

# Consultation Response

## Women and Equalities Committee: Enforcing the Equality Act: the law and the role of the EHRC inquiry

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## **About this consultation**

The Women and Equalities Committee has already made recommendations to improve the enforcement of the Equality Act in specific areas. It now wants to know what more needs to be done to achieve widespread compliance with the Equality Act 2010 for all those with rights under it, including:

- the processes by which individual cases can be brought under the Equality Act, including the barriers that may prevent claimants from enforcing their rights
- the role of the EHRC as the enforcement body, including the effectiveness of its duties, powers and policies
- whether there are other models of enforcement that could achieve more widespread compliance with the rights set out in the Equality Act 2010.

## **Introduction**

Age UK is a national charity that works with a network of partners, including Age Scotland, Age Cymru, Age NI and local Age UKs across England, to help everyone make the most of later life, whatever their circumstances. In the UK, the Charity helps more than seven million older people each year by providing advice and support. It also researches and campaigns on the issues that matter most to older people. Its work focuses on ensuring that older people: have enough money; enjoy life and feel well; receive high quality health and care; are comfortable, safe and secure at home; and feel valued and able to participate.

## **Key points and recommendations**

- Despite the Equality Act expanding legal protection for the rights of older people, older people continue to experience discrimination in their daily lives.
- However, both individual and systemic barriers to bringing a claim under the Act such as a lack of public understanding, legal aid cuts and (prior to their abolition) Employment Tribunal fees, as well as poor implementation arising from funding cuts in some sectors means that enforcement action under the Act has not resulted in widescale change.
- There is evidence to suggest that the Public Sector Equality Duty (PSED) has been poorly implemented and largely disregarded by public authorities.
- Multiple discrimination, which was left out of the Equality Act, should be re-examined and clause 14 should be brought in to force.

- The EHRC should continue to expand its age discrimination programme, and in particular, continue to prioritise supporting initiatives to strengthen older people's rights, including steps towards the development of a UN Convention on the Rights of Older People.

## **How easy it is for people to understand and enforce their rights under the Equality Act?**

The Equality Act 2010 provided a set of legislative tools for tackling age discrimination both within the realm of employment and in the provision of goods and services, which has greatly benefited older people in the UK. Although the Employment Equality (age) Regulations 2006 outlawed age discrimination in employment, there was no previously existing legislation outlawing age discrimination in services. In sum, the Equality Act has expanded legal protection for the rights of older people and reinforced the remedies that exist when these rights are breached in employment, financial and consumer services, and health and social care.

Despite this, older people, of whom there are 11.8 million aged over 65<sup>i</sup>, continue to experience discrimination in their daily lives.

In employment, since the 2006 Regulations, the removal of the Default Retirement Age, and the extension of the right to request flexible working, attitudes to older employees by employers have improved. The Government commissioned two Surveys of Employers' Policies Practices and Preferences Relating to Age – known as SEPPP1 (2006) and SEPPP2 (2010). An Age UK comparison of the two found there was some positive change leading to a reduction in advertised age-based job criteria (e.g. maximum recruitment ages), but more limited attitudinal changes, with older workers still often looked on unfavourably.

Despite this, unjustified age discrimination is rife, in spite of it being illegal under the Equality Act 2010. Polling by YouGov commissioned by Age UK in 2017 found that 36% of over 55s felt they had been disadvantaged at work because of their age.

*C has worked for same company for 30 years, recently applied for a new position. During interview C felt potential age discrimination took place. A comment was made that there are concerns regarding his age/ the investment that is needed within the role.*

In health and social care, there is compelling evidence of the harmful effects of age discrimination. Research demonstrates that older people have poorer access to treatments for common health conditions. Treatment rates drop disproportionately for people over 70-75 years in areas such as surgery<sup>ii</sup>; chemotherapy<sup>iii</sup>; and talking therapies<sup>iv</sup>. And although

the UK is generally seen as a pioneer of palliative care, this is not always played out in the experiences of many individuals and their families, with people over 80 experiencing the worst overall quality of care in the last two days of life compared with other age groups, covering such areas as pain relief, nutrition and emotional needs.<sup>v</sup>

*M (94) had varicose vein the size of a golf ball. GP sent her to hospital to have it operated on. Hospital said they do not operate on over 69s.*

It remains a major concern that a broad exception for financial services in the Equality Act 2010 may restrict older people's access to essential products including loans, mortgages, travel and motor insurance, making it harder for older people to shop around for the best products.<sup>vi</sup> The Financial Services Ombudsman has reported a number of cases in which older people have experienced difficulties moving home, paying off their mortgages, and taking out extra lending because of restrictions accessing these financial services.<sup>vii</sup>

I have had a mortgage with [a] Building Society for over 40 years. Without considering my personal finances they have refused to consider extending my mortgage beyond age 75. I have had to take an expensive product to complete my mortgage within their age limit.

