IFLL
Inquiry into the Future for Lifelong Learning

Age Discrimination and Education

A Legal Briefing Paper

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NIACE has a broad remit to promote lifelong learning opportunities for adults. NIACE works to develop increased participation in education and training, particularly for those who do not have easy access because of class, gender, age, race, language and culture, learning difficulties or disabilities, or insufficient financial resources.

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Designed and typeset by Creative by Design, Paisley, Scotland

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Foreword

The Inquiry into the Future for Lifelong Learning (IFLL) was established in September 2007 and published its main report, Learning Through Life, in September 2009. The Inquiry is sponsored by NIACE, the National Institute for Adult and Continuing Education, with an independent Board of Commissioners under the chairmanship of Sir David Watson. Full details of the IFLL can be found at www.lifelonglearninginquiry.org.uk.

The overall goal of the Inquiry is to offer **an authoritative and coherent strategic framework for lifelong learning in the UK**. This will involve:

- articulating a broad rationale for public and private investment in lifelong learning;
- a re-appraisal of the social and cultural value attached to it by policy-makers and the public;
- developing new perspectives on policy and practice.

This paper on age discrimination and education by Helen Mountfield, a barrister with Matrix Chambers, adds an important dimension to the Inquiry's work and outputs. *Learning Through Life* puts forward the case for a radical review of the way we think about the educational life course, and the distribution of opportunity and resources across different ages. Issues of equality and fairness are central to its argument. This paper provides an original and fresh legal approach which complements the social and economic arguments of the main report.

The paper identifies ways in which the current legislation on equality opens up new opportunities. It does this by strengthening legal support for intergenerational equity, and by putting forward a public sector equality duty which will place public authorities under a legal obligation to give 'due regard' to issues of age equity in relation to education. As Helen Mountfield says: "This offers the possibility of bringing thinking about educational equity and equality into the mainstream of public thinking" – an exciting prospect and one which deserves wide debate and discussion.

IFLL: supplementary papers

- *Learning Through Life* is the main report from the Inquiry, but there are many other outputs. This paper, together with forthcoming papers on expenditure, provides a basic context on the issue of resource and opportunity. Other strands of IFLL work include the following:
- *Thematic Papers* form the core initial substance of the Inquiry's work (see www.lifelonglearninginquiry.org.uk/Thematic-Papers.htm)

They cover the following:

- Prosperity, Employment and Work
- Demography and Social Structure
- Well-being and Happiness
- Migration and Communities
- Technological Change
- Poverty Reduction
- Citizenship and Belonging
- Crime and Social Exclusion
- Sustainable Development

- *Sector Papers.* These discuss the implications of lifelong learning for each of the sectors involved in providing learning opportunities: pre-school, school, FE, HE, private trainers, cultural institutions and local authorities. The goal here is to encourage innovation thinking on how these parts do or do not fit together, as part of a systemic approach to lifelong learning (see www.lifelonglearninginquiry.org.uk/Sector-Papers.htm).
- *Public Value Papers.* These look, from different angles and using a variety of techniques at the 'social productivity' of lifelong learning, such as what effects it has on areas such as health, civic activity or crime. The goal is both to provide evidence on these effects, and to stimulate a broader debate on how such effects can be measured and analysed (see www.lifelonglearninginquiry.org.uk/Public-Value-Papers.htm).
- *Learning Infrastructures.* An electronic consultation has led to a set of scenarios and narratives designed to promote debate and imagination on what the infrastructure for learning might look like in the future. These challenge us to integrate the physical environments of learning, the virtual environments or learning technologies, and people's competences and behaviour (see www.lifelonglearninginquiry.org.uk/Further-Work-Papers.htm).

We have also been consulting in the devolved administrations of the UK nations, and amongst learner groups and other stakeholders.

Next steps

The publication of *Learning Through Life* and the other IFLL papers has prompted debate on the future of lifelong learning amongst different audiences. Our task is now to maintain that momentum. This will be done by sharing the ideas, analysis and recommendations as broadly as possible. Please help us by spreading details of the Inquiry's work through your own personal or professional networks.

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Introduction and overview

This briefing paper is intended to outline the historical, existing and potential future law on age discrimination legislation. The law in relation to age discrimination is changing very fast. It is both a reflection of changing social attitudes to ageing and a driver of them. The publication of the Equality Bill, in April 2009, is an apt time to look back, and forward, at the legal frameworks which have governed, now govern, and may in future govern equitable access to education on grounds of age.

This paper is concerned with adult education, and for the purposes of this paper, an adult is taken to be any person over compulsory school age, that is, over the age of 16.

The first section of the paper provides a general survey of developments in thinking about discrimination and equality law in the late twentieth century and the beginning of the twenty-first. During that period, there was no specific legislation governing discrimination on grounds of age, but some of the other anti-discrimination provisions had tangential effects for age discrimination.

Many believed that there would be a new dawn with the coming into force of the Human Rights Act 1998 on 2 October 2000. However, in relation to age discrimination and education that hope proved to be false. The second part of this paper explains the limited effect which the Human Rights Act has had in limiting discrimination on grounds of age.

