

STATES OF JERSEY



DRAFT DISCRIMINATION (AGE) (JERSEY) REGULATIONS 201-

Lodged au Greffe on 12th April 2016
by the Minister for Social Security

STATES GREFFE



Jersey

DRAFT DISCRIMINATION (AGE) (JERSEY) REGULATIONS 201-

REPORT

SECTION 1 – BACKGROUND

The Discrimination (Jersey) Law 2013 (the “Discrimination Law”) provides that discrimination is prohibited in a number of areas, including: recruitment, paid work, voluntary work, partnerships, professional bodies, education, training, public premises, clubs and associations. The Discrimination Law currently covers discrimination on the grounds of race, sex, sexual orientation, gender re-assignment, pregnancy and maternity. The Minister for Social Security (“the Minister”) is proposing to amend the Discrimination Law by Regulations in order to introduce protection against discrimination on grounds of age.

Introducing protected characteristics into the Discrimination Law by Regulations allows for full consideration of the implications for each characteristic, as it is dealt with. In general, the Discrimination Law provides for a consistent approach to discrimination across all of the characteristics. However, there is also enough flexibility to allow for exceptions or other provisions to apply to specific protected characteristics where this is required. This means that we have the advantage of a single overall Law governing discrimination, as well as individual tailoring to each characteristic. It also allows us to adopt a phased approach to implementation, spreading the administrative burden and identifying any issues that arise as each set of Regulations is introduced.

Having taken into account the need to co-ordinate the work with other States’ policies and strategies, such as changes to the Social Security pensionable age, the Minister proposes to introduce protection against age discrimination from 1st September 2016, and protection against disability discrimination in 2018.

Types of discrimination

The Discrimination Law sets out 4 types of discrimination –

- A person **directly** discriminates against another person if he or she treats that person less favourably than another person because of a particular characteristic. For example, an employer who only interviews job applicants under age 30 because she thinks younger people are more ‘dynamic’ will be directly discriminating against older job applicants.
- A person **indirectly** discriminates against another person where they apply a provision, criterion or practice, which the person cannot show to be a proportionate means of achieving a legitimate aim, that disadvantages (or would, if applied, disadvantage) people with a particular characteristic.

An employer who only considers employees for promotion once they have had 10 years' service, for example, may be indirectly discriminating because younger workers are less likely to have been employed for that long. The issue will be whether there is a genuine need to gain that much experience before being a suitable candidate for promotion.

- **Victimisation** protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result. An employee who claims that their employer is failing to consider younger workers for promotion, for example, will be able to claim victimisation if the employer dismisses him or her as a result.
- **Harassment** involves unwanted conduct which relates to a protected characteristic that violates the dignity of the victim or creates, for example, an intimidating or offensive environment. If, therefore, an employee is subjected to repeated jokes about his age, which persist even when he has made it clear that he finds them offensive, then he will be able to claim harassment.

Enforcement and remedies

The Employment and Discrimination Tribunal (the "Tribunal") will hear complaints about acts of age discrimination. Where both parties agree, all complaints will first be referred for conciliation (by the Jersey Advisory and Conciliation Service (JACS)) or mediation (via the Community Mediation Service). A complainant will need to demonstrate to the Tribunal that, on the balance of probabilities, he or she has been discriminated against on grounds of age. If the Tribunal finds that a complaint has been proved, it may –

1. make an order declaring the rights of the complainant and the respondent;
2. order compensation of up to £10,000 for any financial loss, and up to £5,000 for hurt and distress, subject to an overall limit of £10,000; and
3. recommend that the respondent takes certain action to reduce the adverse effect of the act of age discrimination on the particular complainant.

SECTION 2 – AGE DISCRIMINATION

Evidence of age discrimination

There is currently no legislation to protect people against age discrimination in Jersey, and so with no reason for people to report unacceptable discriminatory acts, it is difficult to assess the prevalence of age discrimination. However, there is some evidence that age discrimination does occur in Jersey.

The States of Jersey Statistics Unit included questions about discrimination in the 2012 Jersey Annual Social Survey (JASS). A quarter (25%) of adults reported having been discriminated against in the previous 12 months. The 2 top grounds for discrimination were reported as age (9%) and race or nationality (9%). Those aged 16–34 and those aged 55–64 were the 2 groups with the highest proportion of reports of being discriminated against on the grounds of age, at 12% and 13% respectively.

JACS provides advice and guidance on the employment implications of the Discrimination Law, including in recruitment and in the workplace. During the year 2015, JACS recorded 23 enquiries from employers, employees and other clients relating to age discrimination. For comparison purposes, JACS also recorded 29 enquiries relating to race discrimination, and 39 enquires relating to sex

discrimination, both of which are already protected characteristics under the Discrimination Law. In the first quarter of 2016 (1st January to 31st March), JACS received 3 enquiries regarding age discrimination, and a further 14 enquiries relating to retirement¹.

Citizen's Advice Jersey provides advice on non-employment-related discrimination, such as in relation to goods, services and housing. During the year 2015, 29 clients have requested and been provided with the advice service. Three clients requested advice in relation to age discrimination. For comparison purposes, during the same period, 16 clients requested advice about race discrimination and 10 clients requested advice about sex discrimination. In the first quarter of 2016 (1st January to 31st March), Citizen's Advice Jersey received 3 enquiries regarding age discrimination.

Public consultation

The Minister issued a Consultation Paper in December 2015, inviting comments from stakeholders on the proposed scope of protection against age discrimination and the exceptions that might be required to ensure that age can continue to be taken into account when it is proportionate and reasonable to do so.

