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# STATES OF JERSEY



## AGE DISCRIMINATION REGULATIONS: CONSULTATION PAPER

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Presented to the States on 22nd December 2015  
by the Minister for Social Security

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STATES GREFFE



## Law to protect against Age Discrimination

### Summary:

This consultation invites comments from stakeholders on the proposed scope of protection against discrimination on grounds of age and the draft Age Discrimination Regulations. The consultation responses will be reviewed and the Regulations amended, as required, prior to the Minister for Social Security asking the States Assembly to approve the draft Regulations.

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Date published:  
21 December 2015

Closing date:  
26 February 2015

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Supporting documents attached:  
Draft Discrimination (Age) (Jersey) Regulations 201-

### How we will use your information

The information you provide will be processed by the Social Security Department in compliance with the Data Protection (Jersey) Law 2005 for the purposes of this consultation.

The States of Jersey may quote or publish responses to this consultation but will not publish the names and addresses of individuals without consent. Confidential responses will still be included in any summary of statistical information received and views expressed.

Under the Freedom of Information (Jersey) Law 2011, information submitted to this consultation may be released if a Freedom of Information request requires it but no personal data may be released. For more information about how we handle data please contact Kate Morel, [K.Morel@gov.je](mailto:K.Morel@gov.je)

Do you give permission for your comments to be quoted?

- 1. No
- 2. Yes, anonymously
- 3. Yes, attributed

Name to attribute comments to:

Organisation to attribute comments to, if applicable

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### Feedback on this consultation

This consultations follows the States of Jersey consultation code of practice. We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation please contact [Communications.Unit@gov.je](mailto:Communications.Unit@gov.je)

### **Outline of consultation**

The Minister for Social Security (the 'Minister') is proposing draft Regulations that would introduce protection against discrimination on grounds of age. The purpose of this consultation is to invite comments from stakeholders on the draft Regulations to ensure that we introduce appropriate protection. The Minister is inviting representations from stakeholders on a number of policy issues, which are outlined in this consultation paper, including the following;

1. The scope of protection against age discrimination
2. A justification defence for direct discrimination
3. Exceptions so that an act is not an act of age discrimination, including exceptions for -
  - Retirement
  - Pensions
  - Age-related concessions
  - Age-related services
  - Health services

The Minister will consider any comments received before finalising the draft Regulations and lodging a Proposition for States debate. The Regulations are expected to come into force on 1 September 2016.

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### **Ways to respond**

You can respond to the consultation until **26 February 2016** in the following ways:

**Online survey:** [www.gov.je/consult](http://www.gov.je/consult)  
**Telephone:** +44 (0) 1534 447203  
**Email:** [K.Morel@gov.je](mailto:K.Morel@gov.je)  
**Write to:** Kate Morel  
Policy Principal  
Social Security Department  
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This consultation paper has been sent to the Public Consultation Register and a number of other selected stakeholders.

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## SECTION 1 – BACKGROUND

### Discrimination (Jersey) Law 2013

The Discrimination (Jersey) Law 2013 provides a framework for protection against discrimination on the grounds of race, sex, sexual orientation, gender reassignment and pregnancy and maternity. The legislation is proposed to be extended by Regulation to protect people in Jersey against age discrimination from 1 September 2016.

#### Protected characteristics

Introducing protected characteristics into the main Law by Regulation enables a consistent and equitable approach to different types of discrimination and simplifies the complexity that has resulted in other jurisdictions as a consequence of having separate and different laws. This approach also allows public consultation to be undertaken at each stage and to spread any potential administrative burden for employers, service providers and other individuals over a period of time.

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

#### Types of discrimination

The framework of the Discrimination Law sets out four types of discrimination;

- A person **directly** discriminates against another person if he or she treats that person less favourably than another person because of a

particular characteristic. For example, an employer who only interviews job applicants aged under 30 because it thinks younger people are more 'dynamic' will be directly discriminating against older job applicants.