In 2006, however, the first specific statutory protection against discrimination on grounds of age was enacted. The Employment Equality (Age) Regulations 2006 ('the Age Discrimination Regulations'), which were made to give effect to the European Commission's Framework Directive on discrimination, came into force in October 2006. The Age Discrimination Regulations cover all vocational training and all training provided in institutions of higher or further education. The third part of this paper covers the effect of the Regulations. However, the full ambit and extent of those provisions still requires clarification by the courts, and the effects of the provisions upon equitable access to all adults, irrespective of their age, remains uncertain. Moreover, they do not appear to have led to any real shift in thinking about age equity in distribution of educational resources. Instead, Help the Aged and Age Concern report substantial anecdotal evidence that steps intended to encourage access to education by disadvantaged age groups may have been removed as a result of a fear-based, one-size-fits-all interpretation of this legislation.

The last part of this paper looks to the future. The Equality Bill, published in April 2009, aims to harmonise discrimination law and to strengthen the law to support progress on equality. It contains provisions which will, if passed, significantly strengthen legal support for intergenerational equity in relation to education opportunities. Part 6 of the Bill specifically outlaws discrimination on grounds of age in relation to further and higher education and by qualification bodies. Part 11 proposes a 'public sector equality

duty'. If it becomes law, the Equality Bill holds out the promise that, for the first time, public authorities will be under a legal obligation to give 'due regard' to issues of age equity in the performance of all their functions.

This prospective positive duty to have regard for the need to promote educational equality is very exciting. It would cover all policy, planning for and provision of educational services by or on behalf of public authorities. A new age equality duty of this kind offers the possibility of bringing ideas about educational equity and equality into the mainstream of public thinking.

Finally, clauses 152 and 153 of the Equality Bill (also in Part 11) explicitly provide, for the first time, that positive action *in favour* of a group that shares a relevant protected characteristic, such as age, will be lawful if that positive action is intended to remove or minimise any disadvantage suffered by persons who share a relevant characteristic and is a proportionate means of achieving that aim.

The Equality Bill, then, offers hope for a joined-up response both to tackling discrimination as between cases that are the same, but also for legal recognition of the need, and support for, positive differential treatment for cases where entrenched social disadvantage suffered by those in particular age groups makes them different.

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The twentieth century legal framework and beyond

It is important to recognise how quickly, and how profoundly, legal understanding of the concepts of 'equality' and equality law has changed, and is continuing to change. There was no overt anti-discrimination legislation in English law until the first Race Relations Act in 1968. Until the introduction of the first positive 'equality duty,[1] the structure of the law was solely to give individual remedies to protect people who were discriminated *against,* on a limited number of protected 'grounds', in particular fields, but no requirement that anyone take any positive steps to eliminate the structural disadvantages faced by members of protected minorities. The protected grounds were, from the 1960s, race; from the 1970s, sex; and from 1995, disability. There were a number of specific sectors in which such forms of discrimination were unlawful, including employment and training, and education (but not provision of public services generally).

Anti-discrimination statutes were not just aimed at direct, or overt, discrimination 'on grounds of' race, sex or disability. They also contained some protection against 'indirect discrimination'. 'Indirect discrimination' is focused on discriminatory effects of ostensibly neutral measures which, although they apply to everybody, have a disproportionately disadvantageous effect of discriminating against members of one protected group, such as one sex or one racial group. To protect against these discriminatory effects of facially neutral 'requirements or conditions', sections 1(1)(b) of both the Race Relations Act 1976 and the Sex Discrimination Act 1975 also made these forms of discrimination unlawful unless there was some objective justification for the existence of the conditions.[2]

The classic example of an indirectly discriminatory rule is an employer who will only accept employees who are six feet tall. That is a neutral rule, but it will have an indirectly discriminatory effect against women, who are far less likely than men (in the case of sex discrimination) or people of Chinese origin (in the case of race discrimination), to be able to comply with such a requirement. Such a rule is unlikely to be objectively justified, because it is hard to see why such a height requirement is needed.

Other indirectly discriminatory criteria, however, may not breach discrimination legislation, because they can be justified. For example, a strength requirement (such as requiring fire fighters to be able to carry a 70 kilogram person down a ladder and to run for 20 metres carrying them) would also be one with which proportionately fewer

[1] Section 71 Race Relations Act 1976, inserted by the Race Relations (Amendment) Act 2000 and brought into force in 2002.
[2] The Disability Discrimination Act 1995 followed a different model, in outlawing direct and indirect discrimination, but also making it unlawful unreasonably to fail to make 'reasonable adjustments' to accommodate disability.

women than men could comply, but might nonetheless be justified in the case of front-line firefighting roles.

The concept of indirect discrimination has had, and continues to have, a beneficial effect in enabling members of minority groups to challenge unjustified and unquestioned barriers to their participation in protected fields. For example, workplace practices frequently used to discriminate against people who worked part-time (which was assumed, without evidence or justification, to evidence a lesser degree of commitment to the workplace). Consequently, it was considered entirely normal to give part-time workers less protection for their employment rights, or to pay them less, or to exclude them from pension schemes. Since women bear the brunt of caring roles in our society and consequently often work part-time, such rules disproportionately disadvantaged them in the workplace.

In an incremental series of cases in both domestic courts and the European Court of Justice, these rules were successfully challenged under legislation relating to sex discrimination.[3] Some of these challenges to the indirectly sexually discriminatory effects of ostensibly 'neutral' rules amounted to attacks on measures which in fact also amounted to age discrimination.

