Two steps forward and one step back? Age discrimination and the Equality Act

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Equality and Human Rights Commission

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- Remit set out in Equality Act 2006
  - S8(1) – promote equality/tackle discrimination
  - S9(1) – duty to promote human rights (*ECHR and other human rights instruments*)
  - S16 – power to conduct formal inquiries
  - S30 – power to bring own-name cases
- Recognised by UN as Category ‘A’ national human rights institution
**Equality Act 2010**
- Consolidates existing anti-discrimination law
- Standardises core concepts (eg indirect discrimination, harassment, victimisation)
- Designed to simplify the law (?)
- Extends protection - eg age discrimination in services, third party harassment at work
- Most of the Act commenced on 1st October
- Statutory Codes of practice; guidance; training

**Protection from age discrimination**
- Employment Equality (Age) Regulations 2006: now part of EA 2010
  - Covers employment and vocational training
- Services, public functions & associations - age discrimination ban in 2012
  - But not for under-18s!
- No protection in premises or schools
Objective justification test (1)

- Direct discrimination because of age is not always unlawful (contrast other ‘strands’)
- Some age-based rules or practices can be ‘objectively justified’ - Section 13(2)
- Two stage test:
  – Is there a legitimate aim?
  – Is this a proportionate (‘appropriate and necessary’) means of achieving the aim?

Objective justification test (2)

- Well-established legal test - eg for single sex services and indirect discrimination
- Case law is developing - but courts generally take a common sense approach
- ‘Proportionality’ is also a strong theme in human rights law
- Allows flexible approach that can adjust to developments in expectations and policy
‘Legitimate aim’?
• Reasonable business needs/economic efficiency (NOT just reducing costs)
• Health and safety (provided risks specified)
• Public health objectives
• Fair exercise of powers
• Ensuring well-being and dignity service users
• Preventing fraud or other forms of abuse

‘Proportionate means’?
• Broadly, the least discriminatory approach
• Blanket policies may not satisfy test
• Cost effectiveness can be a taken into account as part of the justification
• For public bodies, compliance with public sector equality duty may be relevant
Positive action measures (Section 158)

- Provision allows measures aimed specifically at a group sharing a protected characteristic:
  - To overcome or minimise disadvantage
  - To meet particular needs
  - To increase low participation
- All three aims are ‘legitimate’- but need evidence of disadvantage, needs or low participation
- Measures adopted must be proportionate

Public sector equality duty (PSED)

- April 2011 - new PSED, including age
- General duty to have due regard to need to eliminate discrimination, advance equality and foster good relations
- Regulations will flesh out specific duties:
  - Focus mainly on transparency/accountability
  - No national targets will be set
- Implementing PSD duties links with OJ test?
Obligations under Human Rights Act

- HRA: legal framework for treating service users with dignity, respect, fairness, equality, autonomy
- Public authorities have duty to protect and promote human rights
- ‘Human rights approaches’ in services can help raise standards of care
- Age discrimination undermines human rights!

Age exceptions in services

- Objective justification test - concerns:
  - insufficient legal certainty for providers?
  - increased litigation/legal challenges?
  - ‘chilling effect’ on specialist services?
- Order-making powers under Section 197 to introduce express age exceptions
- Draft Order to be published for consultation this autumn
Age exceptions for services

- Policy announcement of permitted exceptions (January 2010):
  - Age based treatment in insurance and other financial services (eg segmented market); but publication of some data will be required
  - General exception for ‘beneficial’ concessions (eg bus passes, cheap haircuts/fish ‘n’ chips)
  - Age-based group holidays (but not accommodation alone)

Age exceptions - health and social care

- Government has been considering whether or not to have exceptions, eg:
  - An exception for age criteria in national public health programmes
  - An exception allowing age to be used in individual professional judgment (following comprehensive assessment of need)

- Controversial – and unpopular with many stakeholders
How could exceptions be framed?

- Tailored exceptions could offer more nuanced approach:
  - Sunset clause stating when exception must be reviewed?
  - Exception could have rules to restrict when it may be used?
  - Requirement to publish data/evidence?

Two questions:

- What would health and social care services look like if harmful age discrimination were to be removed?
- Why are exceptions to the ban on age discrimination needed to achieve this goal?