The Minister was pleased to receive a good response; 116 responses in total were submitted as part of this consultation. The proposals and the exceptions were generally supported by respondents, and the outcomes are presented in a Report which is being presented to the States on the same date that these draft Regulations are lodged *au Greffe* (see R.32/2016). It was clear from the responses that some employees feel that they are being discriminated against because they are being forced to retire at a certain age. As anticipated, the views on the exception for retirement age were polarised, and this was the most complex matter to address in the legislation to ensure that we provide an appropriate balance between certainty and flexibility.

Retirement age and pensionable age

To provide some context to the proposed protection against discrimination in retirement, the current position is that the age at which a person can claim their Social Security pension in Jersey will increase from age 65 to 67 by 2031². The increase will occur gradually over a 12 year period starting in 2020, and people who were born on or after 1st January 1955 will have different pension ages depending on their date of birth.

This was agreed as a necessary step to secure the sustainability of the Social Security Fund, limit the cost of future pensions, and lessen the burden placed on the future working age population. Jersey, like many other countries, has seen a considerable increase in life expectancy. By 2031, life expectancy at age 65 is forecast to have risen to 23.5 years for men (i.e. age 88.5) and to 26 years for women (i.e. age 91) (see P.73/2014). The population of older people in Jersey is set to increase, but the number of working age people will not keep pace with this increase.

According to the States' Medium Term Financial Plan 2016 – 2019 (see P.72/2015) –

“the number of people in Jersey aged over 65 will double from 14,000 today to 28,000 by 2035. This will represent one in four people in the community... The pensioner support ratio (PSR) is calculated as the ratio of working age people to pensioners. At present, the PSR is just under 4 – i.e. for each pensioner in Jersey receiving a pension, there are four working age people

¹ Since the start of 2016, JACS has collected separate data on enquires about retirement.

² Decision of the States Assembly in 2011 (P.58/2011) and change to the legislation in 2014 (P.73/2014)

making contributions to pay for that pension. The rise in the number of pensioners means that by 2032, there are forecast to be only three working age people supporting the pension of each local pensioner. This ratio is forecast to continue to decline rapidly until the early 2040s and then to decline more slowly throughout the rest of the 60 year period covered by the most recent review of the Fund undertaken by the UK Government Actuary's Department."

Increases to state pension ages are common across many countries. Age 67 has become more common, and some countries are moving towards pension ages of 68 and 69. Increases in pension age in the UK are expected to track increases in life expectancy based on the theory that people should access a State pension for around one third of their adult lives.

The State pension age is an important factor in an individual's decision to retire, along with health, financial reasons and other personal reasons. Figures from the Jersey census show that the proportion of older people in Jersey who work (age 60+ for women and age 65+ for men) increased from 10.4% to 14.6% between 2001 and 2011.

The increase to Jersey's state pension age is likely to affect how long people choose to stay in employment. As part of the Jersey Annual Social Survey for 2015, respondents were asked to indicate at what age they planned to stop working, or how old they were when they stopped working if they already had. The report states that –

"In 2008, 60 was the median age given. JASS 2010 found the median age that people planned to, or had, stopped work had increased to 63. The age has increased again in JASS 2015 to a median of 65 years."

The JASS report for 2015 noted that –

"One in three (30%) of those aged under 65 years agreed at some level that they 'would like to continue to work beyond the age of 65'. A larger proportion – three-fifths (60%) – disagreed that they would like to work beyond 65 years. A difference was seen by gender whereby a lower proportion of women (26%) than men (34%) agreed that they would like to continue to work beyond 65 years. Whilst 30% would like to continue working beyond 65 years, half (50%) of adults said they would need to work beyond 65 years in order to maintain their standard of living. Over half (58%) agreed that they would like to find a less demanding job as they got close to pension age."

Based on Jersey Social Security contributions data for September **2015**, 856 people aged 65 and over were in employment working more than 8 hours per week. Of the 856 people, 48% were women and 52% were men. As a proportion of the total number in employment, 1.3% were aged 65–69, and 0.4% were aged 70 and over.

For comparison, 5 years earlier (based on Social Security contributions data for September 2010), 708 people aged 65 and over (148 fewer than in 2015) were in employment working more than 8 hours per week. Of the 708 total, half were men (50%) and half were women (50%). As a percentage of the total number in employment, the proportions over age 65 were similar to September 2015 (1.0% were aged 65–69 and 0.4% were aged 70 and over). However, the data suggests a shift in employment to older people; in 2015, there were 4.3% fewer employed people under age 45 than in 2010.

For a comparison of employment levels for all age-groups in 2010 and 2015, and the sector of employment for those who were over age 65 in 2015, see **Appendix 1** to this Report.

International obligations

In jurisdictions worldwide, it is taken for granted that laws exist to protect people against discrimination. It is important that we have legislation in place to demonstrate internationally that Jersey is a jurisdiction that promotes modern standards of respect for individuals' rights and equality.

The United Nations General Assembly has adopted a set of principles for older people which Governments are encouraged to incorporate into their national programmes whenever possible. These include a requirement for fair treatment regardless of age, the opportunity to work, generate income and access training, and to participate in determining when and at what pace their withdrawal from the labour force takes place. Legislation may be one way in which Jersey can implement these principles, to establish legal standards and prohibit discrimination on the basis of older age.

One of the Council of Ministers' main priorities in its strategic plan for 2015–2018 is to optimise economic growth with the intention of helping to create more good jobs and opportunities for Islanders, removing barriers to employment and increasing participation. The Council of Ministers' desired outcome is that all working age people should fulfil their potential in rewarding employment. An important area of focus for 2015–2018 is to identify and address barriers to work for certain groups, including those wanting to work beyond retirement age.