For example, in *Price v Civil Service Commission* [1978] IRLR 3, a rule that all applicants for jobs in the civil service must be aged under 28 was successfully challenged on the basis that it had an indirectly discriminatory effect against women, who were less likely to have a 'conventional' career pattern. They might therefore be less able to comply with such a rule, given patterns of child-bearing and responsibility for childcare. In another case, *University of Manchester v Jones* [1993] IRLR 218, a 46-year-old woman who had graduated as a mature student unsuccessfully applied for a job as a university career adviser. She challenged the age requirement imposed by the employer (27–35) on the basis that it discriminated against mature students. The university argued that it needed a young careers adviser, so that students seeking advice could identify with them.[4]

However, indirect discrimination law was and remains a slow way of changing structures and practices which disadvantage particular groups. Claims often faced insuperable technical problems for the applicant: identifying a 'requirement or condition,' proving that a particular group 'could not comply' (as opposed to finding this more difficult), and requiring the applicant to prove the adverse effect of a particular

[3] See, for example, *R v Secretary of State for Trade & Industry ex parte Equal Opportunities Commission & Day* [1995] 1 AC 1, in which the House of Lords found that regulations which gave rights to claim for unfair dismissal to full-time workers after two years of consecutive employment, but equivalent rights to part-time workers only after five years, had an unjustified indirectly discriminatory effect against women, who were disproportionately likely to work part time.
[4] The validity of that stereotype was not decided in the (reported) appeal decision, where the claim failed on the basis that the applicant had not identified the right 'pool' of comparators, by focusing on the proportions of men and women in the disadvantaged group (former mature students) rather than the proportions of men and women in the group of 'all applicants who were qualified for the job, and those who would have been qualified if the challenged age condition which was the subject of the challenge was removed.'

rule on a particular group.[5] In the absence of any legally enforceable obligation upon employers or other relevant decision-makers to monitor the effects of their policies and practices, or to consider the way in which existing social structures have entrenched patterns of social disadvantage, anti-discrimination law was at best a weak tool for promoting equality.

Towards the end of the twentieth century, the law started slowly to change. The Disability Discrimination Act (DDA) 1995, when it came, was the first equality statute in Britain which expressly required specific positive steps to be taken by members of society – employers, landlords and so on – to make 'reasonable adjustments' in order to accommodate the needs of disabled people, so as to enable them to access particular jobs, or premises, or services, without disadvantage. It was an important legislative model, because it focused not only on discrimination arising 'on grounds of' a disabled person's disability, but also on discrimination 'for a reason which relates to it'. It was also the first legislation that introduced a specific concept of positive 'reasonable adjustments' which could be required to remove socially constructed disadvantage.

The DDA, with its social model of disability, was important in shifting thinking in equality law, from consideration only of discrimination *in comparison with* a socially-perceived `normal' person, to the idea that the law must require society to take steps to remove entrenched disadvantages, and to provide that which affords members of a disadvantaged group genuinely equal capacity to participate in society (whether in the context of employment, transport, education or access to premises).

The structure of the DDA is, and remains, different from that of the two pioneering equality statutes, and indeed, very different from that of the plethora of later regulations which have followed, in relation to discrimination on grounds of other characteristics, such as sexual orientation, gender re-assignment, religion and belief, and age.[6] It was significant in being the first legal framework which sought to recognise that equality law is not just about ensuring sameness of treatment, but of affording different people different treatment in appropriate cases so as to facilitate, not just equal processes or parity of treatment, but equality of opportunity to participate.

Nonetheless, the prevailing thinking behind twentieth century anti-discrimination discourse was about 'equality of treatment', not about equality of opportunity or outcome or ability to participate. The model was to avoid members of protected

[5] Amendments to the race and sex discrimination legislation have mitigated some of these procedural traps, by requiring claimants to prove only that a 'provision, criterion or practice' is one which 'puts or would put persons of the same [protected group] as [the complainant] at a particular disadvantage when compared with other persons,' and which the person applying the condition cannot show to be a proportionate means of achieving a legitimate aim: see s1(1A) RRA 1976 and s1(2) SDA as amended.

[6] The domestic law on discrimination is now mainly contained in the following legislation: the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; the Equality Act 2006 Part 2; and the Equality Act (Sexual Orientation) Regulations 2007.

groups being treated *less* favourably than members of the historically dominant group, not about challenging the way in which society has been shaped around the needs of that group. In other words, under the sex and race discrimination acts, the central question was 'is this treatment different from the way in which a man (or a white person) would be treated?' And despite the limited attempt in the structure of the Disability Discrimination Act to address the specific difficulties facing disabled people, discrimination law offered little scope for fundamental challenge to long-standing and overlapping structures that excluded the less powerful from opportunities which were available to the dominant groups around whose needs society is structured.

At the very end of the twentieth century, legislatures and policy-makers began to recognise the limitations to the law in addressing these questions. The European Community's 'Race Directive'[7] broadened the effect of the 'equal treatment' principle in relation to race discrimination (requiring equality principles to be extended to the performance of public functions). This was closely followed by the 'Framework Directive,'[8] which broadened the grounds upon which member states must protect workers from discrimination in relation to employment and occupation. The Framework Directive included a requirement to prohibit discrimination on grounds which included age in relation to education or training.[9]

But there was another vital spur to a different way of thinking about the legal promotion of equality, which did not come from the European Union. In 1998, the MacPherson Inquiry reported on the policing failures which surrounded the death of Stephen Lawrence, a black teenager who was murdered in a racially motivated killing in South-East London.