- A person **indirectly** discriminates against another person where they apply a provision, criterion or practice, which the person cannot show to be a proportionate means of achieving a legitimate aim, that disadvantages (or would, if applied, disadvantage) people with a particular characteristic. An employer who only considers employees for promotion once they have had ten years' service, for example, may be indirectly discriminating because younger workers are less likely to have been employed for that long. The issue will be whether there is a genuine need to gain that much experience before being a suitable candidate for promotion.
- **Victimisation** protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result. An employee who claims that their employer is failing to consider younger workers for promotion, for example, will be able to claim victimisation if the employer dismisses him or her as a result.
- **Harassment** involves unwanted conduct which relates to a protected characteristic that violates the dignity of the victim or creates, for example, an intimidating or offensive environment. If, for example, an employee is subjected to repeated jokes about his age, which persist even when he has made it clear that he finds them offensive, will be able to claim harassment.

### Areas in which discrimination is prohibited

Discrimination is currently prohibited in the following areas;

1. Paid work including recruitment and terms of employment
2. Contract workers
3. Partnerships
4. Professional or trade organizations
5. Professional bodies
6. Vocational training
7. Employment agencies
8. Voluntary work

9. Education
10. Goods, facilities and services
11. Access to and use of public premises
12. Disposal or management of premises, e.g. letting property
13. Clubs.

### **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. The general exceptions relate to –

- Acts done to comply with a law or an order of a court or tribunal
- Acts done to comply with the law of another country
- National security
- Positive action
- Charities
- Clubs restricted to persons who share a protected characteristic
- Pre-selection by an employment agency
- Selection for domestic employment
- Genuine occupational requirement
- Vocational training
- Provision of care in the carer's home
- Disposal of premises

A number of exceptions specific to age are also likely to be required, for example, in relation to employment benefits, financial and insurance services and age-related concessions.

### **Enforcement and remedies**

The Employment and Discrimination Tribunal will hear complaints about acts of age discrimination. All complaints will first be referred for conciliation or mediation, if both parties agree:

- Complaints relating to age discrimination in employment will be referred to the Jersey Advisory and Conciliation Service (JACS) for conciliation.

- Complaints relating to age discrimination in other areas will be referred to the Community Mediation Service for mediation by a qualified mediator.

A complainant will need to demonstrate to the Tribunal that, on the balance of probabilities, he or she has been discriminated against on grounds of age. If the Tribunal finds that a complaint has been proved, it may;

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

### **Is there any evidence of age discrimination in Jersey?**

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. Without a legal benchmark against which behavioural standards can be assessed and with no recourse to justice or compensation, acts of age discrimination probably do not currently come to light. However, there is some evidence that age discrimination occurs in Jersey.

The States of Jersey Statistics Unit included questions about discrimination in the 2012 Jersey Annual Social Survey (JASS). A quarter (25%) of adults reported having been discriminated against in the previous 12 months. The two 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 two groups with the highest proportions who reported being discriminated against on the grounds of age, at 12 percent and 13 percent respectively.

JACS provides advice on the employment implications of the Discrimination Law, including in recruitment and in the workplace. During the period 1 January to 30 November 2015, JACS recorded 23 enquiries (from employers and employees) relating to age discrimination. For comparison purposes, JACS also recorded 23 enquiries relating to race discrimination and 31 enquires relating to sex discrimination, both of which are already protected characteristics under the Discrimination Law.



Jersey Citizen's Advice provides advice on non-employment related discrimination, such as in relation to goods, services and housing. During the period 1 January to 20 October 2015, 23 clients have requested and been provided with the advice service. None of those clients have asked for advice specifically in relation to age discrimination. For comparison purposes, during the same period, 15 clients requested advice about race discrimination, 2 clients requested advice about sex discrimination and 1 client requested advice about disability discrimination.

### **International obligations**

In jurisdictions worldwide, it is taken for granted that laws exist to protect people against discrimination. It is important that we have legislation in place in order to demonstrate internationally that Jersey is a jurisdiction that promotes modern standards of respect for individuals' rights and equality. There has been consistent and overwhelming support for the introduction of legislation in Jersey to address discrimination issues generally.

The United Nations General Assembly has adopted a set of principles for older persons, which Governments are encouraged to incorporate into their national programmes whenever possible. Legislation may be one way in which Jersey can implement these principles, to establish legal standards and prohibit discrimination on the basis of older age.

