate means** of achieving one of these stated aims (see below for an explanation of ‘proportionate’). If challenged, the reasoning and evidence behind the approach would need to be justified.
- 2.12. In developing and evaluating positive action steps it may be helpful to think about any local groups may have an interest and could be consulted.

### **Objective justification of discriminatory treatment: the “objective justification” test**

- 2.13. If a service provider or commissioner has policies or practices which neither come within an exception nor qualify as positive action, they will still be lawful if they can be “objectively justified”.
- 2.14. Objective justification is a legal test: the age-based approach must be a ‘proportionate means of achieving a legitimate aim’. It is best to approach the test in two stages, looking first at whether there is a legitimate aim and second at whether the approach is proportionate.
- 2.15. Chronological age should not be used as a substitute for an individual assessment of need nor should assumptions be made based on a person’s chronological age or age stereotypes. However, where chronological age is a *genuinely* relevant factor in decision making, it should be capable of being objectively justified.
- 2.16. You should not be fearful of making different provision where it can be shown to be justified. However, when considering differential arrangements or reviewing existing arrangements, it is important to think about the reasons and evidence justifying those arrangements. Do not wait until you have a complaint.

#### *What is a legitimate aim?*

- 2.17. A legitimate aim is one that is non-discriminatory in itself, and represents a real, objective need. Legitimate aims can often be outcomes that are socially positive or generally in the public interest.
- 2.18. Here are some examples of legitimate aims that may apply to the NHS:

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- Ensuring services are targeted at those who evidence demonstrates are most in need (e.g. targeting public health programmes at particular age groups based on clinical evidence);
- Ensuring the wellbeing and dignity of service users by providing appropriate facilities;
- Providing separate services that are appropriate to different age groups.

2.19. Although managing limited resources and economic efficiency may sometimes be capable of being considered a legitimate aim, financial considerations alone cannot expect to satisfy the test.

2.20. The use of age to meet a legitimate aim must also be “proportionate”.

### *What is proportionate?*

2.21. The approach of the law is that the end does not automatically justify the means – hence the need for proportionality when working towards a legitimate aim. For their approach to be proportionate, a commissioner or service provider must show, if challenged, that there is not a less discriminatory way of achieving their desired outcome, or “legitimate aim”. They may also need to show that their policy or practice is appropriate, necessary to achieve the legitimate aim and that it brings benefits that outweigh any downsides. The more serious the disadvantage caused by the discriminatory provision, the more convincing the objective justification must be.

2.22. This is essentially a balancing exercise. The reasons for adopting the approach need to be set against discriminatory effect of the provision. Being ‘necessary’ does not mean it has to be the only possible way of achieving the aim.

2.23. If challenged in the courts, the commissioner or service provider will need to produce evidence that the provision can be objectively justified. Good administrative practice already requires decision making to:

- be evidence based;
- take account of all relevant factors and disregard irrelevant considerations;
- consult appropriately with relevant interest groups;

- comply with the Public Sector Equality Duty (which includes carrying out of a robust analysis of the impact on equality as an integral part of the decision making process) and if an option will have an adverse impact, consider if this can be removed or mitigated. If it cannot be removed or mitigated, consider whether the preferred option is capable of objective justification.

2.24. Good administrative practice must be borne in mind when services are in the planning stage.

*Example of objective justification in the field of health*

2.25. Some health and social services are designed and delivered to meet particular needs or conditions which are likely to be more prevalent in particular age groups. Population based evidence demonstrates that interventions affecting specific age groups are more beneficial and effective than for other age groups. Commissioners and providers of health and care services should not be discouraged from taking account of age where this is justified.

2.26. For example, the Department of Health invites women aged 25-49 for a cervical screening test every three years, whereas women aged 50-64 are invited every five years. This is because statistics show that the younger group are more susceptible to the disease than the older group. In this example, the health service is likely to be able to objectively justify offering more regular screening to the younger age group, as this can be seen as a proportionate response to statistical evidence that this group is at the greatest risk of developing cervical cancer<sup>5</sup>.

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<sup>5</sup> Para 23-24, Equality Act 2012: Banning Age Discrimination In Services – An overview for service providers and customers (GEO, 2012).