The MacPherson Report famously described the 'institutional' racism which could exist, without malice by individuals, in circumstances where the potentially discriminatory or unequal effects of an institution's policies and practices remained unexamined and unchallenged. The Report stated (at paragraph 46.27):

> "... It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities."

The legislative response to the MacPherson report was to seek to address and eliminate such 'institutional' discrimination (by public authorities at least), by creating strong and enforceable duties upon them to have 'due regard' to the equality in the performance of their functions.

[7] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[8] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
[9] The other 'new' protected grounds were religion or belief, disability, and sexual orientation. The Framework Directive insofar as it relates to age was given effect in English law by the Employment Equality (Age) Regulations 2006, and the effect of these regulations on age equity in relation to education is discussed later on in the report.

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The first of the general public sector equality measures to be introduced was section 71 RRA.[10] It came into force in 2002 and imposed a duty on public authorities in the performance of their functions, to have 'due regard' to three equality objectives: the need to eliminate unlawful racial discrimination, the need to promote equality of opportunity and the need to promote good relations between persons of different racial groups.[11]

Mike O'Brien MP, Parliamentary Under-Secretary of State for the Home Department, introducing the Race Relations (Amendment) Act 2000 (RRA) (HC Standing Committee D, 2 May 2000) said:

> "The Bill is one of the most significant steps that the Government will take on race equality in Britain ... The Bill will create a positive duty on all public authorities to promote race equality. It will be a major change in law. The Government sees this new duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities, but in the delivery of services to ethnic minorities ... In considering any new element of Government policy, a Minister must consider the implications for ethnic minorities and race equality generally ... The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services – it should be part of the mainstream of policy consideration ...."

The explicit aim of the new duty under section 71 RRA, which applied to all public authorities, was to require them to place considerations about how to achieve race equality at the heart of their policy considerations in performance of their functions. Section 71 is an ever-speaking, relevant `equality' consideration, the weight of which is to be determined by its relevance to a particular context, and by the proportionate importance of equality considerations to that context or function.

Section 71 RRA was followed by equivalent, though not identical, provisions in relation to disability (section 49A DDA, in force December 2006), and sex (section 76A SDA, in force December 2007). These parallel duties are somewhat broader in scope, and more specific, than the duty under section 71 RRA. For example, as well as the need to eliminate unlawful discrimination and the need to promote equality of opportunity, which feature in section 71 RRA, section 49A(1), DDA also requires public authorities to have regard for the need to eliminate harassment of disabled persons that is related to their disabilities, and the need to take steps to take account of disabled persons' disabilities, even where that involves more favourable treatment, the need to promote

[10] Introduced by the Race Relations (Amendment) Act 2000.
[11] A very limited predecessor to section 71 had existed before the current version of section 71 was introduced, but it applied only to local authorities, and was generally regarded as a difficult-to-enforce target duty.

positive attitudes towards disabled persons and the need to encourage the participation of disabled persons in public life.[12]

The general equality duties under the RRA, DDA and SDA are, however, identical in structure (in requiring 'due regard' to be paid, by public authorities, to identified equality ends, are described as needs in the statute, 'in the performance of their public functions.)' The policy intention of `mainstreaming' equality issues into all public authority decisions and activities was the same for the race, gender and disability equality duties, and so the case-law on one equality duty is relevant to considering the scope, purpose and effect of the others.[13]

The first court decisions on the scope and effect of the general equality duties have given them a full and helpful interpretation, and have been of critical importance in changing the shape of the discourse – from an obligation upon particular potential tortfeasors[14] to refrain from discriminating against individuals, to a developing public law duty, enforceable by anyone with standing, which requires all public bodies to seek to promote equality.

This model is very important to those concerned with age equity in education, because the Equality Bill 2009 proposes a general 'public sector equality duty' which would include an obligation to have 'due regard' to the need to promote equality on grounds of protected characteristics, including age.

In some early important cases on the public sector equality duties, the courts emphasised the importance of the promotion, and judicial protection of equality. In *Secretary of State for Defence v Elias,*[15] Lady Justice Arden said that it was 'not possible' to say that the Secretary of State's failure to comply with the positive equality duty was not 'a very serious matter'.

The courts have also made it clear that while the general equality duties are `input' obligations, in the sense of requiring public authorities to undertake specific processes of thought, rather than obligations to achieve any specific outcome, they are very far from being mere aspirational `target duties'. As J Munby observed in *R(E) v Governing Body of JFS,*[16] it is wrong to say that general equality duties take matters no further if no underlying illegality is made out, or that they are non-enforceable target duties. They are 'unqualified' duties to 'have due regard to the need to achieve these [equality] goals'.

[12] The 'general' duties are also buttressed by specific duties, contained in secondary legislation, and enforceable only against particular public authorities, which require them to set out, in 'equality schemes', the ways in which they propose to operate and monitor the operation of equality issues. The specific equality duties are quite different from one another, and a detailed examination of them is beyond the scope of this paper.
[13] R(Chavda) v London Borough Council [2007] EWHC 3064 (Admin) at [40].
[14] 'Tortfeasor' is a person who commits a tort (civil wrong), either intentionally or through negligence.
[15] [2006] EWCA Civ 1293; [2006] 1 WLR 3213
[16] [2008] EWHC 1535 (Admin) [2008] ELR 445 at [204-206] (in a part of the judgment which is not subject to appeal)