### **States strategic plan 2015-2018**

The States strategic plan for 2015-2018 notes that *“Over the next 20 years the number of people in Jersey aged over-65 will double and there will be nearly three times as many people over-85...Today, 14,000 Islanders are aged 65 or over. By 2035, this will increase to 28,000 – about one in four people.”*

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

One of the Social Security Department's key objectives in its business plan for 2015 was to provide adequate income for old age, which is affordable for our children, and to assist older Islanders to maintain standards of living by means that are financially sustainable for future generations. The criteria for success include that the *"Discrimination and Employment Law protects older workers from discrimination and exclusion from the workplace"*. A key target for the Department in 2015 was to commence research on extending the discrimination law to age-related issues.

## **SECTION 2 - OTHER JURISDICTIONS**

### **UK**

Discrimination legislation in the UK has been developing for almost 40 years. Age discrimination is one of the more recently introduced protected characteristics having been unlawful in the workplace and in vocational training since 2006<sup>1</sup>. Since 2012, age discrimination has also been outlawed in the provision of goods and services for people aged 18 or older. Age discrimination is not prohibited in relation to premises or schools.

The accumulation of case law precedents and amendments to the law, as well as the influence of European Directives, have created an intricate and complicated legal subject. Employers are able to try to justify age discrimination, whether it is direct or indirect. In this respect, protection against discrimination on grounds of age differs from the other characteristics, such as sex and race, which do not permit justification of direct discrimination. Justification will be established if an employer can show that what it has done is a proportionate means of achieving a legitimate aim. Harassment, however, can never be legally justified.

The European Equal Treatment Framework Directive No. 2000/78 ('the Directive'), which makes age discrimination laws compulsory throughout the EU, gives some examples of possible legitimate aims for age discrimination:

- employment planning;
- the training requirements of a position;
- rewarding loyalty; and
- the need for a reasonable period before retirement.

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<sup>1</sup> The Employment Equality (Age) Regulations 2006 were subsumed into the Equality Act 2010

It is more difficult to justify direct discrimination than indirect discrimination because the aims of an individual employer are not sufficient to justify **direct** discrimination without an additional 'social policy objective'. However, indirect age discrimination can be justified by a wider range of legitimate aims, including simply the employer's own aims, in the same way as any other form of indirect discrimination. Consistent with other forms of discrimination, an employer cannot justify discrimination solely because not discriminating would involve increased costs. However, it may be able to show that it has a lawful 'legitimate aim' which also has a cost-saving element

### **Northern Ireland**

Age discrimination at work is unlawful in Northern Ireland<sup>2</sup>. Protection against age discrimination extends to employees, partners in firms, contract workers and anyone undertaking vocational training. All aspects of employment (or prospective employment) are protected from age discrimination including recruitment, terms and conditions, training and dismissal. In some cases, different treatment of an employee because of their age can be justified. For example, when an employer makes special provisions for younger or older employees to protect their safety and welfare.

Protection against age discrimination does not apply in the provision of goods and services, premises, education or any other areas in Northern Ireland. However, a public consultation has recently concluded in which the government proposed to extend protection against age discrimination to the provision of goods and services.

### **Isle of Man**

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

### **Guernsey**

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

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<sup>2</sup> [www.legislation.gov.uk/nisr/2006/261/part/4/made](http://www.legislation.gov.uk/nisr/2006/261/part/4/made)

### **Other jurisdictions**

In most jurisdictions worldwide, laws to protect against age discrimination have only recently been enacted. However, nationwide laws have existed for 30 years in the United States, 20 years in Canada and 10 years in Australia. According to a 2001 report of the Joseph Rowntree Foundation which looked at the UK's options for legislating against age discrimination<sup>3</sup>, the evidence suggested that legislation had some impact on discrimination in these countries.

Research in the United States which compared differences over time and across states with different levels of legislation appeared to show that age discrimination laws significantly increased the employment rates of older workers. This was mostly due to older workers staying on in employment for longer, rather than a greater number of older workers being taken into employment. There was also some evidence from the United States that employers may be less likely to hire older workers on the basis that they are not permitted to set mandatory retirement ages.