SECTION 3 – OTHER JURISDICTIONS

United Kingdom

Age discrimination is one of the more recently introduced protected characteristics in the UK, having been unlawful in the workplace and in vocational training since 2006³. Age discrimination has also been outlawed in the provision of goods and services for people aged 18 or older since 2012. Age discrimination is not prohibited in relation to premises or schools.

Unlike other protected characteristics, the UK provides for a general defence of justification in cases of direct as well as indirect age discrimination. Direct discrimination will be justified if it can be shown that the treatment complained of is a proportionate means of achieving a legitimate aim – the same formulation that is used in cases of alleged indirect discrimination cases. This exception derives from the scope of the EU equal treatment framework directive, and in employment cases it appears that the 'legitimate aim' relied upon must relate to a wider social or labour market objective – although the precise scope of this is unclear.

Northern Ireland

Age discrimination at work is unlawful in Northern Ireland⁴. Since 2011, employers must be able justify any age-based retirement policy. Protection against age discrimination does not apply in the provision of goods and services, premises, education or any other areas in Northern Ireland. A public consultation was undertaken in 2015 in which the government proposed to extend protection against age discrimination to the provision of goods and services.

³ The Employment Equality (Age) Regulations 2006 were subsumed into the Equality Act 2010

⁴ www.legislation.gov.uk/nisr/2006/261/part/4/made

Isle of Man

Discrimination in employment on the grounds of age is not yet dealt with specifically in the Isle of Man legislation. A draft Equality Bill has been prepared, which is intended to deal with discrimination comprehensively across a range of protected characteristics. Consultation on the draft Bill was undertaken in 2014.

Guernsey

Guernsey currently provides protection against discrimination on grounds of sex, and the government has prioritised disability to be introduced as the next protected characteristic. There are currently no plans to introduce protection against discrimination on grounds of age.

Other jurisdictions

In most jurisdictions worldwide, laws to protect against age discrimination have been enacted relatively recently. However, laws have existed for almost 50 years in the United States, more than 30 years in Canada, and more than 10 years in Australia.

According to a 2001 report of the Joseph Rowntree Foundation, which looked at the UK's options for legislating against age discrimination⁵, the evidence suggested that legislation had some impact on age discrimination in these countries. Research in the United States which compared differences over time and across states with different levels of legislation appeared to show that age discrimination laws significantly increased the employment rates of older workers. This was mostly due to older workers staying on in employment for longer, rather than a greater number of older workers being taken into employment.

SECTION 4 – THE DRAFT REGULATIONS

Scope of the protection

The draft Regulations provide that age discrimination would be prohibited in most areas, including – recruitment, paid work, voluntary work, training, partnerships, professional bodies and clubs and associations. Age discrimination would not be prohibited in education, premises and the provision of goods, facilities and services to those under age 18, as provided in paragraphs 27, 35 and 41 of the new Part 4 of Schedule 2 proposed to be inserted by the draft Regulations. This reflects the position in the UK. In education, for example, much of a child's school life is determined by their age; including the classes and exams that they may take, and so decisions and opportunities based on age are an inherent and necessary factor in schooling.

Protection against discrimination on grounds of age would differ from the other characteristics, including sex and race. As in the UK, there is an opportunity to justify an act of direct age discrimination as a proportionate means of achieving a legitimate aim. This is known as the general justification defence⁶, and it will be a matter for the Tribunal and the courts to decide whether the defence has been made successfully, on a case-by-case basis. This different approach recognises the fact that a person's age – which is always changing – is relevant to his or her experience, abilities, circumstances and needs, in a way that other characteristics such as sex and race are not. This means that there are a wide range of circumstances in which different treatment based to some extent on age may be justified. If the Regulations attempted an exhaustive list of every possible exception, they would be unwieldy and still risk inadvertently excluding treatment that would be widely recognised as reasonable.

⁵ www.jrf.org.uk/report/age-discrimination-legislation-choices-uk

⁶ This is provided in Regulation 2 and is an amendment to Article 6 of the Discrimination Law.

Relying on the general justification defence should be a last resort, and to maintain the greatest possible clarity there is still a need for appropriate specific exceptions.

The exceptions

Exceptions describe the circumstances in which an act will not be treated as a prohibited act of discrimination. The Discrimination Law currently includes some general exceptions that will apply to all of the protected characteristics. These include where an act is done to comply with another Law, in circumstances where there is an occupational requirement for a protected characteristic, and in circumstances where there is a need for positive action, for example to overcome previous disadvantage.

The draft Regulations would introduce some additional exceptions that are specific to age, as described in **Appendix 2** to this report. The exceptions that are included in the draft Regulations were generally supported in the consultation as sensible circumstances in which age or length of service should continue to be a relevant factor. Some of the exceptions deal with narrow and technical issues to avoid inconsistencies and contradictions within the legislation. The draft Regulations include exceptions that deal with, for example, financial and insurance services, age limits in sport and competitions which are necessary for fair competition or safety, and age-related concessions, such as a discount for a certain age-group.

The most important of the new exceptions relates to retirement age. At the consultation stage, the draft Regulations allowed employers to require employees to retire at pensionable age without having to show any justification for that approach. Following consultation however, the draft now provides that this situation will only continue for 2 years – until 1st September 2018. From that date, the forced retirement of an employee will amount to direct discrimination unless the employer can show that the retirement is a proportionate means of achieving a legitimate aim. This proposal accords with the strategic priority of the States, to optimise economic growth by removing barriers to employment and increasing participation in rewarding employment, including for people who want to work beyond retirement age.

More detail on the exceptions is provided in **Appendix 2** to this report.

