
STATES OF JERSEY



CONSULTATION SUMMARY OF RESPONSES: LAW TO PROTECT AGAINST AGE DISCRIMINATION

Presented to the States on 12th April 2016
by the Minister for Social Security

STATES GREFFE

Consultation Summary of Responses

Law to protect against Age Discrimination

Summary of Consultation responses:

The Minister for Social Security (“the Minister”) consulted on the proposed scope of protection against discrimination on grounds of age and the draft Age Discrimination Regulations¹. The Minister invited comments from stakeholders on a number of policy issues, including the following –

1. The scope of protection against age discrimination.
2. Whether the Regulations should include a general justification defence for claims of direct discrimination.
3. What exceptions will be required so that an act is not an act of age discrimination.

The proposals and the exceptions were generally supported by respondents. The scope of the legislation will therefore remain as drafted, so that protection against age discrimination would be prohibited in all areas except education and premises; and the protection against age discrimination in goods, facilities and services would be limited to people who have attained age 18. More information is provided in the Consultation Outcomes report that starts on the next page.

Minister/Department response to this feedback:

The Minister is very grateful to all those who responded during the Consultation. The Minister has considered the comments submitted by each respondent and this process has informed her decisions. A number of changes have been made to the Consultation draft of the Regulations, which include –

1. The inclusion of a general justification defence for direct age discrimination.
2. A change to the policy for the retirement age exception.

The Draft Discrimination (Age) (Jersey) Regulations 201- (the “draft Regulations”) will be lodged on 12th April 2016 for States debate on 24th May 2016 (*see P.37/2016*). The Minister intends that, subject to the States Assembly approving the draft Regulations, protection against age discrimination will be available from 1st September 2016.

Supporting documents attached: None.

¹ www.gov.je/Government/Consultations/Pages/LawAgainstAgeDiscrimination.aspx

CONSULTATION OUTCOMES

Members of the Public were invited to give their views on the scope of the protection against age discrimination and the proposed exceptions, as set out in the Consultation draft of the Regulations. The Minister had not reached any firm policy decisions prior to the Consultation, but decided that a draft of the Regulations should be circulated to help stakeholders consider the proposals.

The Minister had proposed to include some exceptions similar to those found in the UK's Equality Act that would, for example, allow age-related employment benefits and age-related concessions in goods and services. It was recognised that other exceptions would be more controversial and require more detailed consideration, such as in relation to retirement age.

Section 2 sets out in more detail the responses to the Consultation.

Section 1 – Consultation method

The Minister issued a Consultation Paper on 21st December 2015, inviting respondents to complete the online survey or send written comments.

The Minister received 63 written responses to the Consultation. In addition to this, the responses submitted by the CIPD Jersey branch and Law at Work presented the views of a further 53 respondents. Although these respondents completed different surveys, 116 responses in total were submitted as part of this Consultation. The responses can be categorised into the following respondent types:

Respondent type	Number
Employee	18
Employer	5
Trade union/staff association	1
Employer/business association	1
Individual citizens (including retired, self-employed)	11
Other (CAB, JACS, CIPD, lawyers)	11
Not specified	16
CIPD respondents	29
Law at Work respondents (employers)	24
TOTAL	116

Some of the written responses represented the views of more than one individual, including the following:

CIPD Jersey Branch – The Chartered Institute of Personnel and Development (CIPD) is the world’s largest Chartered Human Resources development professional body. The CIPD Jersey branch is made up of 15 Committee members representing a broad spectrum of industries on the Island. The CIPD Jersey branch collated responses from its members via an online survey and written responses. In total, 29 responses were received from respondents in a range of industries. All comments from these respondents have been attributed in this report to “CIPD respondent”.

Jersey Chamber of Commerce – Chamber is the largest employer representative body in the Island which includes members from all business sectors who are dedicated to the promotion of trade, commerce and the general prosperity of Jersey. The Chair of Chamber’s Human Resources Committee discussed the proposals with Chamber members before submitting a response on behalf of Chamber.

Law at Work – Law at Work (LAW) is a provider of employment relations consultancy services to Channel Islands-based employers. LAW acts for employers, and primarily represents their views and concerns in responding. Recipients of the LAW e-bulletin were sent a questionnaire which focussed on the exceptions to prohibited acts which relate to employers. Responses were received from 24 employers over 12 different sectors, employing a total of more than 1,727 employees. Law at Work offers the results as an insight into the views of these 24 employers on the employment-related exceptions.

Unite the Union – Unite is the UK’s largest trade union, with 1.4 million members across the private and public sectors. The union’s members work in a range of industries, including all the manufacturing and transport sectors, financial services, print, media, construction, local government, education, health and ‘not for profit’ sectors. Unite is Jersey’s biggest union. The response was provided by Howard Beckett, Director of Legal, Affiliated Services & Membership, Unite the Union.

Employment Lawyers’ Association – The Jersey branch of the Employment Lawyers’ Association (“ELA (JB)”) consists of local practitioners of Jersey employment legislation, who deal day-to-day with such matters and have a professional interest in relevant proposed developments to the Island’s legislative regime. The response was submitted on behalf of the ELA (JB) Committee.

In addition to this, 15 stakeholders attended meetings in February to discuss the issues raised in the Consultation Paper. This included – representatives of Age Concern, CIPD Jersey branch, Jersey Hospitality Association, States of Jersey, JACS, Citizen’s Advice Jersey, Jersey Voluntary and Community Services, a recruitment agency and 3 law firms. Some of these stakeholders also submitted a written response.

Section 2 – Consultation responses

The specific issues for the Consultation were described in the preamble to each set of questions in the Consultation Paper. The following summary sets out an overview of the responses received to each survey question, including quotes from some of the respondents. It does not set out all of the responses in full. The selected quotes are intended to give an indication of the range of responses that were received to each question, and to allow some of the specific issues raised by respondents to be considered and addressed by the Minister in the “Outcomes” boxes.

Unless otherwise stated, any references to the Regulations and paragraph numbers in the following report refer to the Regulations and paragraph numbers that were set out in the Consultation Draft of the Discrimination (Age) (Jersey) Regulations 201-².

General comments

A number of respondents commented generally in support of introducing protection against age discrimination, including the following comments –

“This is an important step for protection of the public.” (Employer, transport, storage and communications)

“Unite welcomes this progressive step for the States of Jersey to introduce age discrimination legislation. (Unite the Union).”

One respondent questioned the need for protection against age discrimination, as follows –

“Is there actually a problem here? There hasn't been any demonstration, as far as I can see, that there is a requirement for this legislation.” (Employee, transport, storage and communications).

Given that there is no legislation to protect people against age discrimination in Jersey, it is difficult to assess the prevalence of unacceptable discriminatory acts. However, it is clear from the responses to the Consultation that some employees feel that they are being discriminated against because they are being forced to retire simply because of their age.

The 2012 Jersey Annual Social Survey (JASS) found that a quarter (25%) of adults in Jersey 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 proportions who reported being discriminated against on the grounds of age. Around a quarter of those unemployed and looking for work (25%) reported having been discriminated against on the grounds of age in the previous 12 months, compared to one in 20 (6%) employed people. The most frequently cited place where discrimination occurred was at work; 36% of respondents who reported being discriminated against in the previous 12 months said that it had happened at work.

² www.gov.je/Government/Consultations/Pages/LawAgainstAgeDiscrimination.aspx

Outcomes

The Minister is pleased to see general support for the legislation.

A number of respondents commented that the legislation, including any exceptions, must comply with human rights legislation. The Minister is satisfied that the necessary human rights checks will be undertaken by the Law Officers' Department before the legislation is put forward to the States.

1. Scope of protection against age discrimination

Respondents were asked if they agree with the proposed scope of the protection (paragraphs 27, 36(1) and 43 of the proposed new Part 4 of the Discrimination Law).

Age discrimination would be prohibited in all areas except education and premises, and the protection against age discrimination in goods, facilities and services would be limited to people who have attained age 18. This would reflect the position in the UK. If the protection against age discrimination were to be extended to these 3 areas, it is likely that a number of additional exceptions would be required.

Of those who responded to the Minister's survey, 80% agreed that the scope of the protection against age discrimination should be limited as currently drafted, and 20% did not agree. Of those who responded to the CIPD survey, 97% agreed with the proposed scope.