### **SECTION 3 - POLICY ISSUES FOR CONSULTATION**

The Minister believes that it should be unlawful to discriminate on the grounds of age. You are invited to give your views on the scope of that protection.

The Minister believes that, as long as appropriate exceptions are made for certain specific situations, protection against age discrimination can be provided without placing an unfair burden on employers and businesses in Jersey. It is proposed to include some exceptions similar to those found in the UK's Equality Act that will, for example, allow age-related employment benefits and age-related concessions in goods and services. Other exceptions will require more detailed consideration, such as in relation to retirement. Your views on the proposed scope of the legislation and the exceptions are invited in paragraphs 1 to 20 below.

The Minister hopes that it will be helpful for stakeholders to review a set of draft Regulations as part of this consultation process. The Minister has not made firm policy decisions at this stage, but has proposed that the draft Regulations should be based on some of the existing exceptions in the Discrimination Law and the Equality Act, where possible. It is anticipated that the draft Regulations will be revised to reflect the outcomes of this consultation.

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<sup>3</sup> [www.jrf.org.uk/report/age-discrimination-legislation-choices-uk](http://www.jrf.org.uk/report/age-discrimination-legislation-choices-uk)

## 1. Scope of protection against age discrimination

The Minister proposes that age should be included as a protected characteristic under the Discrimination Law. Of the areas in which discrimination is currently prohibited<sup>4</sup> (see pages 4-5 of this paper) it is proposed that age discrimination would be prohibited in all areas except education and premises. In addition, the protection against age discrimination in goods, facilities and services would be limited to people who have attained age 18.

This would follow the position in the UK where age discrimination is outlawed in the provision of goods and services for people aged 18 or older<sup>5</sup> and is not prohibited in relation to premises or schools. If the protection against age discrimination was extended to these areas, it is likely that a number of additional exceptions would be required.

**Education** – Much of a child’s school life is determined by their age; including the classes and exams that they may take and so decisions and opportunities based on age are an inherent and necessary factor in schooling. A draft exception has been included at Paragraph 27 so that, as in the UK, age discrimination is not a prohibited act of discrimination in relation to the admission and treatment of pupils in schools.

**Premises** – Reflecting the UK position, Paragraph 43 of the draft Regulations provides that age discrimination is not a prohibited act of discrimination in relation to ‘access to and use of public premises’ (Article 23) or ‘disposal or management of premises’ (Article 24).

**Goods, facilities and services** - Reflecting the UK position, Paragraph 36(1) of the draft Regulations provides that protection against age discrimination in the provision of goods, facilities and services would only apply to people who have attained the age of 18.

### Question 1a

Do you agree with the proposed scope of the protection, in that 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?

Yes

No

<sup>4</sup> Parts 3, 4 and 5 of the Discrimination Law

<sup>5</sup> Section 28 of the Equality Act

Please give any reasons for your response.

### Question 1b

If the scope of the protection against age discrimination was extended to any of those three areas, would any additional exceptions be required?

Yes

No

*If yes, please describe what circumstances should not be treated as an act of age discrimination in relation to the admission and treatment of pupils in schools, in relation to premises, or in relation to the provision of goods, facilities and services for those who have attained age 18.*

## 2. Justification defence for direct discrimination

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. Justification will be established if an employer can show that what it has done is a proportionate means of achieving a legitimate aim. This appears to be a very wide exception<sup>6</sup> but UK case law has made it clear that it only applies where the aim being pursued by an employer has a social policy objective<sup>7</sup> (e.g. relating to labour market policy) and so it is more difficult to justify direct discrimination than indirect discrimination.

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<sup>6</sup> Equality Act (Section 13(2))

<sup>7</sup> See *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16.

The UK position leaves the justification defence rather uncertain and so it is proposed that a general defence should not be included in our draft Regulations. Instead, we are proposing some additional exceptions that are not included in the Equality Act, such as, in relation to health services and other age-related services. This would provide more certainty for employers and service providers. It is proposed that the existing description of what constitutes direct discrimination should apply to age discrimination in the same way that it applies to race and sex discrimination in that it cannot be justified, unless there is a specific exception in the Law.