FINANCIAL AND MANPOWER IMPLICATIONS

Policy development, advice, conciliation and enforcement – For 2016, a budget of £113,050 is available, which makes provision for the cost of the advisory, conciliation and mediation services provided by JACS and Citizens Advice Jersey, as well as the cost of providing an enforcement service via the Tribunal.

States Human Resources – Any work and associated costs that are required to review staff policies and provide staff training to support non-discriminatory behaviour will be undertaken as part of the ongoing Public Sector Reform programme. The potential cost of defending any discrimination complaints against the States in relation to the new protected characteristic will be met from within existing resources. It is difficult to predict the potential and future costs of the Human Resources and Law Officers' Departments' time, particularly as there have been few discrimination complaints to the Tribunal to date, and no discrimination complaints against the States' Employment Board.

APPENDIX 1

Additional information from contributions data based on age

Chart 1 – Comparing employment levels by age based on September 2015 contributions data

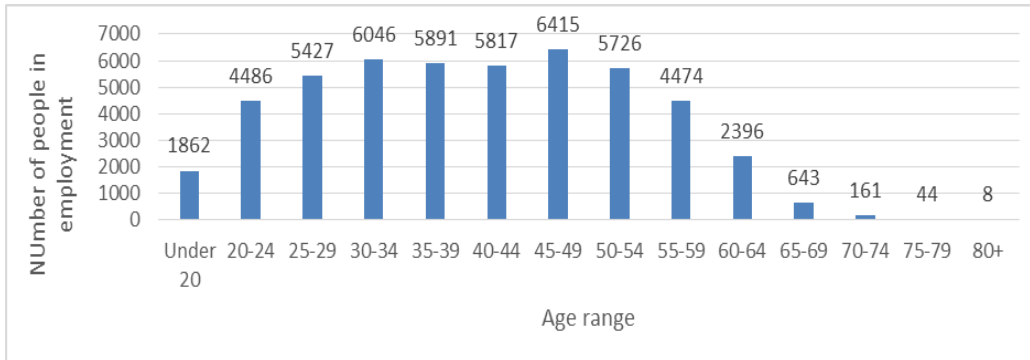


Chart 2 – Comparing employment levels by age based on September 2010 contributions data

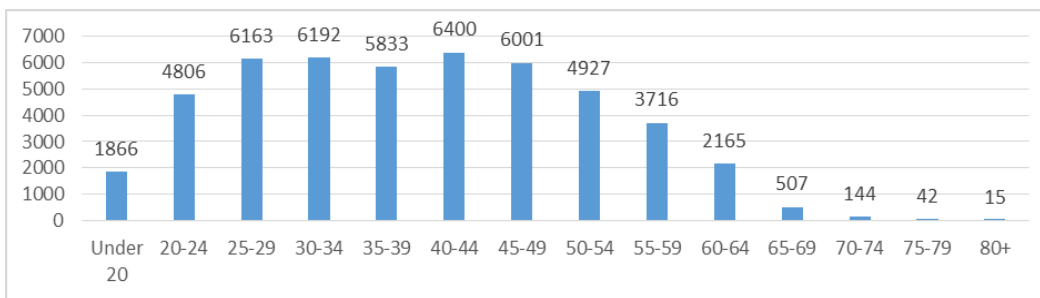


Table 1 – Number of over-65s in employment, by employment sector, based on September 2015 contributions data

Sector	Number of people
Banking, Insurance	144
Retail, Wholesale	131
Misc. Services (hairdressing, cleaning, etc.)	90
Public Sector (including temporary seasonal posts)	87
Misc. Professional (science & chemicals, etc.)	76
Tourism, Leisure and Catering	75
Construction	50
Medical Services	47
Transport and Communications	47
Private Domestic Service	28
Agriculture and Fishing	26
Motor Trades	22
Misc. Trades (glass, timber, printing, etc.)	11
Engineering	9
Educational Services	8
Utilities	5
Total	856

Exceptions for age discrimination

Reference	Exception	Description/purpose of exception
Regulation 5	Occupational requirement	An existing general exception (Schedule 2 paragraph 2G) is extended so that a voluntary work manager may take into account age – or any other protected characteristic – to the same extent that an employer would be permitted to take that characteristic into account. The exception applies where, having regard to the nature of the work, a particular protected characteristic is a requirement and that requirement is a proportionate means of achieving a legitimate aim.
Paragraph 25	States' policy or Ministerial Decision	The exception provides that it is not age discrimination to limit access to States-provided facilities and services based upon a person's age where the purpose is to promote employment and training opportunities, or to provide access to facilities and services to individuals in that age-group. There is sometimes a need to provide different types of employment services for different age-groups, and the exception provides clarity so that targeted services can continue to be provided to support specific age-groups.
Paragraph 26	Immigration	This exception mirrors similar provisions in the UK and provides that the exercise of functions under immigration law by officers of the Jersey Customs and Immigration Service will not amount to age discrimination. The exception only covers functions set out in either UK or Jersey Immigration law, and does not extend to powers of arrest.
Paragraph 28	Employment benefits	The exception addresses the risk that if employers are not permitted to base decisions about certain employment benefits on age or length of service without facing a claim of age discrimination, then they might stop offering the following 3 types of benefits – <ul style="list-style-type: none"> • Benefits based on an employee's length of service • Insurance and related financial services (e.g. life assurance) to employees only while they are under pensionable age • Assistance with child care for children of a particular age-group (e.g. child care vouchers).