A number of respondents commented in support of the proposed approach, including the following –

“Rights and responsibilities are associated with the age of majority and it may not be appropriate for minors to be able to make a complaint when the decision may be in their best interest.” (Malcolm Ferey, Citizen's Advice Jersey)

“Exceptions appear appropriate and is reflective of the UK position – although maybe consideration could be given to school leaving age for goods and services.” (JACS)

The Jersey Chamber of Commerce reported that its members had raised no concerns about the scope of the protection against age discrimination and the exceptions as drafted.

Unite the Union did not agree with the proposed scope of the protection, commenting –

“Unite does not accept the reasoning behind the exception for education and premises. There is, for example, good evidence of age discrimination and its detrimental effect, including from Professor John Field of Stirling University and others referred to here:

<http://www.theguardian.com/education/2009/jun/09/backtoschool-accesstouniversity>.”

Unite the Union also said that the protection against age discrimination in goods, facilities and services should begin at age 16.

A Law firm commented on the scope of the exception for premises –

“It seems to us that this blanket exception is potentially very wide-ranging. By way of example, it has the effect of permitting a person to evict an occupant of premises purely because they are 30 years old and refusing a 50 year-old access to public premises, such as a public swimming pool. How would the latter sit with the provision of goods, facilities and services in respect of which there are no exceptions for age?” (Law firm)

Respondents generally did not support extending the scope of the protection, and so there were few examples given of additional exceptions that might be required if the Law were to be extended to these 3 areas. Suggestions included exceptions for age discrimination in education admissions, progress through schools and exams, access to certain premises for under-18s, and age-restricted residential developments (e.g. homes for “over-55s only”).

Outcomes

There is clear support for this approach, and no convincing reasons were presented to justify extending the scope of the Regulations. The Minister intends to retain the scope, as drafted, so that age discrimination will not be a prohibited act of discrimination in relation to –

- the admission and treatment of pupils in schools
- access to and use of public premises
- disposal or management of premises
- the provision of goods, facilities and services for under-18s.

JACS and Unite the Union suggested that protection against discrimination in goods, facilities and services should apply to those over school-leaving age (16), rather than age 18. No other respondents have suggested or considered this alternative, and no reasons have been given to justify this as a more appropriate age. The Minister has decided that it would be preferable to retain the age of 18 – the same as the UK – as this age is more likely to be relevant than age 16 in restrictions on certain types of goods and services.

There is an overlap between access to premises and the provision of services; in some cases you cannot have one without the other. Sometimes the issue of access will be determined by the service provider and sometimes by a third party. The Regulations seek to strike a balance between flexibility and clarity, and they reflect the position in the UK. Complicated exceptions can cause confusion and unforeseen consequences, and the Regulations seek to avoid them where possible. The Minister is satisfied that the current exception for premises is appropriate given the many circumstances in which the use and disposal of premises may be legitimately restricted to users of a particular age-group. The scope of the protection may be extended in the future.

2. Justification defence for direct age discrimination

Respondents were asked if they agree with the proposal that we should differ from the UK by not allowing a general defence of justification to direct age discrimination, and instead including some additional specific exceptions.

In the UK, there is a general defence of justification to claims of **direct** discrimination that applies only where the protected characteristic is age. In this respect, protection against discrimination on grounds of age differs from other characteristics, including sex and race. An employer can justify its actions if it can show that what it has done is a proportionate means of achieving a legitimate aim. This is potentially a very wide exception,³ but UK case law has made it clear that it only applies where the aim being pursued by an employer has a social policy objective⁴ (e.g. relating to labour market policy), and so it is more difficult to justify direct discrimination than indirect discrimination.

The UK position leaves the justification defence rather uncertain, and so the Minister had proposed that a general defence should not be included in our draft Regulations. Instead, we had proposed some additional exceptions that are not included in the Equality Act, such as, in relation to health services and other age-related services. The intention was to provide more certainty for employers and service providers.

Of the responses to the Minister's survey, 59% of respondents agreed that we should differ from the UK by not allowing a general defence of justification to direct age discrimination, and 41% disagreed. The responses to this question are more equally split than responses to most of the other questions, and so it is important to look carefully at the reasons given by respondents.

Of those who responded to the CIPD survey, 75% agreed that we should differ from the UK by not allowing a general defence of justification to direct age discrimination.

Comments from respondents who agreed with the approach, as drafted, included the following –

“I believe that only being able to rely on specific exemptions is clearer and more consistent with existing Jersey discrimination legislation.” (Malcolm Ferey, Citizen's Advice Jersey)

“The UK's justification defence places employers in a situation of uncertainty as to whether or not their actions could crystallize a claim. The proposal for our local additional exceptions give clarity and ensure there is no need for interpretation – with employers having increased certainty around decision-making, i.e. retirement.” (JACS)

“Desirable to have more certainty in this area; specific exceptions can be reviewed/added to if found appropriate in the future.” (Paul St. John Turner, employee, financial services)

³ Equality Act (Section 13(2))

⁴ See *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16

“If the UK policy leaves grey areas that can be misinterpreted it would be better to define the exceptions.” (Susan Le Gresley)

Comments from respondents who felt that we should follow the UK Law, and allow a general defence of justification to direct age discrimination, included the following –

“The employer should be able to claim the general exception. It will be up to the Tribunal to determine whether it has reasonably been applied.” (Wendy Lambert, Lambert Legal)

“As a large employer predominantly based out of the UK we are accustomed to dealing with UK discrimination legislation. In the particular situation of age discrimination law, the UK definitions have not caused us any difficulties thus far. We would not see the need to deviate from them.” (CIPD respondent)

“Unite accepts the logic of having a defence of justification in relation to direct age discrimination. All protected characteristics are unique. The most significant feature of age as a protected characteristic is that we are all people of age. We agree with the courts in the UK that the scope of the defence in relation to direct discrimination should be more limited than in relation to indirect discrimination and consider that the States of Jersey should adopt in its legislation with reference to the social policy objective.” (Unite the Union)

“To not include a defence creates an imbalance of rights between employer and employee... If we in Jersey do not give employers the chance to at least present the logic behind their decisions then we are inadvertently restricting their business development.” (Anonymous respondent)

“The potential difficulty which arises from not having a general defence of justification to direct age discrimination is that the exceptions will turn out to be insufficient in their scope. It may be that this can be addressed by providing a general defence to direct discrimination and or indirect discrimination where compliance would involve disproportionate cost to the employer or to any associated employer (or any benefit scheme run provided by such employer). Perhaps the exception could be limited by reference to benefit schemes which were in place prior to the law coming into force.” (Huw Thomas, Carey Olsen)

Other respondents noted that, by trying to be prescriptive and listing each exception, it is inevitable that some issues will be missed, leading to Tribunal complaints in circumstances where commonsense suggests that the action should not have been treated as an act of age discrimination.

Outcomes

This is clearly a fundamental policy decision. A law on discrimination must try to draw a balance between the need for certainty and clarity in terms of what is required, and the flexibility needed to deal sensibly with unforeseen circumstances where discrimination would generally be accepted as fair. The UK approach seems very flexible – but is also the cause of much uncertainty. It is not yet clear when direct discrimination can be justified, and considerable litigation on the point has yet to resolve the uncertainties inherent in the general defence.

Replicating the UK position is in, any event, not easy, as it depends on the effect of the EU Equal Treatment Framework Directive (2000/78/EC), Article 6 of which allows for direct discrimination which is justified by a legitimate aim “including legitimate employment policy, labour market and vocational training objectives”. The extent to which this limits the scope of the permitted justification was explored by the Supreme Court in *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, in which Baroness Hale identified 9 specific legitimate aims approved by the European Court of Justice. It would be difficult to replicate the scope of this case law in a series of clear principles outlined in the Regulations themselves. In addition to this, the European Directive only applies to discrimination in the context of employment, and does not extend to the wider provision of goods and services. The Equality Act only sets out one general defence of justification, but it appears that its meaning will shift depending on whether the alleged discrimination is within the scope of the Directive itself.

The only sensible course of action is either to have a general justification defence, leaving it to the Tribunal and the courts to decide what does and does not count as a legitimate aim, or to avoid a general defence altogether and rely on specific exceptions.

It should be remembered that these Regulations form part of a whole, in that they amend the [Discrimination \(Jersey\) Law 2013](#) (the “Discrimination Law”). No other protected characteristic has a general defence of justification, and so the first question must be what is so special about age that it requires one? It has been pointed out that we all have an age – but we also all have an ethnic origin. It is true, however, that our age changes constantly over time in a way in which our ethnic origin or sex does not.

