

Education and Training Committee, 25 September 2008

Guidance on age discrimination for education providers

Executive summary and recommendations

**Introduction**

This paper provides the Committee with information on the impact of the Employment Equality (Age) Regulations 2006 on education and training providers and programmes.

**Decision**

The Committee is invited to agree the decisions within the attached paper.

**Background information**

None

**Resource implications**

None

**Financial implications**

None

**Appendices**

- Position statement for education and training providers on age discrimination
- Legal advice from Jonathan Bracken, HPC's Solicitor

**Date of paper**

1 August 2008

# Guidance on age discrimination for education providers

## Introduction

One of HPC's six guiding principles is to work collaboratively. This includes providing guidance on issues where appropriate and working to share good practice. The guidance often reflects HPC's work within a changing environment which is affected by both internal and external factors. These external factors can include changes in legislation or the implementation of new legislation.

Age discrimination has previously been raised by the Education and Training Committee (ETC) as an area requiring consideration, particularly because HPC has also received queries from education and training providers about this area. Queries have centred on the implications of this legislation in relation to both providers and programmes. The majority of questions from education and training providers have been on whether there should be a minimum age of entry in admissions criteria. We have also received questions from students and applicants asking whether programmes should have a minimum age of entry.

HPC published an equality scheme in 2008 as part of its commitment to preventing discrimination and valuing equality<sup>1</sup>. One of the points identified in the scheme was that the Policy and Standards department would work with the Education department to produce guidance or a position statement on the impact of the age legislation on education and training providers.

## Legislation

The European Council Directive 2000/78/EC established a general framework for equal treatment in employment and occupation. This Directive prevents unjustified discrimination on the grounds of age in employment and vocational training. In the UK, the Directive has been implemented through the Employment Equality (Age) Regulations 2006 ('the Regulations') which came into force on 1 October 2006. Vocational training is defined very broadly in this legislation, and includes the provision of courses for students and student services.

Most education and training providers are covered by the age regulations as the regulations apply to all acts by further and higher education institutions in Great Britain. Separate but similar provision is made in Northern Ireland by the Employment Equality (Age) Regulations (Northern Ireland) 2006.

Universities or other institutions which provide further or higher education can not discriminate against applicants or students on the basis of age. This means that education and training providers should remove entry requirements which are based on a minimum age. There are a number of other issues that education and training providers might need to consider. These include but are not limited to the following.

- Whether there is a maximum or minimum age for entry.
- Whether age requirements are set for access to any courses or activities.

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<sup>1</sup> <http://www.hpc-uk.org/assets/documents/100021B1HPCEqualityandDiversityScheme.pdf>

- Whether age is taken into account when considering applications for admission, access or benefits (including funding) or conditions.
- Whether student accommodation is provided on the basis of age or whether it is available to all students.
- Whether there are any assessment processes where age may be a factor in reaching decisions.
- Whether there are any 'time-served' criteria for admission which amount to age discrimination.

## **Objective justifications**

Unlike other legislation designed to prevent discrimination, age discrimination can be permitted where there is an 'objective justification' for doing so. An 'objective justification' enables an age-based decision to be made where it is appropriate.

However, this would be difficult to demonstrate as education and training providers would have to show that the discrimination was a proportionate means of achieving a legitimate aim. In this definition, 'proportionate' means that the discriminatory effect of any practice based on age is significantly outweighed by the importance and benefits of achieving this aim. In addition, the legitimate aim cannot be achieved by a less discriminatory method.

It is unlikely that adopting particular practices to avoid costs or inconvenience will be considered legitimate. Thus, education and training providers which adopt age related entry requirements because students must undertake certain physical tasks are unlikely to meet the legitimate criteria. This is because it would be possible to introduce competency assessments to assess their ability to undertake physical tasks instead.

It is also unlikely that education and training providers would be able to use the standards that HPC sets, such as the standards of proficiency, as the basis of an 'objective justification'. This is because we do not require any age related requirements either explicitly or implicitly within our standards.

## **Healthcare regulators**

The Nursing and Midwifery Council (NMC) sets standards of proficiency for pre-registration nursing education.<sup>2</sup> In these standards, the NMC specified that applicants commencing pre-registration nursing education should be at least 17 years and 6 months old. This standard was set to ensure compliance with a European Directive which stated that applicants for nursing programmes must have completed secondary school education.