## 3. What if I want to commission or provide services based on age?

### Can you objectively justify your approach?

- Some questions to help you decide this include the following:
  - What is the aim that you are trying to achieve? Is it a legitimate one, representing a genuine need? Is it non-discriminatory?
  - Why use age as a criterion? If the answer is simply 'because we can't afford to offer the same treatment to all age groups' then it will not be acceptable to use age as a criterion.
  - What age criterion do you propose to use, and how do you propose to use it? What is the evidence base to support the approach?
  - How is the unequal treatment based on age a useful, suitable or effective means of achieving the legitimate aim or objective? Are there alternative means of achieving the aim which would have less impact on those suffering the less favourable treatment?
  - Even if there were no alternative means of achieving the aim, does the treatment have an excessive or disproportionate effect on those suffering the unequal treatment? Can you meet the objective justification test?
  - Can the policy or practice be justified as positive action? Does it prevent or compensate for a disadvantage, meet a particular need or encourage under represented groups to take up opportunities? Can it be justified as positive action to meet these identified needs?

### How to prepare for the ban

#### **All NHS bodies and organisations carrying out NHS functions:**

- 3.1. Senior leadership is key to ensuring that age is given equal consideration alongside the other protected characteristics covered by the Equality Act 2010. Such leadership

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should ensure raised staff awareness and encourage appropriate behaviours – leading to an inclusive culture. Senior management teams could ask themselves the following<sup>6</sup>:

- i. Do you have a senior lead for age equality?
- ii. Has your organisation conducted a recent audit of its policies and the way services are provided in relation to age?
- iii. Have you reviewed your policies and service provision where age is used as a criterion and satisfied yourselves that age is used in an appropriate way that can be objectively justified?
- iv. What arrangements are in place for regular review of policies and practices to ensure that they do not unjustifiably disadvantage a particular age group?
- v. Are adequate arrangements in place to ensure that staff have up to date knowledge of the requirements of equality legislation in particular the introduction of the provisions making it unlawful to discriminate, harass or victimise a person on grounds of age? How is this measured?
- vi. What measures are in place to ensure that staff understand their legal obligations and what this means to them in the context of their work?
- vii. How do you use existing sources of information to identify risks that require investigation to ensure compliance with anti-discrimination legislation (in particular the ban on age discrimination) and ensure that any bad practice is swiftly identified and remedied?
- viii. How does your organisation involve all age groups, especially older and younger people and their organisations in issues about age discrimination and promoting age equality?
- ix. From the perspective of your role, are there any specific issues or service areas that your organisation needs to be particularly aware of in relation to age?
- x. How does your organisation promote images of age that are positive and diverse?
- xi. Do you have evidence that age awareness and wider equalities issues are embedded in the competencies training of all staff to ensure that services are responsive to the needs of everyone who uses them?

3.2. These questions can be applied to other protected characteristics, so you may wish to use them in developing your organisation's equality objectives, strategies and action plans.

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<sup>6</sup> Whilst these questions apply to existing organisations, they are equally relevant to the emerging NHS commissioning bodies (i.e. CCGs and the NHS Commissioning Board), who will wish to put plans in place in readiness for April 2013.

3.3. In addition to the above questions:

### **Commissioners and planners**

3.4. If you are commissioning or planning services using age as a factor in decision-making, can you objectively justify your approach?

#### **Quality adjusted life years (QALYs) – should these still be used?**

In the light of responses to the 2009 consultation, the Department of Health reviewed its use of QALYs as an evaluation tool. It came to the conclusion that the alternative methodologies currently available were not practical or would result in even greater differences in treatment by age. In the light of this, DH continues to use QALYs in its analytical work. They will keep the methods in which QALYs are applied under review to ensure that we are aware when the methodology treats an age group less favourably and consider whether there are alternative methods that could be adopted.

For more information:

<http://www.nice.org.uk/newsroom/features/measuringeffectivenessandcosteffectivenessstheqaly.jsp>

### **Providers**

3.5. The NHS Southwest toolkit provides information and advice on what age equal services would look like and an audit tool for achieving age equality in your existing services (see online resources).

### **Health professionals making individual decisions on treatment**

3.6. Chronological age should not be used as a substitute for the thorough assessment of an individual's needs and circumstances. However this does not prevent health care professionals taking a person's age into account where appropriate to do so when discussing potential interventions - for example, where age may be a risk factor. Maintaining an appropriate record showing why a particular intervention or care package was chosen (and, if the person's age was a factor, why it was necessary) will provide assurance in case of legal challenge.