The Minister is conscious of the risk that new legislation might have unforeseen consequences which could have a damaging effect on employment or the provision of services. It is therefore proposed that the Regulations will be amended to include a general justification defence of “a proportionate means of achieving a legitimate aim”. Including a general justification defence will also allow us to simplify some of the specific exceptions that would otherwise have to be included. In particular, there is no longer any need for a specific exception relating to retirement of those under pensionable age, nor in relation to the provision of age-related goods and services. In each case, what will matter is that the actions of the employer or service provider are a proportionate means of achieving a legitimate aim.

EXCEPTIONS

Exceptions set out the circumstances in which an act will not be treated as a prohibited act of discrimination. The Discrimination Law currently includes “general” exceptions that will apply to all protected characteristics, and exceptions that are specific to certain protected characteristics. Commonsense dictates that it is appropriate to include certain exceptions so that age can be taken into account. The following exceptions were proposed.

3. Financial and insurance services

Respondents were asked if they agree with the proposal to include an exception for the provision of financial and insurance services (new paragraph 2K of Part 1 proposed for Schedule 2 to the Discrimination Law by Regulation 4).

The exception would allow 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, only if it is reasonable to do so based on statistics and actuarial data from a source on which it is reasonable to rely. Similar exceptions already exist in relation to the protected characteristics of race and sex.

Of the responses to the Minister’s survey, 83% of respondents agreed with the proposed exception for the provision of financial and insurance services, and 17% disagreed. Of those who responded to the CIPD survey, 95% agreed with the proposed exception.

Comments from respondents in favour of the exception included the following –

“Essential to maintain fairness in respect of premiums, benefits and charges according to the level of risk reflecting age factors.” (Paul St. John Turner, employee, financial services)

“This is obvious – insurance companies cannot provide personal insurance unless they have provided appropriate statistical risks based on general actuarial information which is age related. However, while premiums could be high, they should not be excluded altogether, for example, making it impossible for elderly people to travel.” (Tony Bellows, employee, financial services)

Outcomes

The responses indicate that it is appropriate to include an exception so that age can be taken into account in the provision of financial and insurance services. The Minister intends to retain the exception to provide certainty in the provision of these services.

4. Access to States schemes

Respondents were asked if they agree with the proposed exception for access to States-provided facilities and services, such as employment schemes, that apply age-related criteria (paragraph 25 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4).

The draft exception provides that it would not be an act of 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 specific facilities and services targeted to individuals in that age-group. For example, the States of Jersey 'Advance to Work' scheme targets those aged 16–24 to provide experience and skills for young people who may have little or no experience of the workplace. Other schemes, such as 'Advance Plus', provide employment services to people of any age.

Of the responses to the Minister's survey, 65% of respondents agreed that such an exception should be included, and 35% did not agree. Of those who responded to the CIPD survey, 79% agreed with the proposed exception.

Comments from respondents who agreed with the exception included the following –

“Opportunities need to be created to enable young people to start their working life and to develop their skill sets.” (JACS)

“This seems essential for such facilities to achieve their objectives.” (Paul St. John Turner, employee, financial services)

“As long as appropriate consideration is also given to other schemes, so that, for example, 40 or 50 year olds out of work can also have access to appropriate training opportunities and facilities suitable to their age and experience.” (Tony Bellows, employee, financial services).

Comments from respondents who did not agree with the proposed exception included the following –

“Everyone should have the same opportunities if they are out of work.” (CIPD respondent)

“Already back to work schemes are specifically targeted at younger people and elder people are excluded, ignored, and on generally less catered for. If there was a balance of schemes I would not have an issue. Elder people can have less scope in the work area due to the physical aspect of some jobs, coupled with firms not wanting to employ and train an elder person.” (Nicolas Jouault, member of the Public).

Outcomes

Many respondents appreciated why such an exception will be important to ensure that targeted services can continue to be provided without the risk of a complaint. Even some of those who did not agree with the exception demonstrated, within their own comments, why there is sometimes a need to provide different employment services for different age-groups. A similar exception already exists in relation to race discrimination.

This exception would only apply to services that are supported by a Ministerial Decision or a decision of the States Assembly. The Minister has decided to include a general defence of justification – which will mean that any training, work experience, and employment schemes might be justifiable as a proportionate means of achieving a legitimate aim. However, this specific exception will be retained to provide certainty in the provision of services that are genuinely intended to support, rather than exclude, specific age-groups.

5. Immigration

Respondents were asked if they agree with the proposed exception for immigration (paragraph 26 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception would provide that it is not an act of age discrimination for an officer of the Jersey Customs and Immigration Service to treat some people differently because of their age, where this is necessary in exercising their duties under the immigration legislation. This would allow the immigration authorities to impose particular requirements or conditions, or to refuse to admit or allow a person or group of persons to remain in Jersey for a reason relating to their age.

Of the responses to the Minister's survey, 71% of respondents agreed with the proposed exception and 29% did not agree.

Comments from respondents who agreed with the proposed exception for immigration included the following –

“As long as there are published guidelines around how this exception applies and how this is likely to be exercised by Customs and Immigration. This will protect both those wishing to live in Jersey as well as any Customs Officer acting in the line of duty.” (JACS)

“Acceptable to the extent that this exception is necessary for the fulfilment of the requirements of the immigration law.” (Paul St. John Turner, employee, financial services)

“You must allow people to do their job properly so that if professional training dictates that certain parties represent a specific risk then fine.” (Employer, financial services).

Comments from respondents who did not agree with the proposed exception for immigration included the following –

“I think I would need to understand the rationale behind its inclusion in the UK Act first.” (Wendy Lambert, Lambert Legal)

“As dangerous ground for Customs and Immigration as could be contrary to Human Rights legislation.” (Employee, public sector)

“Further and particularly in relation to age it is regressive and should at least be the subject of justification.” (Unite the Union).

Outcomes

The draft exception has been discussed with the local Customs and Immigration Service in relation to the rules under which officers exercise their duties under the immigration legislation. It has been agreed that the exception will be reviewed by the Law Officers’ Department and redrafted if necessary. The Equality Act includes a specific age discrimination exception for immigration.

6. Higher education and employment opportunities

Respondents were asked if they agree with the proposed exception for the provision of higher education (paragraph 28 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4).

The draft exception would provide that a higher education provider is protected from a claim of age discrimination where, if it selects students only of a certain age-group as suitable for a particular course, the act of age discrimination would not have been prohibited only if it had been done in the context of employment. This is intended to address potential difficulties where a higher education course is linked to an employment opportunity that is aimed at a particular age-group, such as an apprenticeship.

Of the responses to the Minister’s survey, 75% of respondents agreed with the proposed exception and 25% did not agree. Of those who responded to the CIPD survey, 84% agreed with the proposed exception.

Respondents who agreed with the proposed exception for the provision of higher education commented as follows –

“This exemption would ensure that young people are not disadvantaged in taking up courses that will lead to an apprenticeship and it would be inappropriate if a by-product of this law was to inadvertently take away these opportunities.” (Malcolm Ferey, Citizen’s Advice Jersey)

“We need to ensure that this does not cause anyone (from the age of 16 years) to potentially lose a job because they have been denied access to a higher education course as part of a ‘work scheme’/apprenticeship.” (JACS)

“This is consistent with the equivalent exceptions in the context of employment.” (Paul St. John Turner, employee, financial services).

Comments from respondents who did not agree with the proposed exception included the following –

“Many elderly people are struggling to find new employment and may not have the skills to do so, why should such services be limited to the young? Again if there were such schemes available for the sole benefit of elderly I would not have an issue.” (Nicolas Jouault, member of the Public)

“Life long learning, Need to be able to study at all ages.” (Employer, hotels, restaurants and bars).

Outcomes

This was always intended to be a very limited and technical exception, relating not to the general provision of higher education, but to courses which were directly linked to age-related employment opportunities. The exception was initially needed because, without it, a college would be forced to provide a course to someone even if the employment to which it related was not available to them; for example, because of a genuine occupational requirement or because the employer was about to require them to retire.

With the new proposal for a general justification defence to be included in the Regulations, the need for this specific exception falls away. If circumstances arise in which a college feels unable to offer a course because of age, then it can explain why and show that its actions are a proportionate means of achieving a legitimate aim. The default position, however, which will apply in the vast majority of cases, is that higher education should be available to all without discrimination on the grounds of age.