## **How well does enforcement action under the Equality Act work as a mechanism for achieving wide scale change?**

The Equality Act expanded legal protection for the rights of older people and reinforced the remedies that exist when these rights are breached. However, both individual and systemic barriers to bringing a claim under the Act as well as poor implementation arising from funding cuts in health and social care means that enforcement action under the Act has not resulted in wide scale change.

Individual barriers such as a lack of understanding of their rights<sup>viii</sup>, loss of capacity, cognitive and physical disability can prevent older people from bringing a claim under the Equality Act. For example, 850,000 people are estimated to be living with dementia in the UK, of whom 808,000 are aged 65 years or over. By 2025, the number is expected to rise to 1.14 million. Almost two thirds (59%) of people aged 80 and over in the UK have a disability. In the health and social care setting, people may be or feel powerless to realise their rights under the Equality Act, particularly if they are experiencing frailty or very unwell, which can impact on their capacity. They may also feel afraid to complain because they are dependent on the services offered.

This feeling of powerlessness also applies in other settings, for example, some of the Windrush victims reported feeling powerless.<sup>ix</sup>

Cuts to legal aid, changes to eligibility scope, and the increase in court and tribunal fees have also impacted on older people's ability to bring a claim under the Equality Act. Although legal aid for initial advice in employment discrimination claims can now be accessed via the Civil Legal Advice telephone gateway, there is evidence to suggest that this has been underused compared with predicted take-up, which may be due partly to a lack of public awareness.<sup>x</sup> There are also concerns that the reduction in Law Centres and advice services has made it even harder for people to access the advice they need. The balance of power within the Employment Tribunal (ET) system is already heavily weighted in favour of employers, in particular large employers, who are more likely to have ready access to legal advice and understand the processes and systems involved.

Employment Tribunal fees significantly undermined the Equality Act. Since the abolition of ET fees in 2017, there has been a nearly threefold increase in the number of ET claims in the period of April to June 2018 when compared to the same quarter in 2017.<sup>xi</sup> It is now very clear that ET fees restricted access to justice and reduced incentives for employers to comply with discrimination laws. Introducing fees to pursue age discrimination cases made it easier for employers to discriminate against older workers exacerbating the difficulty of staying in work until (the increasing) State Pension Age, contrary to the public policy objective of Extending Working Lives.

Secondly, the rights of employees and service users are just one aspect of the Equality Act. The other very important aspect is the implementation of best practice, which supports the positive obligations arising from the Equality Act for employers, public authorities and service providers to act preventatively and to adopt equality frameworks and ensure that the right systems are in place.

For example, the Public Sector Equality Duty (PSED) contained within the Equality Act, encourages public bodies to use the duty to meet the challenges and opportunities of our ageing society. The Duty has the potential to build equality considerations into all public authority decision-making. However, there is evidence to suggest that the PSED has been poorly implemented and largely disregarded by public authorities. For example, in 2017 Age UK carried out a mystery shopping exercise, ringing 100 randomly picked local councils in England, to ask what options people have if they want to claim help with their rent and council tax but do not use the internet. Experiences varied but around two-fifths (41 per cent) of councils told us that claims have to be made online, or by downloading a form from their website, and others strongly encouraged online claims. Many older people are reluctant to claim the financial support, which they are due, and any pressure to claim online is likely to be an additional barrier. Local councils, like other public bodies, have a range of responsibilities under the PSED to eliminate discrimination and promote equality within their decision-making and policies. However, the results of this research suggest that many councils were not considering these responsibilities under the Equality Act by

ensuring that they had fully assessed the impact of these policies on people with disabilities and older people.

Funding cuts in health and social care have also had an impact on need and on the ability of providers to implement equality frameworks. There has now been a £160 million cut in total spending in real terms on older people's social care in the five years to 2015/16. Cash transferred from the NHS to social care has grown from two per cent of the total public spend on older people's social care in 2006/07 to 16 per cent in 2015/16. This year Age UK's analysis shows there are now nearly 1.2 million people (1,183,900) aged 65+ who don't receive the help they need with essential daily living activities. This represents a 17.9 per cent increase on last year and a 48 per cent increase since 2010. Nearly one in eight older people now live with some level of unmet need. Age UK estimates that an additional £4.8 billion a year would ensure that every older person who currently has one or more unmet needs has access to social care, rising to £5.75 billion by 2020/21.<sup>xii</sup>

Overall, England has seen a 63 per cent rise in the overall rate of these avoidable admissions since 2003. But for older people, these rates have increased by a staggering 107 per cent for those aged 65-69, and by 119 per cent for older people aged 75-79. In the most recent year for which figures are available (2016/17) there were 341,074 avoidable emergency admissions for people aged 65 and over, Age UK found. Age discrimination compounds other forms of discrimination with a significant number of older people experiencing multiple disadvantage and deprivation as a result. Section 14 of the Equality Act 2010 contained a 'dual discrimination' provision to cover direct discrimination on up to two combined grounds. However the section was never enacted. Recognising the high levels of multiple discrimination faced by some groups of older people, particularly women, and older BAME persons, Clause 14 should be brought in to force.