In November 2007 the NMC issued a directive which withdrew this standard and the minimum age for entry to a programme.<sup>3</sup> In the directive, the NMC state that this action was taken to ensure compliance with the new legislation on age discrimination.

No other regulators prescribe entry requirements on the basis of age.

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<sup>2</sup> <http://www.nmc-uk.org/aArticle.aspx?ArticleID=1658>

<sup>3</sup> <http://www.nmc-uk.org/aFrameDisplay.aspx?DocumentID=3491>

## **HPC Standards of education and training**

HPC sets standards of education and training (SETs) which courses are approved against as part of the approvals process. The SETs do not require that education providers have entry or selection criteria based on age. This means that it is not necessary to amend the SETs in light of the Regulations coming into force.

In addition, the SETs also require that the education provider should have:

‘...an equal opportunities and anti-discriminatory policy in relation to candidates and students, together with an indication of how this will be implemented and monitored’ (SET 2.3)

HPC is currently consulting on amendments to the SETs. The amendments include a change to the standard above which requires that the education provider should have:

‘...equality and diversity policies in relation to applicants and students, together with an indication of how these will be implemented and monitored’ (SET 2.3)

These SETs are important as they encourage education and training providers to have equal opportunities and anti-discriminatory policies in place as well as implementing and monitoring these policies.

However, it is recognised that some education and training providers are concerned about the impact of the Regulations. The Executive suggests that a position statement is produced for education and training providers based on the information in this paper. This guidance can be published on the website and shared as appropriate.

## **Recommendations**

- The Committee is asked to agree the text of the proposed position statement on age discrimination which is appended to this paper.
- The Committee is asked to agree that the position statement should be published on the HPC website.

## **Position statement for education and training providers on age discrimination**

The Health Professions Council (HPC) is a UK wide statutory regulator of 13 health professions. Part of HPC's role includes the approval of pre-registration training and education programmes. HPC is committed to equality and diversity and has produced this position statement as part of that commitment.

The Employment Equality (Age) Regulations 2006 (the Regulations) came into force on 1 October 2006.

The Regulations apply to both employment and vocational training. They prohibit direct and indirect discrimination against a person on the basis of age unless it can be objectively justified. They also prohibit harassment based on age and victimisation of those who may have asserted rights under the Regulations or alleged that another person has breached them.

This means that education and training providers can not discriminate against applicants or students on the basis of age. Education and training providers should remove any entry requirements they may have which are based on a minimum age or on 'time served criteria'. Admission criteria based on 'time served' could include requiring that applicants should have 5 years experience of the work place before they can undertake a course. This would indirectly discriminate against anyone who was under 23 years old.

There are a number of other issues that education and training providers should consider. We have listed some of the issues that education and training providers should consider but this is not an exhaustive list.

- Whether there is a maximum or minimum age for entry.
- Whether age requirements are set for access to any courses or activities.
- Whether age requirements are set for access to any placements.
- Whether age is taken into account when considering applications for admission, access or benefits (including funding) or conditions.
- Whether student accommodation is provided on the basis of age or whether it is available to all students.
- Whether there are any assessment processes where age may be a factor in reaching decisions.
- Whether there are any 'time-served' criteria for admission which amount to age discrimination.
- Whether any language or terminology is used in any publications which might be considered to be discriminatory on the basis of age, such as 'experienced' or 'dynamic'.

In many of the examples above, having requirements based on age would be discriminatory as it would prevent those who did not meet the age criteria from being able to study on the programme or access either placements or resources.

Other issues, such as using particular language, could be considered to be indirect discrimination as they might discourage applicants from applying because they were concerned that their age meant their application might not be successful.

In some cases, discrimination (though not harassment or victimisation) may be permitted where an objective justification can be provided for doing so. In these circumstances the education and training provider would have to prove that the discrimination was a proportionate means of achieving a legitimate aim. This means that the organisation would have to show that the benefits of achieving the aim greatly outweighed the effect of the discrimination. In addition, the organisation would have to prove that there was no other way of achieving this aim.

It is unlikely that education and training providers would be able to use the standards that HPC sets, such as the standards of proficiency, as the basis of an 'objective justification'. This is because we do not require any age related requirements either explicitly or implicitly within our standards.