7. Apprenticeships

Respondents were asked if they agree with the proposed exception for apprenticeship schemes (paragraph 29 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception would allow (but would not require) apprenticeship schemes to be aimed at and offered to people aged 21 or younger, or by giving preference to those aged 21 or younger.

Of the responses to the Minister’s survey, 64% of respondents agreed with the proposed exception and 36% did not agree. Of those who responded to the CIPD survey, 72% agreed with the proposed exception.

Respondents who agreed with the proposed exception for apprenticeship schemes commented as follows –

“The word Apprentice put you into a category of a certain age hence e.g. a person say in his 40s can’t be classed as an Apprentice.” (Jersey resident)

“Jersey school leavers need to have access to opportunities across all the industries and apprenticeships aimed at this age group can secure this... it would be interesting to see how many people over the age of 21 would be disadvantaged by this exception e.g. how many actually apply for and are declined for apprenticeships. Furthermore the exception does not prevent an

employer offering an apprenticeship to someone over the age of 21 should they wish to do so.” (JACS).

Respondents who did not agree commented as follows –

“Access to any apprenticeship should not exclude on the basis of age, those who are older may wish to change career or find themselves after redundancy looking to need to retrain.” (Parent)

“Flexibility in the workplace is essential as is re-training at different stages of life. An apprentice should not be seen only as someone who is a young person.” (Employee, public sector)

“With employment being so competitive, and so many young people aged 21–25 still finding themselves struggling to make a solid career, I believe the age banding for apprenticeships shouldn't be capped at 21. This move would exclude a potentially better skilled more mature group of people who will benefit considerably from being included on apprenticeship schemes without being pipped to the post by those under 21. It is difficult enough as it is to secure a foot on the career ladder without more age related barriers being created.” (Anonymous respondent)

“Apprenticeships to me mean learning a new trade/career from the bottom. Why should this be restricted by age if an individual can afford to do it?” (CIPD respondent).

Outcomes

This exception was not intended to undermine the ability of older workers to retrain. The Minister appreciates that many people benefit from the opportunities that an apprenticeship can offer at different stages in their working life. On the other hand, apprenticeships perform an important function in providing a bridge between school and working life for many young people who are not pursuing full-time higher education. If they have to compete with older candidates who already have some years of work experience they will be at a significant disadvantage. The Minister remains of the view that, in the right circumstances, employers should be allowed to target apprenticeships at younger workers.

However, in view of the concerns that have been expressed, together with the proposal for a general defence in cases where discrimination is a proportionate means of achieving a legitimate aim, the Minister proposes that the specific exception relating to apprentices should be removed. The default position will therefore be that apprenticeships should be equally open to all. It will be possible for employers who want to provide particular opportunities for young people to express a preference for apprentices from a particular age-group. Under the general defence this will be lawful, as long as the employer can show that it is a proportionate means of achieving a legitimate aim.

8. Employment benefits

Respondents were asked if they agree with the proposed exception for 3 types of employment benefit (paragraph 30 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4) –

- Benefits given to employees based on their length of service
- Insurance and related financial services (e.g. life assurance) to employees only while they are under pensionable age
- Provision of child care for children of a particular age-group (e.g. child care facilities or vouchers).

Of the responses to the Minister’s survey, 92% of respondents agreed with the proposed exception and only 8% did not agree. Of those who responded to the CIPD survey, 94% agreed with the proposed exception.

Comments from respondents who agreed with the proposed exception for employment benefits commented as follows –

“Many employers like to offer enhanced benefits based on length of service as recognition of the loyalty that employees have shown by remaining with them... The cost of insurance and financial benefits do increase with age and may be prohibitive for some employers, thus rather than run the risk of a discrimination claim an employer could choose to not offer such benefits to all employees. This in turn could lead for instance to employees having to rely solely on the States Pension having made no provision for a personal pension during their working life. To extend provision for child care is likely to be cost prohibitive therefore the same applies as for insurance, however in this case this may mean that skilled employees remain at home to care for their children, this in turn could lead to a drop in individual skills and also an employer loses out on a valuable employee.” (JACS)

“(i) Length of service; these benefits are intended to encourage loyalty towards the employer. (ii) Insurance: there is a genuine risk that employers would cease to offer this benefit to any employees if this exception was not provided. (iii) These benefits are intended to help parents of younger children stay in work.” (Paul St. John Turner, employee, financial services)

Law at Work asked some more detailed questions of respondents to its own survey to find out whether employers offer these employment benefits, and has summarised the outcomes in respect of each type of benefit as follows –

“Employment benefits – based on length of service – Of those who provide such benefits (63%), 86% agree with this exception (Para. 30(1)) which could discriminate against younger workers and wish such practice to remain lawful on the grounds that service-related benefits attract, retain, reward and are valued by their employees... LAW’s recommendation: to retain the exception in para. 30(1) in full.”

“Employment benefits – insurance – Of those who provide such benefits (46%), 90% stop them at pensionable age and 75% wish such cessation to remain lawful, citing costs as precluding the continuance of such provision beyond pensionable age... Without this exception, more than half of respondents (57%) would either considering withdrawing all benefits for all or reducing level or length of cover across the board. LAW’s recommendation: to retain the exception in para. 30(2-3) in full particularly as any withdrawal of privately-funded medical provision will invariably fall on the States.”

“Employment benefits – childcare assistance – Of those few who provide such assistance (15%), 100% of respondents wish such practice to remain lawful on the grounds that childcare assistance is valued by both employees and employers and important to work life balance. Accordingly, we conclude 100% of respondents agree with this exception (Para. 30(4)). LAW’s recommendation: to retain the exception in para. 30(4) in full although in practice it will only be of protection to a few employers.”

Comments from respondents who did not agree with the proposed exception for employment benefits included the following –

“Unite believes these employment benefits are obvious examples of justifiable age discrimination.” (Unite the Union)

Outcomes

It is clear from the responses that there is widespread support for this exception. It makes sense to most people as an appropriate way of determining benefits for employees, and there are similar exceptions in the UK Equality Act. There is a risk that if employers were not permitted to base some of these decisions on age or length of service without facing a claim of age discrimination, then they might stop offering these types of employee benefits.

9. Minimum wage

Respondents were asked if they agree with the proposed exception in relation to minimum wage entitlement (paragraph 31 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception is required to allow an employer to pay school-children at a lower rate than is paid to an employee who qualifies for the minimum wage by virtue of being over school-leaving age. The intention is that an employer should not face a claim of age discrimination from staff under age 16 who are lawfully paid less than the statutory minimum wage.

Of the responses to the Minister’s survey, 70% of respondents agreed with the proposed exception and 30% did not agree. Of those who responded to the CIPD survey, 93% agreed with the proposed exception.

In its own survey, Law at Work found that 4 respondents employed staff who were of compulsory school-age, and none of those staff were paid less than the minimum wage. Law at Work’s recommendation was *“to retain the exception in para. 31 in full as although in practice it may not be utilised by employers (who, on being asked, did not*

realise that such individuals did not qualify for lower than minimum wage), removing it could impose a barrier to younger people wishing to work whilst attending school.”.

Comments from respondents who agreed with the proposed exception in relation to minimum wage entitlement included the following –

“I agree because this law should not have the effect of removing the possibility of young people entering the workplace and gaining valuable experience. If employers were required to pay all workers the minimum wage, regardless of age, there would be no incentive for employers to take on persons who were under school leaving age.” (Malcolm Ferey, Citizen’s Advice Jersey)

“Whilst an employee is still in full-time education there will be periods of time when they are not available to an employer and also the restrictions that other legislation places on under-16s working does limit where an employer can utilize them.” (JACS).

Comments from respondents who did not agree with the proposed exception in relation to minimum wage entitlement included the following –

“The minimum wage is low enough and no exception should be allowed. Just because someone has attained their 16th birthday is not sufficient reason for a much lower salary to be paid.” (Employer, consumer and carer)

“Do not agree with the concept of a minimum wage. It should be a living wage as applicable to the employee’s circumstances.” (Employee, public sector)

Outcomes

This exception is designed to ensure that the Discrimination Law does not create inconsistencies between rights in the workplace. Some of the comments indicate that respondents were concerned about the perceived unfairness of the proposed exception. The level of the minimum wage and the age at which it must be paid are not matters for this consultation. Without an exception, the principle established in the Employment (Jersey) Law 2003, i.e. that school-children are not entitled to be paid the minimum wage, would be undermined.