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In a recent case about whether disability considerations had been given 'due regard' in the context of formulating and conducting a programme of post office closures,[17] the Divisional Court said that the statutory purpose of the general equality duties was to 'achieve a climate of change'. In that case, Mr Justice Aikens (now Lord Justice Aikens), giving the judgment of the court, set out six general principles which it said emerged from the disability equality duty:[18]

- A public authority which has to take decisions that do or might affect disabled people must be made aware by those advising it of its duty to have due regard to the identified goals. An incomplete or erroneous appreciation of these duties will mean that 'due regard' has not been given to them.
- The duty to have 'due regard' to relevant equality considerations must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and a state of mind. Attempts to justify a decision as being consistent with the exercise of the duty if it was not in fact considered before the decision, are not enough to discharge the duty.
- The duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of 'ticking boxes'. Though the fact that the public authority has not specifically mentioned the relevant equality duty in carrying out the particular function is not determinative of whether the duty under the statute has been performed, it is good practice for the policy or decision-maker to make reference to the provision and any code or other non-statutory guidance in all cases where equality is relevant, both to ensure that relevant factors are actually taken into account and to demonstrate that it has these factors in mind.
- The general equality duty imposed on public authorities is a non-delegable duty. Even if public authorities delegate the performance of some of their functions to third parties, the obligation to have 'due regard' to equality considerations always remains on the public authority charged with it. In practice, another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the equality duty. In those circumstances, the duty to have 'due regard' to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty.
- Fifthly, and 'obviously' (according to the Court) the duty is a continuing one.
- Finally, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their

[17] *R(Brown) v Secretary of State for Work & Pensions and Secretary of State for Business, Enterprise & Regulatory Reform* [2008] EWHC Admin.
[18] And equivalent principles apply in relation to the race equality duty and sex equality duties.

> disability equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept, it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled its general equality duty.

This judgment has not yet received wide attention or comment, but it is difficult to overstate the importance of that statement of principles for the promotion of equality. It means that a public authority is acting unlawfully if it does not give 'due' (and conscious, informed) regard to relevant equality considerations before and at the time that a policy which has equality ramifications is being considered. Equality must be considered 'in substance, with rigour and with an open mind'. The duty cannot be delegated. If a public authority charges another body to carry out functions for it, it must ensure that it only appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so; and must continue to supervise it. Finally, it must keep adequate records of its 'consideration' of equality issues to encourage transparency and disciplined thinking.

Thus, only as we approach the end of the first decade of the twenty-first century have we come to a point where there is, for the first time, a wider social understanding, and even a gradual judicial understanding, that real equality is not just, perhaps not even mainly, about eliminating individual acts of prejudice. Rather, in the words of the Final Report of the Equalities Review,[19] it is about building a consensus that equality is of value to society as a whole; about recognising

> "…the way in which systems and organisations routinely disadvantage entire categories of people,"

and about seeking to alter them so that they do not have that effect.

[19] "Fairness & Freedom: The Final Report of the Equalities Review," 28 February 2007.

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The human rights act – a false hope?

The Human Rights Act 1998 (HRA) came into force on 2 October 2000. The object of the HRA was to give 'further effect' to Convention rights in domestic law. It might have been thought that the HRA would have provided a fertile field for developing new remedies for age discrimination in education. Unfortunately, a narrow interpretation of the relevant provisions meant that this hope was ill-founded.

Article 2 of the first Protocol of the European Convention on Human Rights provides, so far as is material to this paper, that 'no person shall be denied the right to education'.

That has been held to include the right to an effective education and the right of access to existing educational institutions. It includes the right of access to higher and further education;[20] but the European Court of and Commission of Human Rights have held that 'the right to education ... is concerned primarily with elementary education and not necessarily advanced studies such as technology.'[2122] The Commission held, too, that it was legitimate for states to limit tertiary education to 'those who would benefit from it'.

Nonetheless, it might still have been hoped that the Convention would have provided some protection against discriminatory assumptions as to which age groups would or would not benefit from access to particular further or higher education. That is because the Convention contains a wide guarantee against discrimination in the application of other Convention rights. Article 14, the anti-discrimination guarantee, provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status* (emphasis added)."

The European Court of Human Rights held, very early in its history, that Article 14 guaranteed the right not to be unjustifiably discriminated against in the enjoyment of available educational opportunities on grounds of status.[23] However, in the same case, the European Court of Human Rights also held that the State could take into account the needs and resources of the community and individuals concerned, so long as the exercise of this discretion did not 'injure the substance of the right' to education.

[20] *Sahin v Turkey* (2007) 44 EHRR 5, [2006] ELR 73 paras 134 and 141, though arguably not also access to vocational training: *R v Birmingham City Council ex parte Youngson* [2001] LGR 218, where a court held that there was no breach of Article 2 Protocol 1 in refusing to provide a grant for a schoolboy to undertake a full-time vocational dance class.
[21] *Glazewska v Sweden* (1985) 45 DR 300.
[22] *X v UK* App No 5962/72, 13 March 1975 DR 2, 50; *Kramelius v Sweden* App No 21062/92, Commission decision 17 1 1996.
[23] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252.