## **How effective and accessible tribunals and other legal means of redress under the Equality Act are, and what changes would improve those processes**

While we do not believe the age discrimination legislation needs to be changed at this point, there are measures that could make it tighter and improve compliance. For example, the early conciliation regime for employment disputes run by ACAS should be reviewed to ensure it operates in a balanced way that does not disadvantage employees. Also age discrimination is most likely to occur in recruitment. The Government should look at how the Fuller Working Lives strategy can become more focussed on improving recruitment practice and breaking down the unconscious bias that often occurs against older job applicants – Age UK and the Recruitment and Employment Confederation published a joint best-practice guide for recruiters, and could be used as a starting point for further discussion<sup>xiii</sup>. The Government should also monitor case law emerging from the Tribunal

system and courts, and seek to identify any emerging issues that may need legislative action.

## **How effective is the Equality and Human Rights Commission as an enforcement body?**

Age UK would like to see the EHRC continue to operate in an efficient and effective manner to address the broad range of inequalities and human rights breaches faced by people in later life. Unlike the protected characteristics of race, gender and disability there was no legacy commission focused on 'age' and so it was one of the new protected characteristics taken on by the EHRC when it was set up. This is perhaps one of the reasons why the Commission took too long to develop a coherent programme of activities focused on promoting age equality and addressing older people's human rights. However, more recently some high quality and valuable work has taken place in this area, most notably the statutory human rights inquiry into older people receiving home care and its upcoming roundtable on human rights and equality issues facing older people.

From our perspective as an organisation with a primary focus on the promotion of age equality we have always maintained that legislative provisions to outlaw age discrimination will only be effective if implemented alongside measures to address the negative attitudes to age and ageing that so often underpin the discrimination that older people face. The EHRC is of course not the only body that can undertake such activities, and indeed in many instances it will be more appropriate for partner organisations in the voluntary, public and private sectors to take a lead. Nevertheless it is essential that the EHRC continues to meet its statutory responsibility to fulfil this function.

It is especially important that tackling age discrimination is prioritised at this time of major service reform in the health and social care sectors.

In its capacity as a National Human Rights Institution the EHRC should also prioritise supporting initiatives to strengthen older people's rights, including steps towards the development of a UN Convention on the Rights of Older People. Age UK is particularly pleased that the EHRC have dedicated resources and staff to this area of work.

The Government must reconsider the financial services exemption from the ban on harmful age discrimination. Government and the Equality and Human Rights Commission must take steps to raise awareness of the ban on harmful age discrimination in services and support service providers to implement it by providing on-going guidance and support.

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<sup>i</sup> Age UK, *Later life in the United Kingdom*, April 2018.

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- ii Age UK/Royal College of Surgeons, [Access all ages - Assessing the impact of age on access to surgical treatment](#), 2012
- iii NHS England, [Are older people receiving cancer drugs? An analysis of patterns in cancer drug delivery according to the age of patient](#), 2013.
- iv Age UK, [Hidden in plain sight - the unmet mental health needs of older people](#), 2016
- v Royal College of Physicians, *End of Life Care Audit- Dying in Hospital: National report for England*, 2016.
- vi Financial Conduct Authority, [Access to Financial Services in the UK](#), 2016
- vii *Just a number? age, complaints and the ombudsman*, Financial Services Ombudsman, November 2015
- viii Age UK and the British Institute of Human Rights, *Older People and Human Rights: a reference guide for professionals working with older people*, 2011.
- ix “Older people were seen as easy targets, because they were largely voiceless and unlikely to resist deportation”:  
<https://www.theguardian.com/uk-news/2018/jul/18/revealed-depth-of-home-office-failures-on-windrush>
- x The Equality and Human Rights Commission, *The impact of LASPO on routes to justice report*, 2018, p.12.
- xi Ministry of Justice, [Tribunals and Gender Recognition Statistics Quarterly, April to June 2018 \(Provisional\)](#), September 2018.
- xii Age UK, *Briefing: Health and Care of Older People in England 2017*, p4.
- xiii Age UK/REC (2015), Age opportunity: a best practice guide for recruiters. Available at: [https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/rb\\_15\\_age\\_opportunity\\_best\\_practice\\_guide\\_for\\_recruiters.pdf](https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/rb_15_age_opportunity_best_practice_guide_for_recruiters.pdf)