10. Redundancy payments

Respondents were asked if they agree with the proposed exception for redundancy pay (paragraph 32 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4).

The calculation of statutory redundancy pay in Jersey is not based on age, but it does take length of service into account. To ensure that this is not an act of indirect age discrimination, the draft exception provides that an employer will not discriminate when it pays a statutory redundancy payment to employees when they are made redundant. The exception also permits redundancy payments that are in excess of the statutory minimum, as long as they are calculated using the same formula for all employees, regardless of age.

Of the responses to the Minister's survey, 95% of respondents agreed with the proposed exception and 5% did not agree. Of those who responded to the CIPD survey, 100% agreed with the proposed exception.

Law at Work, in its own survey, asked employers if they provide redundancy pay in excess of the statutory minimum and, where enhanced redundancy payments are based on age, if employers wanted to continue calculating payments in this way. Law at Work presented their findings as follows –

“Of those few who provide enhanced redundancy payments (26%), 20% of respondents calculate such payments on age and wish such practice to remain lawful on the grounds it is more difficult for the older to secure alternative employment. Accordingly, we conversely conclude 80% of respondents agree with this exception (Para. 32) that enhanced redundancy payments be permitted so long as they are calculated on the same basis for all employees regardless of age. Further, without this exception, one large employer respondent (350 employees) would change rather than abandon their enhancement scheme to fall within the exception, i.e. downwards so that the old were not advantaged as opposed to commensurately increasing payments for the young. LAW's recommendation: to retain the exception in para. 32 in full as although this will remove hitherto discriminatory rewards from older workers, the Regulations should operate to facilitate the securing of alternative work post-redundancy.”

Comments from respondents who agreed with the proposed exception for redundancy pay included the following –

“Where calculated on a consistent basis, redundancy pay is based on length of service. Some schemes may pay higher levels for older people to reflect the increased difficulty for them in finding new employment; if applied consistently these are also fair and should be covered by the exception.” (Paul St. John Turner, employee, financial services)

“Loyalty should be rewarded, that is not an issue for most people. The problems start when someone feels they have been selected for redundancy because of their age.” (Employee, travel marketing).

Comments from respondents who did not agree with the proposed exception for redundancy pay included the following –

“Again redundancy pay is an example of justifiable age discrimination and could be confirmed as an example of such.” (Unite the Union).

Outcomes

There is clearly widespread support for this proposal, and it makes sense to include this exception. As with many of the other exceptions, the UK Equality Act includes a specific exception for redundancy pay, despite also having an opportunity to justify age discrimination in redundancy pay under the general justification defence as a proportionate means of achieving a legitimate aim.

11. Retirement age

Respondents were asked if they agree with the proposed exception for retirement age (paragraph 33 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4) as well as the corresponding amendment to the upper age limit for protection against unfair dismissal (Regulation 5).

The current position in the UK is that any dismissal by reason of retirement will be direct discrimination unless it can be objectively justified. Guidance as to when such justification may be established has been given by the Supreme Court⁵, but the position remains uncertain. Given the difficulties with the UK model for dealing with retirement, we had proposed not to replicate that position in Jersey. The draft exceptions provided that –

1. Dismissal at pensionable age (as defined by the Social Security Law), 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.
2. When an employer sets a retirement age that is below pensionable age, this will not amount to age discrimination as long as the employer has a policy of requiring employees to retire at that age and that policy is a proportionate means of achieving a legitimate aim.
3. An employer who is recruiting staff, promoting staff or providing training to staff will be allowed to take imminent retirement into account in decision making without that being an act of age discrimination.

Of the responses to the Minister's survey, 56% agreed with the proposed retirement age exception and 44% disagreed. Of those who responded to the CIPD survey, 100% agreed with the proposed exception.

Comments in support of the exception included the following –

“It should be every employer's right to set a retirement age which meets their individual business needs. Looking to the UK Seldon case – in that instance it was deemed perfectly relevant to have a retirement age specified by the aims and ethos of the business (social policy).” (Anonymous respondent)

“Without this exception the risk of a claim for employers would remain in place, and the not knowing how it could be viewed and what justifications are required would create uncertainty around claims. Employers need to be able to have succession planning in place, and without a retirement age to rely on this could develop into a long schedule and may in fact mean that vital employees leave a business to seek the next step up in their career path. This in turn could lead to employment opportunities being opened up at the younger or junior end of the market; the knock on effect of this a shortfall in available skilled employees further down the line.” (JACS)

⁵ The case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16

Comments opposing the exception for retirement age included the following –

“If People are able and wish to work beyond retirement age they should be allowed to do so The States Pension will become unsustainable when people live longer and still able to work maybe into their 90s or beyond one important point is this people will live into mid 100s in years to come hence making use of all able workforce is important to our economy.” (Jersey resident)

“I believe that, instead, “Default Retirement Age” or the ability to force retirement on the basis of age should be removed... Arguments against this have been expressed locally on the grounds of succession planning uncertainty, job blocking for younger people and declining job performance as employees age. With proper management , flexibility and support, and taking the demographic factors of an “ageing society” into account, on balance a removal or partial removal of default retirement age should prove advantageous, as well as being in keeping with the spirit of the removal of age discrimination.” (Paul St. John Turner, employee, financial services)

“In the modern world forced retirement is outmoded and not in keeping with a social inclusion policy, we should adopt the UK stance, thereby allowing employees that wish too, to work on thus reducing the need for immigration.” (Employer, transport, storage and communications)

“Very strongly disagree. This proposal is for the benefit of employers and gives no assurance for a healthy employee wishing to keep on working past normal retirement age as they would provide vast experience unless deemed incompetent.” (Employee, electricity, gas and water)

“It cannot make sense (other than for legitimate reasons e.g. health and safety) to force people into retirement before the statutory pensionable age, currently 65. To do so could cause genuine hardship in retirement due to reduced pensions arising from less than the optimum years of contributions. People forced into retirement at, say, 60 will never work again as there is unavoidable age discrimination of this kind.” (Anonymous respondent, finance sector)

“Protection against forced retirement is fundamental to protection against age discrimination. This must be balanced against the recognition that employers to have a perfectly legitimate interest in managing the age profile of their workforce and it should be open to employees to be able to objectively justify a retirement age.” (Huw Thomas, Carey Olsen).

A number of respondents commented in opposition to the exception based upon their own experiences, as follows –

“My current employer’s policy is forced retirement of permanent contract at age 60, however, I will not receive my state pension until I am 67. I am a 59 year old divorcee with my own home (with a mortgage) and feel far too young to retire. How will I live with no income and financial commitments for 7 years?” (Employee, finance sector)

“My company still has a policy that staff retire at 60, although some people are kept on, on a temporary contract basis after this age. I am extremely worried about my future, as I will not be able to afford to retire. I currently rent my apartment and I if made to retire I will be homeless. I want to be able to work as long as I am able. I do not want to be a burden. Why make people retire if they want to work and are able?” (Employee, finance sector)

Law at Work found that 47% of the employers responding to its survey require their employees to retire at age 65 or higher, and that 70% of these employers would be unhappy to allow employees to retire when they wish. Law at Work concluded that 70% of those responding to its survey agreed with the first part of the exception, which would allow an employer to retire an employee without risking an age discrimination complaint, as long as they have a policy that requires employees to retire at pensionable age or higher. Law at Work commented as follows –

“There are several grounds for such stance: some employers equate retirement age with statutory pensionable age, and think that any State stance that allows employees to be protected at work beyond pensionable age represents a double standard by the States. Others cite capability concerns (including: physical falling off for manual work “wear and tear” and mental incapability or intransigence: “not overly productive”; “lack skills for the modern world” and “reluctant to learn new skills”). Others cite the need for succession planning and new talent. That said, not all respondents are adverse to retirement at will but seek reassurance that fitness assessments will be given credence. LAW’s recommendation: to retain the exception in para. 33(1) for at least five years. Our findings show that businesses are not keen to take the risk of extending the normal retirement age beyond 65. Further, their feedback (particularly to the next exception relating to retirements under pensionable age) shows how ill-prepared they are to deal with the concept of objective justification, let alone retirement at will.”