Whilst age is undoubtedly a 'status' which is protected by the anti-discrimination guarantee, the House of Lords has held that discrimination on grounds of age is not 'suspect class' discrimination. In *Reynolds,*[24] the appellant complained that because she was under the age of 25, she was paid jobseekers' allowance and income support at a reduced rate. She argued that the government should not assume that she had relatively lower expenses because she was younger, it should have distinguished between those whose situations and needs were *actually* different (for example, between householders and non-householders). But the House of Lords rejected that argument. Lord Hoffmann said:

> "... In my opinion, once it is accepted that the necessary expenses of young people, as a class, are lower than those of older people, they can properly be treated differently for the purposes of social security payments...."
>
> "[Counsel for Ms Reynolds] emphasised that the 25th birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25, but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule. But your Lordships are likely to reach what I consider to be the obvious answer without having to resort to such formal reasoning...."

Lord Rodger said:

> " ... There is no doubt that the relevant Regulations, endorsed by Parliament deliberately gave less to those under 25. But that was not because the policy-makers were treating people under 25 years of age as less valuable members of society. Rather, having regard to a number of factors, they judged that the situation of those under 25, as a class, was different from that of people of 25 and over, as a class.... In my view ... it was open to ministers and Parliament, in the exercise of a broad political judgment, to differentiate between the two groups and to set different levels of benefit for them. Drawing the bright demarcation line at 25 was simply one part of that exercise ...."

In other words, the House of Lords does not perceive it to be degrading to dignity to be treated differently or to have certain broad policy assumptions made about you, in the same way as having such assumptions made about one on grounds of some other

[24] *Carson & Reynolds v Secretary of State for Work & Pensions* (2006) 1 AC 173

characteristic such as sex or race. So it does not require the same level of justification for discrimination on grounds of age in the distribution of public benefits as it would require for discrimination on grounds of race or sex. That means that policies which discriminate on the basis of broad, assumption-based cut-off ages (called 'bright line rules') are generally regarded as justified, provided that there is some rational basis for making an assumption about people having different needs at different ages.[25]

Such rules may have particular force in the context of education and the Convention, given that the United Kingdom only signed up to Article 2 of the First Protocol subject to a reservation,[26] namely, that it only applies insofar as it does not prejudice 'efficient education or the efficient use of resources.' In the only case in an English court in which age discrimination in education was challenged using the Convention, this reservation contributed to the application being dismissed.

In *R (Douglas) v North Tyneside Metropolitan Borough Council & Secretary of State for Education,*[27] a mature student complained that he was refused a student loan to study for a BTEC Higher National Certificate in counselling skills because he was over the age of 55 on the first day of the academic year of the course. The statutory rules then in force provided that this was a 'cut off' age for receipt of such a loan. The Court of Appeal rejected his argument that this rule constituted unlawful discrimination against him in relation to his right of access to education on grounds of his age, contrary to Article 14 of the European Convention on Human Rights. The Court of Appeal held that student loan arrangements were not 'sufficiently linked' to the exercise of the right to education to fall within the ambit of the Convention's protection of that right. The absence of funding arrangements might make it more difficult for a student to exercise their rights to education, but did not make it impossible for them to do so. In any event, the Court thought that the age cut-off for receipt of student loans was justified, when the government was allocating scarce resources, and that it was a reasonable assumption that older students had less chance of being in a position to repay than younger students.[28]

This was a very disappointing decision. It took an artificially narrow approach to what amounted to discrimination linked to education, and so did not accept that discrimination in relation to the funding of education had a significant impact on the ability of older students to take up educational opportunities. It also took a very broad-brush approach to the sorts of assumptions which public bodies could legitimately make in relation to whether it was 'worthwhile' to spend money on older

[25] That reasoning was followed by the Upper Tribunal (replacement for the Social Security Commissioners), in relation to a discriminatory rule which gives a lower entitlement to Disability Living Allowance to those who acquire their disability in old age: [2009] UKUT 37 AAC, 3 March 2009.
[26] Now contained in the Education Act 1996.
[27] [2003] EWCA Civ 1847, [2004] ELR 117
[28] The actual result in this case would no longer be the same, given (i) that student loan arrangements for older students have now changed; (ii) that the Employment Equality (Age) Regulations 2006 have a bearing on the situation, and (iii) that state entitlements, such as to access to a student loan, would not be regarded as being within the ambit of the Convention right to property: *Stec v UK* (2005) 41 EHRR SE18. However, the Court of Appeal's reasoning on the effect of Article 14 and the justification for discrimination in circumstances such as these stands.

students, without requiring such bodies to provide any specific evidence as to why such discrimination was justified. This was a judgment which appeared to ossify discriminatory assumptions about when it was appropriate for particular individuals to be supported in participating in the educational process.

Thus, until the enactment of the Employment Equality (Age) Regulations 2006, there was therefore very little protection for people discriminated against on grounds of age in relation to adult education.

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The impact of the Employment Equality (Age) Regulations 2006

A new legal framework, contained in the Employment Equality (Age) Regulations 2006 (SI 2006/1031) ('the Age Discrimination Regulations') provided the first overt protection from discrimination on grounds of age in relation to access to some educational opportunities. The Age Discrimination Regulations were implemented in October 2006. They gave effect to the Framework Directive, and prohibited unjustified direct discrimination, harassment and indirect discrimination on grounds of age in relation to employment and further and higher education.