Reference	Exception	Description/purpose of exception
Paragraph 29	Minimum wage	The exception allows an employer to pay a school child who does not qualify for the statutory minimum wage (by virtue of being under compulsory school-leaving age) at a lower rate than an employee who does qualify for the minimum wage. The exception is required to provide consistency between the right to protection against age discrimination and the principle established in the minimum wage legislation – that school-children are not entitled to be paid the minimum wage.
Paragraph 30	Redundancy payments	We do not want to create an incentive for employers to level down redundancy payments which are often based on a combination of age and length of service. This is a sensible exception to ensure that calculation of redundancy pay based on those factors is permitted, provided the redundancy pay is calculated using the same formula for all employees, regardless of age.
Paragraph 31	Retirement age	<p>The exception provides that dismissal at pensionable age (as defined by the Social Security (Jersey) Law 1974), or at a higher age set by the employer, will not amount to age discrimination, provided that the employer has a policy of requiring employees to retire at that age. Where an employer sets a retirement age that is below pensionable age, the employer will need to demonstrate that retirement at that age is a proportionate means of achieving a legitimate aim in accordance with the general justification defence (Regulation 2).</p> <p>The responses to the consultation highlighted that many employees who reach pensionable age will still want or need to work, and many felt that the consultation draft of the Regulations did not provide sufficient protection for employees. It is clear that there is a balance to be struck between certainty and flexibility. Initially, the draft Regulations will allow an employer to continue requiring employees to retire at pensionable age without facing an age discrimination complaint. However, the proposal has been amended, based on the consultation outcomes, so that we can move fairly quickly to a position where employers will have to justify their need for employees to retire. The draft Regulations will give employers 2 years to adjust to the removal of the retirement age exception. From September 2018⁷, the position would be similar to the UK, in that any dismissal by reason of retirement will be direct discrimination unless it can be objectively justified. This proposal is in line with the strategic priorities of the States.</p>

⁷ The exception will no longer apply where the employee's effective date of termination of employment is on or after 1st September 2018.

Reference	Exception	Description/purpose of exception
		So that the right to claim unfair dismissal accords with the proposed protection against age discrimination, the Employment Law will also be amended to provide that employees are protected against unfair dismissal until they reach either pensionable age or a higher retirement age adopted by the employer (Regulation 6 of the draft Regulations). However, where the effective date of termination of employment is on or after 1st September 2018, an employee of any age will be able to take an unfair dismissal complaint to the Tribunal, and 'retirement' will be a potentially fair reason for dismissal, as long as the employer has acted reasonably in requiring the employee to retire. A code of practice will guide employers in how to operate a fair retirement process, which would have to be taken into account by the Tribunal in deciding individual cases.
Paragraph 32	People nearing retirement age	The exception would allow an employer to take imminent retirement age into account in deciding who to recruit, promote or provide training to in the 6 months prior to an employee's retirement (or a longer period if reasonable in the circumstances). This exception appropriately allows an employer to consider matters such as whether it will make a return on any investment in training during the remaining period of the employee's employment. This exception will not be available after 1st September 2018 ⁸ . However, where an employer can show that it has a justified retirement age, it will be able to argue that taking age into account when recruiting workers already approaching that age was a proportionate means of achieving a legitimate aim.
Paragraph 33	Pension schemes	Pensions are inherently age discriminatory, and this exception is required to allow the provision of occupational, personal and group pension schemes to continue. The exception covers the granting of access to a scheme as well as the terms of the scheme. If pension schemes could not set age specific rules on access to benefits, for example, employers may withdraw such benefits rather than risk an age discrimination complaint.
Paragraph 34	Financial and insurance arrangements	The exception allows providers of insurance and financial services to continue to use a person's age as a factor in assessing risk, calculating premiums and benefits and charging for their products, but only if it is reasonable to do so based on statistics and actuarial data from a source on which it is reasonable to rely. A

⁸ The exception will no longer apply where the act of discrimination occurs on or after 1st September 2018.

Reference	Exception	Description/purpose of exception
		financial services provider can be challenged if a person thinks that a risk assessment is arbitrarily based on age rather than on relevant information from a reliable source.
Paragraph 36	Age-related concessions	The exception would allow service providers and private clubs and associations to offer concessions such as discounts, special arrangements and special offers to people of a particular age or age-group. It would permit, for example, discounts for pensioners in shops and reduced price entry to tourist attractions for children under age 5. The exception would remove some of the uncertainty for service providers in offering such concessions based on age.
Paragraph 37	Age-related holidays	The exception allows businesses such as travel agents and tour operators to continue to provide holidays that provide activities or services designed for the enjoyment of a particular age-group. The main purpose of the holiday must be to bring together people of a similar age. For example, holidays exclusively for the over-55s, or 18 to 30s holidays.
Paragraph 38	Age-restricted services	The exception is essential to allow businesses that sell age-restricted goods (such as alcohol, cinema tickets, fireworks and cigarettes) to continue to ask for proof of age where a customer appears to be younger than a particular age.
Paragraph 39	Sport and competitions	The exception would allow the continued use of age-limits and age-bands which are necessary for fair competition, the safety of competitors, or to comply with rules set by national, international or sports governing bodies. This mirrors the existing exceptions relating to sport and competitions in relation to race, sex and gender re-assignment. The exception applies to all sporting levels, from amateur to professional, and applies to thinking games and competitions (e.g. bridge or chess) as well as physical sports.
Paragraph 40	Scholarships, prizes and awards	The exception provides that the provision of scholarships, prizes or awards will not amount to age discrimination merely on the ground that the scholarship, prize or award in question is made available only to specified age-groups.

Explanatory Note

These Regulations add age to the Discrimination (Jersey) Law 2013 (the “Law”) as a protected characteristic, as well as making an amendment to the Employment (Jersey) Law 2003 in consequence of the amendments made to the Law.