Law at Work has recommended a transition phase that would allow employers to become accustomed to justifying retirement and to deal with capability issues, with possible case law developing in that period. In relation to retirement age below pensionable age, 53% of the employers responding to the Law at Work survey currently require their employees to retire **under** pensionable age. Of these, 70% would be unhappy to increase their retirement age to pensionable age or higher. Law at Work commented as follows –

“Justification for this stance was very thin or, in fact, non-existent – just an assertion of a desire to retire below pensionable age. Ultimately, no respondent was able to objectively justify as a policy of retirement before the age of 65 in the way courts are likely to accept. LAW’s recommendation: to retain the exception in para. 33(2) both now and amend it as the occasion arises for any future law which removes a default retirement age so that any dismissal for retirement requires objective justification. To avoid the uncertainty for both employers and employees that the consultation paper itself recognises comes with this position, LAW recommends the Regulations codify instances of objective justification that UK and EU courts have upheld (in the same way that it has done in lieu of a generic defence for direct discrimination) rather than either wait for judge-made law on the same or provide an open ended defence to direct discrimination.”

Law at Work suggested some examples of objective justification that could be included in the Regulations, including inter-generational fairness, dignity, career progression opportunities, and creating a balanced workforce.

The Jersey branch of the Employment Lawyers' Association (ELA (JB)) commented on the merits of the proposed exception (which they refer to as a Default Retirement Age (DRA) provision) as follows –

“The inclusion of the DRA Provision obviously benefits employers, enabling them to act decisively in connection with pension-age staff. Given the pace at which discrimination laws and regulations are now being introduced in Jersey, it is possible that some employers would welcome regulations that are not unduly complicated to administer or do not have an onerous impact upon decisions they may wish to take in relation to the structuring of their workforce.”.

The ELA (JB) also commented on the drawbacks of the proposed exception –

“Ultimately it preserves the status quo, preventing the pension-age worker from choosing whether he/she would like to retire and draw on a pension or whether he/she wishes to carry on contributing to the employer's business and to the economy. In addition to job security issues, the maintenance of the DRA Provision is a lost opportunity to help change views about the retirement process, encouraging employers and workers to be more positive about the contribution people can make in their late 50s and 60s. Stakeholders such as Age UK referred to the “countdown culture”; the perception that an employee's value lessens simply because he or she is growing older. The Committee considered that the retention of the DRA Provision greatly reduces the impact that the Regulations may otherwise have had in protecting the rights of workers approaching, or that have attained, retirement age. It is a decision for the States of Jersey as to whether the inclusion of the DRA Provision will aid or hinder its medium/long term social and economic policy objectives.”.

Concerns were raised at the stakeholder consultation meetings that the retirement age exception goes too far in limiting the protection against age discrimination that is offered by the Regulations. A written response from a Law firm sums up the issue as follows –

“This provision provides clarity and certainty for employers and enables them to dismiss at that time with no liability for discrimination (on the grounds of age) or unfair dismissal. There is no doubt that clarity within the law is preferable, particularly for those looking to work within the boundaries of the legislation, and for that reason, such a provision is likely to be viewed very positively by employers. However, we do have concerns that the effect of the provision is, in reality, to preserve the current state of affairs thereby affording no new protection to those members of the workforce that are at or approaching retirement age. One of the stated key objectives of the Social Security Department (as outlined in the Consultation Paper) includes the criteria that the “Discrimination and Employment Law protects older workers from discrimination and exclusion from the workplace”. It is our view that this

provision, as currently drafted, does not provide any added protection to older workers and significantly reduces the impact of the Regulations.”.

Unfair dismissal age limit (Regulation 5, the new Article 74) – So that the right to protection against unfair dismissal accords with protection against age discrimination, it was also proposed to amend the Employment Law to provide that employees are protected against unfair dismissal either until they reach pensionable age or, where that particular job has a higher retirement age, the employee is protected against unfair dismissal until they reach that higher age.

Of the responses to the Minister’s survey, 67% agreed with the proposed amendment to the upper age limit for protection against unfair dismissal and 33% disagreed. Of those who responded to the CIPD survey, 92% agreed with the proposed amendment. Comments on the proposed amendment including the following –

“The employment law allows for 5 fair reasons for dismissal (retirement is not one of these) so if an employee has reached retirement age and is no longer able to undertake the role as effectively as they had done when they were younger, such a dismissal is likely to follow a capability process, which would be an unjust way to finish one’s working life with that employer and is unlikely to reflect the value and skills for the work they had undertaken at a younger age.” (JACS)

“I would take the view that the insertion of retirement as a potentially fair reason for dismissal into the Employment (Jersey) Law 2003 would achieve a fair and reasonable balance. The provisions could be usefully based on those in force in the UK between 2006 and 2011 ... Such an approach would in my view balance the interests of employers in being able to manage retirement and interests of employees wishing to work beyond a retirement date.” (Huw Thomas, Carey Olsen)

“Exceptions should not be made to allow employers to retire employees purely on grounds of age if they are competent to do the job. In a time when we are trying to reduce the burden on the States of an ageing demographic, it makes no sense someone actively earning and paying tax to be removed from the workforce purely on the grounds of age if they can still do the job.” (Tony Bellows, employee, financial services)

“It provides greater protection to working people and is eminently justifiable particularly in the context of age discrimination legislation.” (Unite the Union).

People approaching retirement age (paragraph 34 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4) – The draft Regulations include an additional exception relating to retirement that would allow an employer to take imminent retirement age into account in deciding who to recruit, promote or provide training to. Law at Work found that 50% of its employer respondents wanted to be able to avoid recruiting, promoting or providing training to those nearing retirement age without it being unlawful. Although 50% of the Law at Work respondents agreed with the exception, 78% considered 6 months before retirement too short a period. The preferred permissible period ranged from 12 months to 5 years. Law at Work commented as follows –

“Rationales included: wasted costs of training; the need for a return on such investment; and possible unsustainable increase in workload for existing staff responsible for training (in light of the likely increase in older workers that the Regulations create). LAW’s recommendation: to retain the exception in para. 34 and to extend the period in para. 34(2) to 6 months or longer where such direct discrimination can be objectively justified.”

Outcomes

Reaching a policy decision about retirement age is the most difficult decision in relation to these draft Regulations. It is clear that there are arguments on both sides, and responses to the Minister’s survey were split. A matter such as this will always polarise respondents and there is no one outcome that will satisfy all stakeholders. There is clearly a balance to be struck between certainty and flexibility.

To address the concerns of some respondents that the exception, as drafted, excessively limits protection against age discrimination, an alternative was explored by respondents during one of the stakeholder consultation meetings. The suggested exception would have required an employer to justify – as a proportionate means of achieving a legitimate aim – a dismissal on grounds of retirement at any age. This would be quite flexible in that an employer could potentially justify any retirement, but the position for employers would be less certain as to whether or not the Tribunal will find age discrimination. A number of the respondents provided comments on that suggestion, and the Minister was grateful to have the opportunity to consider the alternative suggestion in more detail. Some stakeholders felt that employers would be able to manage this uncertainty, whereas others were concerned that employers would find performance management of older workers difficult and that employers would need a transition phase to adjust to such a requirement.

It was clear from the responses that some employers require employees to retire at the age of 60. Employees who choose to retire at that age can continue to do so, but requiring an employee to leave work many years before pensionable age could cause considerable hardship. It was originally proposed that there should be a specific exception that would only allow forced retirement below pensionable age where the employer can demonstrate that this is a proportionate means of achieving a legitimate aim. That exception essentially replicated the general justification defence, and so there is no longer any need for that specific exception. The only change made by removing the specific exception is that there will be no express requirement for the employer to have a policy of retirement under pensionable age. However, it is highly unlikely that the Tribunal would find that an employer has acted in a proportionate way if it has decided to dismiss an employee without having a clear policy of requiring employees of that age to retire. This will provide an improvement in the rights of such employees.

As for retirement at pensionable age, the Minister appreciates that this is a widely-adopted practice, and that many employers will have planned on the basis that they could require their employees to leave when they reach the age of 65. However, the Minister agrees with those respondents who felt that the consultation draft of the Regulations provided insufficient protection for employees. Many employees who reach pensionable age still have much to offer the world of work in terms of their skills and experience, and need to work in order to support themselves and their families. With demographic trends, such as increases in life expectancy and people starting work later in life, as well as funding issues for pensions, there is a good business case for enabling older workers to extend their working lives to enhance

economic output. In addition, the proposal is in line with the strategic priorities of the States to optimise economic growth by removing barriers to employment and increasing participation in rewarding employment.