The Age Discrimination Regulations do not apply to all 'education', but only to any 'training which would fit a person for employment', whether provided by a public, private or voluntary sector body. However, training is given a wide definition. It includes all types and all levels of training which would help fit a person for any employment: vocational guidance, facilities for training, practical work experience and assessment related to the award of any professional or trade qualification.[29] The government also decided that to avoid arid demarcation disputes and confusion, all education and training which is provided in further or higher education institutions, is covered by the Age Discrimination Regulations, whether or not the course or student is designated as being 'vocational'.[30]

The extent of adult learning provisions covered by the Age Discrimination Regulations is not yet clear from the case law. There is a particular lack of clarity about the extent of protection for community learning facilities such as evening classes, which may or may not be vocational and which may or may not be regarded as 'further education'. The reality is that an overwhelming majority of public providers of adult education, at least, regard themselves as bound to apply the Age Discrimination Regulations in relation to the educational facilities and support which they apply.

However, evidence from Help the Aged, Age Concern and NIACE suggests that the effect of the publication of the Age Regulations has actually been to encourage educational providers to react defensively and to introduce 'age-neutral' provisions which actually remove support for age groups who were already disadvantaged in relation to genuinely equal access to educational opportunities. For example, many local authorities which had previously had concessionary fees for those over the age of 60, abolished those fee concessions (perhaps because they feared that they did not have enough evidence to support the making of those concessions – a result of inadequate research and monitoring). Removal of these concessionary fees may have been part of the cause of the significant drop in the number of older students participating in programmes funded by the Learning and Skills Council.

[29] Regulation 20(4).
[30] Regulation 23(4).

Help the Aged, Age Concern and NIACE published an information leaflet and sought to bring to public attention the fact that it was lawful for providers to apply fee concessions in two specific sets of circumstances. Firstly, if the concession is designed to achieve a legitimate aim, and is a proportionate means of achieving that aim, it may be justified (under regulation 3(1) of the Age Discrimination Regulations). Secondly, regulation 29(1) allows positive action in favour of particular age groups if such training 'would help fit them for particular work' or would enable them 'to take advantage of opportunities for doing particular work' where this 'prevents or compensates for disadvantages linked to age, for people ... doing that work or likely to take up that work.' However, there is little evidence to suggest that these nuanced provisions are widely understood or used; nor that vocational training providers gather evidence from which they could specifically identify what 'disadvantages linked to age' may be suffered by members of a particular age group.

The effect of the Age Discrimination Regulations may paradoxically have been unhelpful to members of disadvantaged older age groups in obtaining access to adult education in some circumstances. In some cases and some places, nervous authorities have withdrawn age concessions so as to act in an 'age blind' manner, when the reality is that a number of concessions could easily be justified as compensating for cumulative age-based educational disadvantages, if education providers compiled appropriate statistics, or were aware of the literature on the subject.

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A broader framework – positive equality duties and the equality bill

The Equality Bill 2009, introduced in the House of Commons in April 2009, is intended both to consolidate the plethora of existing anti-discrimination legislation, and to 'strengthen the law to support progress on equality.'

Clauses 4 and 5 of the Bill renders 'age' as one of the 'relevant' protected characteristics, or a ground upon which a person can be protected from discrimination by the terms of the Bill. But the protection is by reference to a person's being of a 'particular age group,' and a reference to 'persons who share a protected characteristic is 'a reference to people of the same age group.' An age group is a reference to a group of persons 'defined by reference to age, whether by reference to a particular age or to a range of ages.

The precise ramifications of this group-based approach have yet to be established. It would appear to strengthen protection from discrimination on grounds of age, because while bright-line rules may still exist, that group-based discrimination must still be justified. This may help to avoid the kinds of assumption-based bright-line rules which are currently sometimes used, without evidence or analysis, as a cipher for particular life-stages (for example, 'under 35 = early career', 'over-65 = post-employment').

Age-based discrimination in relation to all adult education, not just vocational education, is included within the framework of the Equality Bill. The whole of Part 6 of the Act relates to discrimination in education, but Chapter 1, which relates to schools, provides that age is not a protected characteristic in respect of school education for persons under the age of 18.[31]

Elsewhere in the education system, however, (in relation to Further and Higher Education – Chapter 2 of Part 6; and recognition of qualification by qualification bodies – Chapter 3 of Part 6), discrimination on grounds of age in relation to education is rendered illegal:

In the arrangements a responsible body makes for deciding who is offered admission as a student, and upon what terms; and in the way it provides education and other benefits, and in the way a qualifying body chooses to confer, qualify or remove, qualifications.

This is a more comprehensive guarantee against discrimination than currently exists in the Age Discrimination Regulations.

[31] That provision has been much criticised, but is not the subject of this paper which focuses on adult education.

The most exciting provisions, from the point of view of advancing more genuinely equitable access to educational resources, are the combination of the proposed general equality duty for public sector bodies in clause 143 of the Bill, and the positive action provisions in clauses 152 and 153.

Clause 143 provides that a public authority or any other body which is not formally a 'public authority', but which exercises that public functions must, in the exercise of those functions, have due regard to 'the need' to:

- eliminate discrimination which is prohibited by the Equality Bill (including the need to eliminate age discrimination in education);
- advance equality of opportunity between people who share a relevant protected characteristic, such as age, and others who do not share it;
- foster good relations between people who share a relevant protected characteristic, such as age, and others who do not share it.

The obligation to have 'due regard' to the 'need' to eliminate discrimination means not only considering how to prevent direct age discrimination, but also analysing the public authority's procedures, policies and practices so as to identify whether they may have an unintended indirectly discriminatory effect on those from a particular age group; to consider whether, if so, they are justified; and if they are not, to consider how the discriminatory effect of those procedures, policies or practices may be removed.