Regulation 2 inserts a new paragraph in Article 6 of the Law to the effect that in relation to the protected characteristic of age a person does not directly discriminate against another person by treatment that is a proportionate means of achieving a legitimate aim.

Regulation 3 adds age as a protected characteristic for the purposes of indirect discrimination.

Regulation 4 amends Schedule 1 to the Law so as to prescribe age as a characteristic protected from discrimination under the Law.

Regulation 5 amends Schedule 2 to the Law. The general exception where a protected characteristic is a genuine occupational requirement is extended to cover voluntary work. Then a new Part 4 is added dealing with exceptions to prohibited acts in relation to age which includes new paragraphs 25 to 41.

Paragraph 25 allows implementation of a States’ policy or Ministerial decision applying age-based criteria for the purposes of promoting employment or other opportunities or providing access to facilities and services.

Paragraph 26 provides that an officer of the Jersey Customs and Immigration Service does not discriminate in relation to the provision of goods, facilities or services in relation to the protected characteristic of age in the exercise of his or her statutory functions.

Paragraph 27 makes lawful age discrimination in relation to a student or a person applying for admission as a student to a school.

Paragraph 28 enables age-based discrimination in relation to the provision of benefits to employees (including contract and voluntary workers).

Paragraph 29 enables an employer to pay a person less than a rate of the minimum wage where the person does not qualify for that rate.

Paragraph 30 enables the provision of redundancy payments not to be discriminatory on grounds of age provided that payments are calculated using the same formula for all employees regardless of age.

Paragraph 31 allows an employer to dismiss an employee who has reached pensionable age or, if higher, the employer’s retirement age if the employer has a policy of requiring employees to retire at that age. The provision also applies to contract and voluntary workers and applies only where the effective date of termination is before 1st September 2018.

Paragraph 32 enables employers, etc. to take into account that a person is nearing retirement age in deciding on who to recruit, promote or move to another position, or what training is to be provided. It applies only where the act of discrimination occurs before 1st September 2018.

Paragraph 33 permits age-related pension schemes.

Paragraph 34 enables discrimination on grounds of age in relation to the provision of financial and insurance services.

Paragraph 35 enables discrimination on grounds of age in the provision of goods, facilities and services in relation to persons under the age of 18.

Paragraph 36 allows for age-related concessions in relation to the provision of goods, facilities and services and in relation to club benefits.

Paragraph 37 permits the restriction of holidays to persons of a particular age group.

Paragraph 38 allows refusal of a service to persons appearing to be under the statutory age for that service and who are unable to provide satisfactory proof of being the required age.

Paragraph 39 enables age-related sport and competitions.

Paragraph 40 enables discrimination whereby scholarships, prizes or other awards are restricted to specified age groups.

Paragraph 41 enables age-related discrimination in relation to access to and use of premises or disposal or management of premises.

Regulation 6 amends the Employment (Jersey) Law 2003 by making an employee having to retire a reason to justify dismissal and substitutes Article 74 to make new provision regarding upper age limits for unfair dismissal to reflect the provisions on retirement age added to the Discrimination Law by Regulation 5.

Regulation 7 names the Regulations and provides for them to come into force on 1st September 2016, apart from the provision in Regulation 6 relating to the reason for dismissal, which comes into force on 1st September 2018.



Jersey

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Arrangement

Regulation

1	Amendment of the Discrimination (Jersey) Law 2013	19
2	Article 6 amended	19
3	Article 7 amended	19
4	Schedule 1 amended.....	19
5	Schedule 2 amended.....	20
6	Amendment of Employment (Jersey) Law 2003	26
7	Citation and commencement.....	27



Jersey

DRAFT DISCRIMINATION (AGE) (JERSEY) REGULATIONS 201-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES, in pursuance of Articles 5 and 47 of the Discrimination (Jersey) Law 2013¹, have made the following Regulations –

1 Amendment of the Discrimination (Jersey) Law 2013

The Discrimination (Jersey) Law 2013² is amended in accordance with Regulations 2 to 5.

2 Article 6 amended

After Article 6(8) there shall be inserted the following paragraph –

“(8A) In relation to the protected characteristic of age a person does not directly discriminate against another person (the ‘subject’) if the person can show his or her treatment of the subject to be a proportionate means of achieving a legitimate aim.”.

3 Article 7 amended

In Article 7(4), after sub-paragraph (d) there shall be added the following sub-paragraph –

“(e) age.”.

4 Schedule 1 amended

In Schedule 1 after paragraph 6 there shall be added the following paragraph –

“7 Age

(1) Age is a protected characteristic.

(2) In relation to the protected characteristic of age –

- (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
 - (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
- (3) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.”.

5 Schedule 2 amended

- (1) In Part 1 of Schedule 2, in paragraph 2G –
- (a) in sub-paragraph (2) the word “and” in clause (c) shall be deleted and after clause (d) there shall be inserted the following clause –
 - “(e) Articles 17 and 18.”;
 - (b) in sub-paragraph (3) after the words “contract work” there shall be inserted the words “, voluntary work”.
- (2) After Part 3 there shall be added the following Part –

“PART 4

EXCEPTIONS TO PROHIBITED ACTS: AGE

25 Age: act done pursuant to States’ policy or Ministerial decision

An act of discrimination is not prohibited by this Law if it is done pursuant to a policy adopted by the States or by Ministerial decision where the implementation of that policy or decision applies criteria based upon a person’s age, for the purposes of –

- (a) promoting employment or other opportunities; or
- (b) providing access to facilities and services.