It is therefore proposed that the retirement age exception should be retained, as drafted, for a period of 2 years. This should allow employers sufficient time to assess whether they need to require employees to retire at a fixed age and to make plans accordingly. After 2 years (from 1st September 2018), the specific exceptions for retirement would no longer apply. The position would then be similar to the UK; employers would be able to justify the forced retirement of an employee where this a proportionate means of achieving a legitimate aim.

Unfair dismissal – To mirror the Discrimination Law exception for retirement age, the upper age limit on protection against unfair dismissal would remain as drafted for 2 years. However, the Minister intends to amend the Regulations so that the upper age limit on protection against unfair dismissal would not apply from 1st September 2018, and an employee of any age would be entitled to take an unfair dismissal complaint to the Tribunal. At that time, we would also insert “retirement” into the Employment Law as a potentially fair reason for dismissal. The issue in each unfair dismissal case would therefore be whether the employer had acted reasonably in requiring the employee to retire. As recommended by a number of respondents, a Code of Practice would be provided to guide employers in how to operate a fair retirement process. The Code would also be taken into account by a Tribunal when considering the issue of justification in a discrimination claim.

Nearing retirement age – Law at Work have suggested that an employer should have the option to justify a longer period of time in the run-up to retirement age, in making decisions about who to recruit, promote or provide training to. The Minister intends to request a change to the draft Regulations so that the exception would apply for 6 months or such longer period as is reasonable in the circumstances.

12. Pension schemes

Respondents were asked if they agree with the proposed exception for occupational, personal and group pension schemes (paragraph 35 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The equivalent exception in the UK legislation provides a range of specific and complex exceptions in relation to the operation of occupational pension schemes.

Of the responses to the Minister’s survey, 72% agreed with the exception, and 28% disagreed. Of those who responded to the CIPD survey, 100% agreed with the proposed exception.

Comments from respondents who agreed with the proposed exception for pension schemes included the following –

“The cost of insurance and financial benefits do increase with age and may be prohibitive for some employers, thus rather than run the risk of a discrimination claim an employer could choose to not offer such benefits to all employees. This in turn could lead for instance to employees having to rely solely on the States Pension having made no provision for a personal pension during their working life.” (JACS)

Comments from respondents who did not agree with the proposed exception for pension schemes included the following –

“This exception seems to require further examination. Occupational pension benefits should not be restricted by age, and removal of these benefits (e.g. employer pension contributions) on an age basis should amount to age discrimination.” (Paul St. John Turner, employee, financial services)

“Most pension schemes are run by National firms, why complicate matters by not working to UK legislation, which will most likely eventually happen anyway.” (Nicolas Jouault, member of the Public).

Law at Work’s survey of employers found that 45% of the respondents provided pensions. Sixty-two percent of these employers take account of age in the provision of such pensions and would want that practice to remain lawful. Law at Work commented as follows –

“Without the relevant exception, some respondents would consider withdrawing pensions for new staff and/or phasing out their pension schemes altogether. LAW’s recommendation: to retain the exception in para. 35. Pensions are, after all, inherently age discriminatory. Without this exception, pensions would be so burdensome for employers, particularly if encouraging employees to work beyond normal retirement age, and any withdrawal of privately-funded pension provision will invariably fall on the States and its welfare bill.”

A Law firm provided the following comment –

“Article 35 of the Regulations provides the provision of a pension scheme (or other similar scheme) does not amount to age discrimination. Is it intended that this purely be limited to the provision of the scheme so that, for example, the terms of the scheme itself are not caught?”

Outcomes

The exception in relation to pensions was intended to cover not just the employer granting access to the scheme, but also the terms of the scheme itself. It does appear that the drafting is too narrow. It would clearly be unworkable if a pension scheme was not permitted to set age-specific rules on access to benefits, for example. The Minister will seek to amend the exception so that it also covers the terms of any such pension scheme.

13. Goods, facilities and services

Respondents were asked if they agree with the proposed exception for age-related services (paragraph 36(2) to 36(6) of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception provides that a person would not contravene the prohibition of age discrimination by providing age-related services where age is a relevant factor in the effectiveness or suitability of a particular service. The exception describes the circumstances in which it applies.

Of the responses to the Minister's survey, 90% agreed with the exception and 10% disagreed.

Comments from respondents who agreed with the proposed exception for age-related services included the following –

“Keeps consistency between different protected characteristics.” (JACS).

Comments from respondents who did not agree with the proposed exception for age-related services included the following –

“Can't see any need for this or reason it would ever be used.” (Unemployed respondent).

Outcomes

This draft exception provided that a person would not contravene the prohibition of age discrimination by providing age-related services where age is a relevant factor in the effectiveness or suitability of a particular service, and where the discrimination was a proportionate means of achieving a legitimate aim.

Having decided to include a general justification defence, this specific exception becomes unnecessary, and so the Minister has requested that it be removed from the draft. Providers of goods and services would not be acting unlawfully where taking account of someone's age is justified under the general defence. In practice, the Tribunal is likely to have regard to the same issues of effectiveness and suitability that were set out in the draft exception.

14. Healthcare

Respondents were asked if they agree with the proposed exception for the provision of healthcare (paragraph 37 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception would provide that age discrimination by a healthcare provider will not be unlawful where it is proportionate in all the circumstances, having regard to the well-being and clinical needs of the patient, the relevant clinical evidence **and** the prevailing standards of medical treatment.

Of the responses to the Minister's survey, 69% agreed with the exception and 31% disagreed.

Comments from respondents who agreed with the proposed exception for health care services included the following –

“This is consistent with the absence of a general defence of justification, and appropriate for the well-being and clinical needs of the patients.” (Paul St. John Turner, employee, financial services).

Comments from respondents who did not agree with the proposed exception for health care services included the following –

“Any decisions taken because of age or which place specific age groups at a particular disadvantage should be justified as a proportionate means of achieving a legitimate aim.” (Unite the Union)

“I think the general exception should be included.” (Wendy Lambert, Lambert Legal)

“Age should not be a reason for disadvantaging patients.” (Retiree).

Outcomes

This exception is no longer required in light of the proposal to include a general justification defence. The position in Jersey would mirror that of the UK under which age discrimination in the provision of healthcare is unlawful unless it is a proportionate means of achieving a legitimate aim. Health professionals would therefore be able to provide the best possible care based on a proper assessment of clinical need, taking age into account when it is appropriate to do so. What will not be permitted, however, are decisions based on a person’s age which are not justified by the medical evidence or treatment which undermines the dignity of older patients. In the NHS, guidance stresses that appropriate clinical judgments can be made, and that the prohibition on discrimination is concerned with unjustified treatment based on stereotypical assumptions about what is appropriate for people in different age-groups.

15. Age-related concessions

Respondents were asked if they agree with the proposed exception for age-related concessions (paragraph 38 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception would allow service providers and private clubs and associations to offer any type of discount, special arrangement, or special offer to people of a particular age or age-group. It would cover, for example, discounts for pensioners in shops and museums.

Of the responses to the Minister’s survey, 88% agreed with the exception and 12% disagreed.

Comments from respondents who agreed with the proposed exception for age-related concessions included the following –

“People providing services should be permitted to price their services how they like, in order to achieve the aims of their organisation. It is not for government to interfere in the pricing policy of individual businesses.” (Employee, transport, storage and communications)

“Absolutely – pensioners are on lower incomes on average hence special discounts are helpful and increase their quality of life.” (Tony Bellows, employee, financial services).

Comments from respondents who did not agree with the proposed exception for age-related concessions included the following –

“Age-related concessions to the cinema or hairdressers and the like are clearly good for society and could be included as a list of examples.” (Unite the Union).

Outcomes

There is widespread support for this proposal, and it makes sense to include this exception. As with many of the other exceptions, the UK Equality Act includes a specific exception for age-related concessions, despite the general defence. The exception would allow concessions for people in any age-group, not just pensioners. The Minister does not feel that this issue can be dealt with by way of a general defence and a list of examples. There are problems with including examples in legislation, because it is not always clear how they will be interpreted by the courts, and how the inclusion of one specific example might affect the way in which the courts might approach a situation that is not covered in the list.

16. Age-related holidays

Respondents were asked if they agree with the proposed exception for age-related holidays (paragraph 39 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception allows service providers, such as travel agents, to provide age-related holidays. The main purpose must be to bring together people of a similar age: for example, holidays exclusively for the over-55s.

Of the responses to the Minister’s survey, 94% agreed with the exception and 6% disagreed.