But the duty goes beyond the mere 'removal of discrimination.' It recognises that a level playing field is no good if some of the runners have been nobbled, or if no steps are taken to recognise disadvantages which they may suffer if there is only 'exact equality of *treatment'.* The public sector equality duty also requires public authorities to have due regard to the 'need to advance equality of opportunity' for people who share a relevant protected characteristic and persons who do not. Clause 143(3) of the Bill explains that this involves having due regard, in particular to the need to:

- remove or minimise disadvantages suffered by persons [of a particular age group] that are connected to that characteristic;
- meet the needs of persons who share that [age group] that are different from the needs of persons who do not share it;
- encourage persons who share that [age group] to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Clause 143(4) of the Bill explains that having due regard to the 'need to foster good relations between persons who share a relevant [age group] and persons who do not share it' involves having due regard in particular to the need to:

- tackle prejudice; and
- promote understanding.

Finally, clause 143(5) of the Bill provides that 'compliance with the duties in this section may involve treating some persons more favourably than others'; although 'that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.'

The public sector equality duty does not create new private-law rights enforceable by individuals, but if a public authority fails to comply with this duty, then anyone with standing can bring a challenge by way of judicial review. It should be interpreted in accordance with the guidelines laid down by the Divisional Court in the post office closures case in relation to the disability equality duty (paragraphs 35-36 above).

This means that the Bill will introduce a new, legally enforceable duty upon public authorities to mainstream thinking about the age equality implications of all their actions, into all their service design and delivery, whether or not they do it directly themselves or through third parties.

The public sector duty does not just refer to a need to 'eliminate discrimination,' without any intelligent thought about what that means. It truly embraces Sen's capability based model of equality. Public authorities are required to address their minds to all barriers to participation from disadvantaged groups.

This not only requires them to address the structural hurdles which may be put up by their own policies, procedures or practices (that is, indirect discrimination caused by their own ways of doing things). The enquiry which they are required to make is a broader one, namely, to identify the disadvantages which are connected with a particular characteristic, and considering what steps can and should be taken to meet the specific needs of people with that characteristic to remove or minimise those disadvantages. So, for example, a public sector education provider must not only look at whether the entrance requirements unjustifiably privilege people from younger groups over older ones, but whether there are steps which they ought to take to introduce access courses for older people which could remediate the disadvantages which many older people have suffered because of the historically more limited access to educational opportunities.

Moreover, clause 143 of the Bill will require public authorities to have due regard to the need to eliminate *perceptual* age barriers to participation in education. These barriers may be both internal to particular people who share the protected 'age' characteristic and external prejudices. Firstly, there is an enforceable obligation upon public authorities to encourage people from disadvantaged age groups to overcome their own internalised 'confidence' barriers to participation.[32] Secondly, there is a further enforceable obligation upon those public authorities to identify and tackle 'prejudice'

[32]Clause 143(3)(c), which requires public authorities to have due regard in particular to the need to 'encourage' people to participate in activities where participation with people with a particular protected characteristic is disproportionately low.

against people from particular age groups, so as to promote understanding of the needs and capacities of members of those age groups.[33]

Having properly identified what are the barriers to equitable participation, public authorities are then in a position to decide that it would *not* be discriminatory to treat particular, disadvantaged age groups in a way which would appear at least to be 'more favourable' than the way others are treated, if this inequality of input is designed to achieve a more equitable distribution of participation and outcome.

This last limb of clause 143 ties in with the 'positive action' provisions in clauses 152 and 153 of the Equality Bill. These provide that the Bill does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a particular characteristic, if to do so reduces their under-representation in relation to particular activities, and meets particular needs associated with it, provided this is a proportionate means of achieving that aim.

The explanatory notes which accompany the Bill suggest, as an example of the use of clause 143, that the public sector equality duty could lead a local authority to review its use of Internet-only access to council services; or focus 'Introduction to Information Technology' adult learning courses on older people, with the aim of advancing equality of opportunity, in particular meeting different needs, for older people.

There are some unfortunate loopholes in clause 143 as it is presently drafted. For example, there are no equivalents of the 'specific equality duties' which currently exist in race, sex and disability discrimination law, which require public authorities to measure and monitor the potentially discriminatory or disadvantageous effects of their policies on the relevant protected groups.[34]

However, it is at least arguable that the rest of the 'public sector equality duty' cannot be properly performed unless such public authorities decide how they will measure, and then address their minds to, the equality implications of their actions. As noted earlier, this may make it easier to challenge the unexamined 'assumption-based' bright line rules which are currently deployed, if it can be shown that these are not the product of any proper analysis or evidence-based thinking.

For those interested in age equity in access to education, therefore, the Equality Bill offers the prospect of an intelligent and joined-up legal framework for supporting the development of an equitable and justified distribution of educational opportunities across age groups. Intelligent application of the public sector equality duty and the positive action provisions could be a real spur to the active pursuit, in particular by public authorities, of steps to promote real age equality. For example, by identifying where current inequalities lie (in a measurable way); questioning why these arise; considering the possible steps that could be taken to produce more equality of

[33] Clause 143(4) requires public authorities, in seeking to 'foster good relations' between people of different groups, to have due regard in particular, to the need to tackle prejudice and to promote understanding.
[34] Although these may be provided in secondary legislation.

outcome/participation, and taking those which they consider most appropriate, on the basis of that evidence-based analysis. If the provisions in the Equality Bill become part of a new Equality Act, it should be given a cautious, and creative, welcome.