26 Age: immigration

- (1) An officer of the Jersey Customs and Immigration Service does not contravene Article 22, in relation to the protected characteristic of age, in the exercise of any immigration functions.
- (2) In sub-paragraph (1) ‘immigration functions’ means any functions exercisable in relation to immigration –
- (a) under any enactment; or
 - (b) under any Act of the United Kingdom extended to Jersey (whenever it was so extended) except for sections 28A to 28K of the Immigration Act 1971.

27 Age: education

Article 21 shall not prohibit a person discriminating against a student, or a person applying for admission as a student, on grounds of the student's or applicant's age.

28 Age: employment benefits

- (1) The provision of benefits to employees based on their length of service does not constitute indirect discrimination under this Law in relation to the protected characteristic of age.
- (2) An employer who makes arrangements for, or affords access to, the provision of insurance or a related financial service to employees only while they are under pensionable age does not contravene this Law in relation to the protected characteristic of age.
- (3) Sub-paragraph (2) applies only where the insurance or related financial service is, or is to be, provided to the employees or a class of employees –
 - (a) in pursuance of an arrangement between the employer and another person; or
 - (b) where the employer's business includes the provision of insurance or financial services of the description in question, by the employer.
- (4) An employer who provides, makes arrangements for or facilitates the provision of care for children of particular ages does not contravene this Law in relation to the protected characteristic of age.
- (5) In this paragraph –
 - (a) 'care' includes supervision;
 - (b) 'child' means a person under the age of 18;
 - (c) 'employee' includes a partner of a partnership to which Article 12 applies, a contract worker and a voluntary worker;
 - (d) 'employer' includes a partner of a partnership to which Article 12 applies and a manager;
 - (e) facilitating the provision of care includes –
 - (i) paying for some or all of the cost of providing care for a child,
 - (ii) helping a parent of a child to find a suitable person to provide care for the child,
 - (iii) enabling a parent of a child to spend more time providing care for the child or otherwise assisting the parent with respect to the care that the parent provides for the child;
 - (f) 'pensionable age' has the same meaning as in Article 1A of, and Schedule 1AA to, the Social Security (Jersey) Law 1974³.

29 Age: minimum wage

- (1) An employer who pays a person less than a rate of the minimum wage where the person does not qualify for that rate does not contravene this Law in relation to the protected characteristic of age.
- (2) In this paragraph ‘minimum wage’ shall be construed in accordance with Article 16(3) of the Employment (Jersey) Law 2003⁴.

30 Age: redundancy payments

- (1) The provision of redundancy payments by employers to employees, whether in compliance with or in excess of the statutory minimum, does not constitute discrimination under this Law in relation to the protected characteristic of age provided that the payments are calculated using the same formula for all employees regardless of age.
- (2) In this paragraph –
 - (a) ‘employee’ includes a partner of a partnership to which Article 12 applies and a contract worker;
 - (b) ‘employer’ includes a partner of a partnership to which Article 12 applies.

31 Retirement age

- (1) An employer who dismisses an employee who has reached pensionable age or, if higher, the retirement age set by the employer, does not commit an act of direct discrimination in relation to the protected characteristic of age if the employer has a policy of requiring employees to retire at such an age.
- (2) The fact that an employer may, from time to time, allow an employee to remain in post beyond pensionable age or, if higher, the retirement age set by the employer shall not of itself be taken to mean that the employer does not have a policy of requiring employees to retire at such an age.
- (3) In this paragraph –
 - (a) ‘employee’ includes a partner of a partnership to which Article 12 applies, a contract worker and a voluntary worker;
 - (b) ‘employer’ includes a partner of a partnership to which Article 12 applies and a manager;
 - (c) ‘pensionable age’ has the same meaning as in Article 1A of, and Schedule 1AA to, the Social Security (Jersey) Law 1974.
- (4) This paragraph applies only to a dismissal where the effective date of termination (within the meaning of Article 63 of the Employment (Jersey) Law 2003) is before 1st September 2018.

32 Persons nearing retirement age

- (1) An employer who takes into account that a person is nearing retirement age in deciding on –
 - (a) who to recruit;
 - (b) who to promote;
 - (c) who to move to another position; or
 - (d) what training is to be provided to any employee,does not contravene this Law in relation to the protected characteristic of age.
- (2) In this paragraph a person is nearing retirement age if the person's age is not less than 6 months (or such longer period as is reasonable in the circumstances) short of pensionable age or, if higher, the retirement age set by the employer.
- (3) However, in the case of a training course that lasts more than 6 months there is no contravention of this Law under sub-paragraph (1) if the employee's retirement age (as determined by sub-paragraph (2)) is within 6 months of the date on which the training is due to be completed.
- (4) In this paragraph –
 - (a) 'employee' includes a partner of a partnership to which Article 12 applies, a contract worker and a voluntary worker;
 - (b) 'employer' includes a partner of a partnership to which Article 12 applies and a manager;
 - (c) 'pensionable age' has the same meaning as in Article 1A of, and Schedule 1AA to, the Social Security (Jersey) Law 1974.
- (5) This paragraph applies only where the act of discrimination occurs before 1st September 2018.

33 Age: pension schemes

- (1) The provision and the terms of an occupational pension scheme, or any personal or group personal pension scheme, do not contravene this Law in relation to the protected characteristic of age.
- (2) In this paragraph 'group personal pension scheme' means arrangements administered on a group basis under a personal pension scheme that are available to employees of the same employer or of employers within a group.

34 Age: financial and insurance arrangements

- (1) Parts 3 and 5 shall not prohibit a person discriminating against a person on grounds of age, in relation to the terms on which an annuity or policy of insurance is offered to, or may be obtained by, that person, if the discrimination is reasonable in the

circumstances, having regard to any statistical or actuarial data on which it is reasonable for the person to rely.