There were no comments specifically opposing the draft exception for age-related holidays. Comments from respondents who agreed with the proposed exception for age-related holidays included the following –

“This is in the interests of the age group in question.” (Paul St. John Turner, employee, financial services).

Outcomes

There is widespread support for this proposal, and it makes sense to include this exception. As with other exceptions, the UK Equality Act includes a specific exception for age-related holidays despite the general defence.

17. Age-restricted services

Respondents were asked if they agree with the proposed exception for age-restricted services (paragraph 40). The draft exception allows 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.

Of the responses to the Minister's survey, 97% agreed with the exception and 3% disagreed.

Comments from respondents who agreed with the proposed exception for age-restricted services included the following –

“Where it is for the health of young people or the safety of others, I don't see how anyone could argue against this exception.” (Malcolm Ferey, Citizen's Advice Jersey)

“There is a legal question here, and staff can get into trouble if they make a mistake.” (Employee, travel marketing).

There were no comments specifically opposing the draft exception for age-restricted services.

Outcomes

There is widespread support for this proposal, and it makes sense to include this exception. As with other exceptions, the UK Equality Act includes a specific exception for age-restricted services despite the general defence.

18. Sport and competitions

Respondents were asked if they agree with the proposed exception for sport and competitions (paragraph 41 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft 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 (such as a veterans' tennis tournament, or an under-21s football league).

Of the responses to the Minister's survey, 97% agreed with the exception and 3% disagreed.

Comments from respondents who agreed with the proposed exception for sport and competitions included the following –

“This is appropriate on grounds of safety, fairness in competition and compliance with the rules of national, international or sports governing bodies.” (Paul St. John Turner, employee, financial services)

“It is probably necessary for fair competition and health and safety regulations.” (Employee, travel marketing).

Unite the Union opposed the exception for sport and competitions commenting as follows –

“The Equality Act does not include an equivalent exception; this would have to be justified as a proportionate means of achieving a legitimate aim.”

Outcomes

There is widespread support for the proposal, and it makes sense to include this exception. As with many of the other exceptions, the UK Equality Act includes a specific exception for sport and competitions despite the general defence (section 195). The Discrimination Law already provides exceptions relating to sport and competitions that allow the existing selection arrangements of national sports teams and local clubs to continue. These exceptions currently apply in relation to race, sex and gender re-assignment (Schedule 2(6) and Schedule 2(21)).

19. Scholarships, prizes and awards

Respondents were asked if they agree with the proposed exception for scholarships, prizes and awards (paragraph 42 of new Part 4 proposed for Schedule 2 to the Discrimination Law by Regulation 4). The draft exception ensures 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.

Of the responses to the Minister's survey, 91% agreed with the exception and 9% disagreed.

Comments from respondents who agreed with the proposed exception for scholarships, prizes and awards included the following –

“This exception is in line with the proposal not to include a general defence of justification, and is appropriate to enable the objectives of scholarships, prizes and awards to be achieved.” (Paul St. John Turner, employee, financial services)

Comments from respondents who did not agree with the proposed exception for scholarships, prizes and awards included the following –

“Not if it is for educational purposes age should not determine access to education.” (Parent).

Outcomes

The Equality Act does not include an equivalent exception. The provision of a scholarship, prize or award only to specified age-groups would have to be justified as a proportionate means of achieving a legitimate aim. However, there is support for the proposal, and it makes sense to include this exception.

20. Other exceptions

Respondents were asked if there any other circumstances in which an exception should be provided that had not been covered in the other questions. The Minister wants to ensure that exceptions are provided so that the introduction of protection against age discrimination does not lead to unintended consequences that limit the legitimate

activities of businesses, organisations, or individuals in Jersey. The suggestions were as follows –

“Respondents from the charity sector remarked that that they were potentially at risk of age discrimination claims from seasonal workers, a proportion of which are retired, who enjoy less favourable terms and conditions of employment than permanent staff i.e. they pay ‘pin’ money to such workers on whom they rely.” (Law at Work)

“I am not sure where the new law/consultation stands on volunteering and age information... In the UK they can ask for date of birth for volunteers. I do think this is important that we follow suit... As an example a new charity will be introducing a reading buddy scheme in Jersey this year. It is important that the scheme has a range of differing role models male and female of differing ages and backgrounds and not just over-60s.” (Mike Graham, Bosdet Foundation)

“Regulation of care homes needs to be examined as at this time we do discriminate on age – have to be over 65 to live in most care of the elderly facilities.” (Employer, healthcare).

Outcomes

Charity seasonal workers – It is not clear whether the example from the voluntary sector is an example of age discrimination or not. The mere fact that seasonal workers who happen to be past retirement age are on less favourable terms and conditions than permanent staff is not in itself discriminatory. What matters is the reason for the less favourable terms. If an employer in any sector is deliberately paying an employee less on the grounds of age, then that is just the kind of discrimination that these Regulations are designed to prevent. Where the overall responsibilities of the job are such that it does not attract the same reward package as permanent staff, then the fact that the role happens to be taken up by many people who have reached retirement age will not mean that there is any direct discrimination. Age is not, in that case, the reason for the pay. If there were any indirect discrimination in the way in which the employer paid its staff, then the employer would need to justify it. As long as the employer could show that differences in pay reflected differences in, for example, commitment and responsibility, then there is unlikely to be any valid claim.

Voluntary work – It is noted that volunteering opportunities are sometimes specifically for young people or older people, and many organisations cannot involve volunteers under the age of 16. Selection based on age or age-group sometimes helps these organisations to place volunteers in appropriate opportunities. The relevant exceptions will be extended to cover voluntary work in the same way as they would apply to employees, including the existing general exception for ‘occupational requirements’.

Residential care – In so far as this consists of the provision of a service, the general justification defence is expected to apply. In so far as it involves the disposal of premises, it would be outside of the scope of the Regulations.

21. Other comments

A number of additional comments were received on matters outside of the remit of this legislation, including suggestions relating to the following –

Benefit conditions – *“I am concerned about the increasing pressure on elderly people having to work when they are not physically capable of doing so, for example LTIA one has to be in the 50% bracket to be in a situation where your contributions are covered.”* (Nicolas Jouault, member of the Public). Conditions for benefit entitlement and job-seeking were not a matter for this Consultation.

Educational grants – One respondent felt that the educational grants system provided by the States of Jersey is discriminatory, commenting that: *“I cannot see what justification there can be to discriminate on the basis of age of married people who are 18, 19, or 20 meaning their parents’ income is used as the basis for access to a grant and those who are 21 and over.”* (Parent). The terms on which discretionary grants are provided are set out in legislation⁶ and so the existing general exception for an “act done under legislative authority” will apply. Any policy decision to change the terms on which discretionary educational grants are offered is outside of the remit of this Consultation. The matter would need to be raised with the Minister responsible for that legislation.

Age of majority – *“It’s time we agreed the age of majority to reflect the 21st century and should apply to all aspects of life including voting age, driving, consent and access to alcohol. It is silly to have different ages at different stages of life.”* (Employee, public sector). This is not a matter for this Consultation.

Compensation award – *“The main problem with the legislation is the £10,000 upper limit on compensation (as it is with other forms of discrimination law in Jersey). Rights without remedies are no rights at all. Rights with very limited remedies are very limited rights, to the extent that wrongdoers may not be taken to tribunal (or mediation).”* (Unite the Union). The Consultation did not seek comments on the current maximum level of compensation that may be awarded by the Tribunal, and the Minister does not propose to amend the level of compensation at this time.

Human Rights – *“I have to question why this consultation or why it is necessary to raise the issue of Age Discrimination in the States yet again when we already have Age Discrimination statutory Law in force under Article 14, HR(J)L. What is needed is for our so called Judiciary/Courts (which are unelected and therefore unlawful) is to enforce and uphold the already established Laws which we have in place (and passed by our States Assembly), to protect citizens of Jersey without further corruption of the Laws that we have in place.”* (Colin Jeanne).

Employment of children – *“A tourism client has expressed frustration at having to turn down applications for work from 15 year olds due to restrictions in the Children’s Law. It is unknown whether there is any such restriction applicable to tourism but the respondent would be keen to harness the strong work ethic it perceives in those under compulsory school leaving age.”* (Law at Work). Limits on hours of work for children are fixed by Order under the [Children \(Jersey\) Law 2002](#). The matter would need to be raised with the Minister responsible for that legislation.

⁶ [Education \(Discretionary Grants – General\) \(Jersey\) Order 2008](#)