### **The Human Rights Act 1998**

3.7. In developing policies for delivering NHS services it is worth remembering that NHS organisations and contractors delivering services on their behalf of the NHS are subject to the Human Rights Act 1998.

3.8. Article 14 prohibits discrimination in very broad terms and requires that the substantive rights such as the right to life, the right not to be detained except in accordance with the law and the right to a private and family life are secured without discrimination. Although any claim of discrimination in breach of the Human Rights Act must be brought as part of a claim that one of the substantive rights (such as the right to life) has been infringed, the court considering a claim may uphold a claim of discrimination even if the court decides there has been no breach of the substantive right.

### The Public Sector Equality Duty (PSED)

3.9. The Equality Act 2010 contains a requirement to proactively consider equality in the planning and commissioning of healthcare services, to ensure that patients have equitable access to healthcare services and to ensure equal treatment when receiving healthcare services. This is known as the Public Sector Equality Duty which came into force in April 2011 and requires public bodies to have “due regard” to three matters when exercising their functions. Specifically, public bodies are under a duty to:

- Eliminate discrimination, harassment and victimisation;
- Advance equality of opportunity between people sharing a protected characteristic and those who do not;
- Foster (encourage and develop) good relations between people sharing a characteristic and those who do not, including promoting understanding and tackling prejudice.

3.10. The Public Sector Equality Duty requires consideration of all the protected characteristics. The duty therefore already includes consideration of “age”. In carrying out the Public Sector Equality Duty and analysing the impact of decision-making on equality, NHS organisations will already have thought about “age” when developing new policies and services and reviewing existing provisions. However, with effect from 1<sup>st</sup> October 2012 the specific anti-discrimination law covering discrimination, harassment and victimisation on the grounds of age in the provision of services come into force.

## 4. Online Resources

### Age equality and discrimination

*Age discrimination ban in services and public functions: An overview for service providers and customers*

<http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/age-discrimination-ban?view=Binary>

*Equality Act 2010: Banning age discrimination in services, public functions and associations. Government response to the consultation on exceptions*

<http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/age-discrimination/>

*Audit tool for achieving age equality in health and social care. Resource pack from NHS South West including an audit tool and sector-specific practice guides for the NHS and social care*

<http://age-equality.southwest.nhs.uk/>

*'What do you expect at your age...' Discussion document for the East of England care and health system on Age Equality*

[https://www.eoe.nhs.uk/downloadFile.php?doc\\_url=1273762188\\_BpFn\\_age\\_equality\\_discussion\\_document.pdf](https://www.eoe.nhs.uk/downloadFile.php?doc_url=1273762188_BpFn_age_equality_discussion_document.pdf)

*Achieving age equality in health and social care: Sir Ian Carruthers OBE, Chief Executive NHS South and Jan Ormondroyd, Chief Executive West Bristol City*

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_107278](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_107278)

*Guidance and tools from NHS Employers on how to promote age equality in the workplace*

<http://www.nhsemployers.org/PayAndContracts/NHSPensionSchemeReview/Age/Pages/Age.aspx>

### Equality Act 2010 and the Public Sector Equality Duty

*Equality Act 2010: What do I need to know? A series of guides from the Government Equalities Office*

<http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/>

*Guidance on the public sector Equality Duty for public authorities in England (and bodies with non-devolved functions in Scotland and Wales)*

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

*Guidance from Age UK on delivering the Equality Duty*

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<http://www.ageuk.org.uk/Documents/EN-GB/For-professionals/Research/Delivering%20The%20Equality%20Duty.pdf?dtrk=true>

## Health and Social Care Act 2012 – Health Inequalities Duty

*Department of Health fact sheet explaining the new Health Inequalities Duty, which is part of the Health and Social Care Act 2012*

<http://www.dh.gov.uk/health/files/2012/06/C2.-Factsheet-Tackling-inequalities-in-healthcare-270412.pdf>

## Human Rights Act 1998 – Health specific guidance

*Practical guidance on human rights within the health sector*

<http://www.equalityhumanrights.com/human-rights/human-rights-practical-guidance/guidance-by-public-sector-area/>

## Equality Delivery System (EDS)

*The EDS is designed to support NHS commissioners and providers to deliver better outcomes for patients and communities and better working environments for staff, which are personal, fair and diverse.*

<http://www.eastmidlands.nhs.uk/about-us/inclusion/eds/>