### **Question 2**

Do you 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?

Yes

No

*Please give any reasons for your response.*

### **3. Financial and insurance arrangements**

The draft Regulations (Paragraph 2K) provide an exception so that providers of insurance and financial services can 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. Paragraphs 7 and 19 of Schedule 2 to the Discrimination Law already provide similar exceptions in relation to the protected characteristics of race and sex. It is proposed that these would be replaced with this new general exception that would apply to all protected characteristics. Providers of these types of services should consider whether the scope of the exception is appropriate.

**Question 3**

Do you agree with the proposed general exception for the provision of financial and insurance services, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

**4. States schemes to promote employment services**

The draft Regulations (Paragraph 25) provide that it will 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 facilities and services to individuals in that age group. For example, the States of Jersey 'Advance to Work' scheme is provided to those aged 16-24. The draft exception is similar to an existing exception in relation to race (Schedule 2(3)).

**Question 4**

Do you agree with the proposed exception for access to States-provided facilities and services, such as employment schemes, that apply age-related criteria?

Yes

No

Please give any reasons for your response.



## 5. Immigration

The exception at Paragraph 26 of the draft Regulations provides 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 immigration law. 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. The Equality Act also includes an exception in relation to immigration<sup>8</sup>. The Customs and Immigration Service is invited to confirm whether this exception is appropriate.

### Question 5

Do you agree with the proposed exception for immigration, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

## 6. Higher education and employment opportunities

Age discrimination would be prohibited in the provision of higher education because higher education is treated as a service (rather than a school) under the Discrimination Law<sup>9</sup> and we have proposed that protection against age discrimination will extend to the provision of goods, facilities and services for people who have attained age 18.

The draft Regulations provide an exception at Paragraph 28 so that a higher education provider is protected from a claim of age discrimination where, in selecting students as suitable for a particular course, the act of age discrimination would not have been prohibited if it had been done in the context of employment. This is important where a higher education course

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<sup>8</sup> Schedule 3(15A)

<sup>9</sup> Discrimination Law, Article 1(1)

links with an employment opportunity aimed at a particular age group, such as an apprenticeship.

**Question 6**

Do you agree with the proposed exception for the provision of higher education, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

**7. Apprenticeships**

Paragraph 29 provides an exception so that apprenticeship schemes can be aimed at and offered to people aged 21 or younger, or by giving preference to those aged 21 or younger. The Equality Act does not include specific exceptions for apprenticeship schemes, although discrimination aimed at achieving the vocational integration of young people may be lawful under the general justification defence (which we do not propose to include).

**Question 7**

Do you agree with the proposed exception for apprenticeship schemes, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

## 8. Employment benefits

Paragraph 30 provides an exception so that the provision of three types of employment benefit to employees does not constitute age discrimination.

**Length of service** - Benefits given to employees based on their length of service will not constitute indirect discrimination. The Equality Act<sup>10</sup> provides an exception allowing for employment benefits to be based on length of service for up to the first five years of service without the need for justification, but the provision is complex.

**Insurance** - Employers that provide insurance and related financial services (e.g. life assurance) to employees only while they are under pensionable age will not contravene the law. The Equality Act<sup>11</sup> provides a similar exception. If the exception was not provided, there would be a risk that employers would cease to offer this benefit to any employees.

**Child care** - An employer will not discriminate on grounds of age if they provide, make arrangements for, or facilitate the provision of child care for children of a particular age group, under age 18. This exception will allow employers to continue to offer child care facilities or vouchers, for example, based on the age of the child, without being open to a direct age discrimination claim from other employees. This is similar to the exception provided in the Equality Act<sup>12</sup>.

### Question 8

Do you agree with the proposed exception for the three types of employment benefit that are set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

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<sup>10</sup> Schedule 9(10)

<sup>11</sup> Schedule 9(14)

<sup>12</sup> Schedule 9(15)

## 9. Minimum wage

The draft exception at Paragraph 31 is required in order to allow an employer to pay a person who **does not** qualify for the statutory minimum wage (by virtue of being under compulsory school leaving age) at a lower rate than an employee who **does** qualify for the minimum wage. 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.