This position statement is not designed to replace legal advice which should be sought when considering the impact of the Regulations on education and training programmes.

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## Age Discrimination

### Introduction

The Employment Equality (Age) Regulations 2006 (the Regulations), which came into force on 1 October 2006, implement the age-related provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and vocational training. Article 1 of that Directive provides that its purpose is:

*to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*

### Scope

The Regulations apply to both employment and vocational training and prohibit:

- direct discrimination - the treatment of one person less favourably than others on grounds of age - unless it is objectively justified;
- indirect discrimination - the application of a criterion, practice or provision which disadvantages a particular age group - unless it is objectively justified;
- harassment - conduct related to age that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person;
- victimisation –the treatment of a person less favourably than others because he or she has asserted rights under, or alleged that another person has contravened, the Regulations.

An important difference between these regulations and other (e.g. race) discrimination legislation is that discrimination is capable of objective justification.

### Application to vocational training

As the Regulations implement an EC Directive, the case law of the European Court of Justice is of relevance and whilst the decisions of that Court have defined “vocational training” broadly to include most higher education and many further education courses, those which are of a general nature and intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation, do not fall within the scope of the definition.

To overcome this potential confusion, the Regulations apply to all acts by further and higher education institutions in Great Britain, so as to establish a uniform regime in this regard, including acts which relate to courses of study which fall outside of the legal scope of the Directive’. Separate but similar provision is made in Northern Ireland by the Employment Equality (Age) Regulations (Northern Ireland) 2006.

The Regulations make it unlawful for:

- universities and other institutions which provide further or higher education to discriminate against students or persons who have applied to be students.
- a person who provides of any type or level of vocational training (including providers of facilities for practical work experience and assessment) to discriminate in relation to such training, access to it or in connection with the arrangements for deciding to whom to offer training. It also makes it unlawful for the training provider to discriminate by terminating the training, or subjecting a person to any detriment during the training.
- a body which confers professional or trade qualifications to discriminate against a person by refusing to confer, or in the terms on which it confers, such a qualification, or by deliberately not granting an application for such a qualification, or by withdrawing (or varying the terms of) such a qualification.
- a trade or professional body to discriminate against a member or an applicant for membership by, for example, terminating membership or refusing to admit an applicant to membership.

## Exceptions

As noted above, discrimination (but not harassment or victimisation) may be permitted where there is objective justification for doing so.

Objective justification enables an age-based determination to be made where it is appropriate but it is a high test and it would be necessary for an education provider or other body to show that the discrimination was a proportionate means of achieving a legitimate aim.

For this purpose “proportionate” means that the discriminatory effect of any age-based practice is significantly outweighed by the importance and benefits of its legitimate aim and that the legitimate aim cannot be achieved by a less discriminatory means. Whether an aim is legitimate will depend upon the facts but adopting a particular practice merely to avoid cost or inconvenience is unlikely to be legitimate.

For example, age-based discrimination as an entry requirement to a programme where students are expected to be capable of certain physical acts is unlikely to be objectively justified given that some form of performance-based testing could be applied without disproportionate cost or inconvenience. Age-related arguments based on “health and safety” grounds are equally unlikely to succeed as again crude attempts to draw an anecdotal correlation between age and ability will not meet the requirement of objective justification.

The regulations include a specific exception for a genuine occupational requirements but that exception is unlikely to have much relevance to vocational training as the test is a high one and requires case-specific proof that:

- an age-related characteristic is a genuine and determining occupational requirement of the employment or the context in which it is carried out; and
- it is proportionate to apply that requirement in the particular case.

This exception is only likely to apply in a narrow range of cases, such as where an actor is needed to play a part which specifically calls for a person from a particular age group.

### **Implications for education providers**

There will be few circumstances in which education providers will be able to meet the objective justification required to discriminate on grounds of age. They will need to review policies which may be discriminatory, such as:

- any fixed minimum or maximum ages for admission to programmes or parts of programmes;
- any “time served” criteria for admission which may amount to age discrimination and which could be replaced by outcomes-based criteria;
- assessment processes which have no formal minimum or maximum age limits but where age is nonetheless a factor in reaching decisions?
- any age-related thresholds for funding.