- (2) Article 22 shall not prohibit the provision of a relevant financial service, so far as it relates to the protected characteristic of age, if the provision is in pursuance of arrangements made by an employer for the service-provider to provide the service to the employer's employees, and other persons, as a consequence of the employment.
- (3) In this paragraph 'relevant financial service' means –
 - (a) insurance or a related financial service; or
 - (b) a service relating to membership of or benefits under a personal pension scheme.

35 Age: goods, facilities and services

Article 22 does not prohibit a person discriminating against another person on grounds of age if the subject of the discrimination is under the age of 18.

36 Age-related concessions

- (1) A person does not contravene Article 22, so far as it relates to the protected characteristic of age, by giving a concession in respect of a service to persons of a particular age group.
- (2) A club does not contravene Article 25, in so far as it relates to the protected characteristic of age, by giving a concession on admission to membership or on access to a benefit, facility or service, for –
 - (a) persons of a particular age group; or
 - (b) persons who have been members of the club for more than a number of years specified by the club for this purpose.
- (3) A club does not contravene Article 25, in so far as it relates to the protected characteristic of age, by giving a concession on invitations, or access to a benefit, facility or service, for guests of a particular age group.
- (4) For the purposes of this paragraph –
 - (a) affording only persons of a particular age group access to a benefit, facility or service for a limited time is to be regarded as a concession;
 - (b) 'concession' means, in respect of a service, a benefit, right or privilege that is provided on such terms or in such a manner that is more favourable than the terms on which, or the manner in which, it is usually provided to a more general group of persons.

37 Age-related holidays

- (1) A person does not contravene Article 22, so far as it relates to the protected characteristic of age, by providing a holiday service to persons of a particular age group.
- (2) In this paragraph –
 - ‘holiday service’ means a service –
 - (a) that involves the provision of at least 2 of the following together for a single price –
 - (i) travel,
 - (ii) accommodation,
 - (iii) access to activities or services not ancillary to travel or accommodation that form a significant part of the service or its cost;
 - (b) the provision of which is for a period of more than 24 hours or includes the provision of overnight accommodation;
 - (c) that the holiday service provider provides only to persons of the age group in question; and
 - (d) an essential feature of which is the bringing together of persons of that age group with a view to facilitating their enjoyment of facilities or services designed with particular regard to persons of that age group;

‘travel’ includes an option for an individual to make alternative travel arrangements to those included in the holiday service as standard.

38 Age-restricted services

- (1) A person does not contravene Article 22, so far as it relates to the protected characteristic of age, by refusing to provide a service the provision of which is prohibited by or under an enactment to persons under the statutory age, to a person who –
 - (a) appears to the person providing the service, or that person’s employee or agent, to be under the statutory age; and
 - (b) on being requested by that person to provide satisfactory identification, fails to do so.
- (2) In this paragraph –

‘satisfactory identification’, in relation to a person, means a valid document that includes a photograph of the person and establishes that the person has attained the statutory age in relation to the provision of the service;

‘statutory age’ means the age specified in or under the enactment whereby a person under that age is prohibited from doing any act.

39 Age: sport and competitions

- (1) A person does not contravene this Law in relation to the protected characteristic of age only by doing anything in relation to the participation of another as a competitor in an age-banded activity if it is necessary to do so –
 - (a) to secure, in relation to the activity, fair competition or the safety of competitors;
 - (b) to comply with the rules of a national or international competition; or
 - (c) to increase participation in that activity.
- (2) For the purposes of this paragraph, an age-banded activity is a sport, game or other activity of a competitive nature in circumstances in which 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 with average persons of another age group as competitors in events involving the activity.

40 Age: scholarships, prizes and awards

An act of discrimination is not prohibited by this Law in relation to the protected characteristic of age where scholarships, prizes or other awards are made available only to specified age groups.

41 Age: premises

An act of discrimination is not prohibited by Article 23 or Article 24 in relation to the protected characteristic of age.”.

6 Amendment of Employment (Jersey) Law 2003

- (1) The Employment (Jersey) Law 2003 is amended in accordance with this Regulation.
- (2) After Article 64(2)(b) there shall be inserted the following subparagraph –
 - “(ba) is that the employee was required to retire;”.
- (3) For Article 74 there is substituted the following Article –

“74 Upper age limit

- (1) Article 61 shall not apply to the dismissal of an employee if on or before the effective date of termination the employee has attained –
 - (a) in a case where –
 - (i) in the undertaking in which the employee was employed there was a common retiring age for men and women holding the position held by the employee, and

- (ii) that retiring age was higher than pensionable age, that retiring age;
 - (b) in a case where –
 - (i) in the undertaking in which the employee was employed there were different retiring ages for men and women holding the position held by the employee, and
 - (ii) the higher of the retiring ages is greater than pensionable age, that higher retiring age; and
 - (c) in any other case, pensionable age.
- (2) Paragraph (1) does not apply if Article 65, 66, 67(1) or (2), 68(1), 69(1), 70 or 70A applies.
 - (3) In this Article ‘pensionable age’ has the same meaning as in Article 1A of, and Schedule 1AA to, the Social Security (Jersey) Law 1974.
 - (4) This Article applies only to a dismissal where the effective date of termination is before 1st September 2018.”.

7 Citation and commencement

- (1) These Regulations may be cited as the Discrimination (Age) (Jersey) Regulations 201-.
- (2) These Regulations shall come into force on 1st September 2016 apart from Regulation 6(2), which shall come into force on 1st September 2018.

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- 1* chapter 15.260
 - 2* chapter 15.260
 - 3* chapter 26.900
 - 4* chapter 05.255