### Question 9

Do you agree with the proposed exception in relation to minimum wage entitlement, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

## 10. Redundancy payments

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, Paragraph 32 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 on the same basis for all employees regardless of age. The Equality Act<sup>13</sup> also provides an exception for redundancy pay schemes.

### Question 10

Do you agree with the proposed exception for redundancy pay, as set out in the draft Regulations?

Yes

No

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<sup>13</sup> Schedule 9(13)

Please give any reasons for your response.

### 11. Retirement age

When it was first introduced in 2006, the UK's age discrimination legislation set out a complicated procedure which allowed an employer to apply a 'default retirement age'. This allowed an employer to require employees to retire at the age of 65 subject to a right on the part of an employee to make a request to remain in work for longer. Younger retirement ages could also be applied if an employer could show that they were objectively justified. The default retirement age was removed in April 2011.

As a result, 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 Court<sup>14</sup>, but the position remains uncertain. Given the difficulties with the UK model for dealing with retirement, it is considered that it would not be appropriate to replicate that position in Jersey. If we did not include a retirement age, it is expected that we would need to allow a general defence of justification to claims of direct discrimination (as described in point 2 above). The draft exceptions at Paragraphs 33 and 34 provide that:

- 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.
- When an employer sets a retirement age that is below pensionable age, this will not amount to age discrimination provided that 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.
- 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.

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<sup>14</sup> The case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16

So that the right to protection against unfair dismissal accords with the proposed protection against age discrimination, Regulation 5 provides an amendment to the Employment (Jersey) Law 2003. This would ensure 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.

**Question 11a**

Do you agree with the proposed exceptions for retirement age, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

**Question 11b**

Do you agree with the proposed amendment to the upper age limit for protection against unfair dismissal?

Yes

No

Please give any reasons for your response.

## 12. Pension schemes

Paragraph 35 of the draft Regulations provides a straightforward exception for the provision of occupational, personal and group pension schemes. The UK legislation<sup>15</sup> provides a range of specific and complex exceptions in relation to the operation of occupational pension schemes.

### Question 12

Do you agree with the proposed exception for occupational, personal and group pension schemes, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

## 13. Goods, facilities and services

Paragraph 36 of the draft Regulations provides an exception for age-related services. It seems appropriate to mirror the existing 'single sex services' exception that is provided in Schedule 2(16) of the Discrimination Law. The draft exception provides that a person would not contravene the prohibition of age discrimination in goods, facilities and services where –

- separate services are provided for people of different ages where this is a proportionate means of achieving a legitimate aim and a joint service would be less effective.
- separate services are provided differently for people of different ages where this is a proportionate means of achieving a legitimate aim, a joint service would be less effective and the extent to which the service is required by one age group means that it is not reasonably practicable to provide the service other than as a separate service that is provided differently for different age groups.

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<sup>15</sup> Equality (Age Exceptions for Pension Schemes) Order 2010

- a service is provided only to people of one age where this is a proportionate means of achieving a legitimate aim and one of the following conditions is met;
  - only people of one age need the service.
  - the service is also provided jointly for people of different ages and it would be insufficiently effective if it were only provided jointly.
  - a joint service for people of different ages would be less effective and the extent to which the service is required by people of different ages makes it not reasonably practicable to provide separate services.
  - the service is provided at a hospital or other establishment for people who need special care, supervision or attention.

### Question 13

Do you agree with the proposed exception for age-related services, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

### 14. Healthcare

Paragraph 37 of the draft Regulations provides that any direct or indirect 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. Stakeholders may wish to consider whether it would be appropriate to define 'healthcare provider' and 'prevailing standards of medical treatment.' Health service providers are invited to confirm whether this exception is appropriate.



The Equality Act does not include an exception for healthcare providers. Any decisions taken because of age or which place specific age groups at a particular disadvantage may be justified as a proportionate means of achieving a legitimate aim. We have proposed not to include an equivalent general defence of justification to claims of direct discrimination and so a draft exception is required for healthcare providers.

**Question 14**

Do you agree with the proposed exception for the provision of healthcare, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

**15. Age-related concessions**

Paragraph 38 of the draft Regulations provides an exception that would permit age-related concessions. This 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. There would be no need to state a reason for a concession and there would be no restriction on the form of the concession or the type of goods or services to which the concession applies. This mirrors Schedule 16(1A) and Schedule 3(30A) of the Equality Act. It would cover, for example, discounts for pensioners in shops and museums.

**Question 15**

Do you agree with the proposed exception for age-related concessions, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

### **16. Age-related holidays**

The draft Regulations (Paragraph 39) provide an exception for businesses, such as travel agents, that provide age-related holidays. The age range must be clearly indicated at the time the holiday is offered and the main purpose must be to bring together people of a similar age. For example, holidays exclusively for the over-55s. The exception is equivalent to Equality Act Schedule 3(30B).

#### **Question 16**

Do you agree with the proposed exception for age-related holidays, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

### **17. Age-restricted services**

The draft exception at Paragraph 40 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, for example, age 25. A similar exception is provided in Schedule 3(30C) of the Equality Act.

**Question 17**

Do you agree with the proposed exception for age-restricted services, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

**18. Sport and competitions**

The Discrimination Law already provides exceptions relating to sport and competitions<sup>16</sup> 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 reassignment. Paragraph 41 of the draft Regulations would add an exception for age discrimination in sport and competitions. As in Section 195(7) of the Equality Act, the exception would allow the continued use of age limits and age bands which are necessary for fair competition, the safety of competitors or to comply with rules set by national, international or sports governing bodies (e.g. a veteran's tennis tournament, or under-21s football league).

**Question 18**

Do you agree with the proposed exception for sport and competitions, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

<sup>16</sup> Discrimination Law, Schedule 2(6) and Schedule 2(21)

### **19. Scholarships, prizes and awards**

Article 1(1) of the Discrimination Law defines 'services' to include the provision of scholarships, prizes or awards. Protection against age discrimination in goods, facilities and services is proposed to apply to those who have attained age 18. Paragraph 42 of the draft Regulations provides an exception so 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. The Equality Act does not include an equivalent exception; this would have to be justified as a proportionate means of achieving a legitimate aim.

#### **Question 19**

Do you agree with the proposed exception for scholarships, prizes and awards, as set out in the draft Regulations?

Yes

No

Please give any reasons for your response.

### **20. Any other exceptions**

The Minister wishes to ensure that extending the characteristics that are protected under the Discrimination Law should not lead to unintended consequences that limit the legitimate activities of businesses, organisations, or individuals in Jersey. Views are therefore invited from any stakeholder who feels that other special provisions should be made for particular circumstances in respect of age discrimination.

#### **Question 20**

Are there any other circumstances in which an exception should be provided that has not been covered in any of the questions listed above?

Yes

No

If yes, please specify any specific circumstances that should be covered by an exception and give any reasons for your response.

**21. About you**

21a. Please tick which of the following you are responding as:

- |  |  |
|--|--|
| <input type="checkbox"/> Employer                    | <input type="checkbox"/> Employee                      |
| <input type="checkbox"/> Employers' association      | <input type="checkbox"/> Trade union/staff association |
| <input type="checkbox"/> Other, please specify below |  |

21b. If you are an employer or an employee, please specify your sector.

- |  |   |
|--|---|
| <input type="checkbox"/> Agriculture                           | <input type="checkbox"/> Construction                 |
| <input type="checkbox"/> Electricity, gas and water            | <input type="checkbox"/> Financial services           |
| <input type="checkbox"/> Manufacturing                         | <input type="checkbox"/> Hotels, restaurants and bars |
| <input type="checkbox"/> Public sector                         | <input type="checkbox"/> Wholesale and retail         |
| <input type="checkbox"/> Transport, storage and communications |   |
| <input type="checkbox"/> Other sector, please specify below    |   |

21c. Do you give the Minister permission to quote your comments publicly?

- |   |  |                             |
|---|--|-----------------------------|
| <input type="checkbox"/> Yes, anonymously | <input type="checkbox"/> Yes, attributed to me | <input type="checkbox"/> No |
|---|--|-----------------------------|

21d. If your comments are to be quoted, who should they be attributed to?