

Progressing age equality in NHSScotland

1. Background

1.1 Equality Act

The UK Government has introduced the Equality Act 2010. The aim of the Act is to consolidate, simplify and, where appropriate, harmonise equality legislation that has been produced over the last 40 years.

Equalities legislation is reserved to the UK Government; however the wide remit of the Equality Act impacts on Scotland and its devolved functions

1.2 A ban on age discrimination

The Equality Act 2010 aims to bring parity across the equality strands and to that end will introduce legislation to prohibit unjustifiable age discrimination in the provision of goods and services. The Act will:

- create a public sector duty to have due regard to the need to:
 - eliminate discrimination;
 - advance equality of opportunity, and
 - foster good relations between people who share a protected characteristic and people who do not share it, and:
- ban age discrimination against those over 18 years in the provision of services and exercise of public functions.

This duty applies to eight protected characteristics, one of which is age. The ban on age discrimination applies in relation to adults; the public sector duty applies in relation to people of all ages, including children.

It is anticipated that the public sector duty will be effective from 2011. The ban on age discrimination for those over 18 will be effective from 2012.

The Government Equalities Office (GEO) published a consultation paper on age discrimination in 2009, which explained that the UK Government expected to see the ban on age discrimination in services and public functions come into force in all sectors. The ban on age discrimination has particular implications for:

- health care services and the NHS;
- social care/community care services.

1.3 The Scottish context

With already well documented changes in demographics indicating an increasing older population, it is considered that the extension of age equality to the provision of

goods and services will have major implications for the provision of community care and for NHS services to older people in Scotland.

There are a range of services, policies and legislation relating to health and social care which are either targeted at a specific age group, or are only available over/under a certain age. Particular areas of focus include mental health services, breast, bowel and retinal screening, orthopaedics, oncology, sensory impairment and end of life issues. Many of these are being investigated as part of the Department of Health (DoH) programme of work (summary below).

In March 2009 NHS boards were asked to provide information on policies and functions operating with an age differentiation. This indicated that there are significant policies that will be implicated by the introduction of the Act.

Readiness for the ban in health boards is being progressed by the Scottish Government Health Directorate (SGHD) and in social care by Community Care within Scottish Government.

2. Implications

2.1 UK wide work- the review

During 2009 the Department of Health (DoH), lead a review to look at the potential issues around the extension of age equality legislation to health and social care with the aim of helping service providers prepare for forthcoming legislation. The Department of Health's review of age discrimination aimed to make recommendations on the following areas:

- The timetable for implementation for the ban on age discrimination;
- Where it is objectively justifiable to retain age based differentiation in services;
- How to support the health and social care system to implement the public sector duty in respect of all age groups;
- Which key actions health and social care bodies should take to make demonstrable progress in meeting their obligations as quickly as possible.

A summary of the review to date can be found in Appendix 1 and 2

SGHD is supporting this considerable work acknowledging that the moral and ethical issues raised by the ban are the same, irrespective of organisational differences. This has proved to be the case.

2.2 Service Change Implications

The review identifies that the ban on age discrimination (in particular removing age based differentiation within services) represents a major service change in how health services are delivered. To meet this and the wider requirements of the age proposals it suggests focussing its work within the context of the personalisation of care agenda. Within this context, matching services more closely to the needs, preferences and aspirations of service users and carers will deliver greater personalisation and tackle the age discrimination that older people in particular experience. It is well documented

that older people experience discrimination as ageist attitudes, neglect and general poor treatment that does not uphold their dignity and respect. Appendix 3

2.3 Resource Implications

The anticipated financial and demographic changes that health and social care services are going to face in the coming years provide an important context for the DoH review. It is clear that, with an increasing older population and tighter funding, service redesign to release resources to provide better, more equitable care and a stronger matching of resource and need through personalisation and, in some situations, redistribution of resource, will be the principle means by which health boards will be able to implement the ban on age discrimination and wider equality work.

2.4 Exceptions

The DoH suggests that few, if any, policy and practice exceptions are needed to the age ban; however it reflects that it may be useful to protect national age limits set for public health programmes such as the screening and flu immunisation programmes as well as clinical professional judgement. For example, it is considered that the screening programme age limits will meet the Equality Act requirements if it can be demonstrated that the age limits are supported by evidence, that is, that they can be justified by clear reference to medical research and evidence.

Age limits for screening are different in England, Scotland and Wales. Lawyers for the DoH and the GEO are of the view that this is permissible, provided the different administrations can demonstrate that the age limits set are related to their medical evidence.

The equality concepts of 'objective justification', "legitimate aim" and "proportionate means" have a strong bearing on the consideration of exceptions, and their use in demonstrating clear links between clinical evidence and the setting of age differentiation of services.

- **What is objective justification?**

Objective justification is the test set out in equality legislation that services and employers have to use to substantiate any exemptions to the laws. The objective justification test, for either direct or indirect discrimination, should be a proportionate way of achieving a legitimate aim.

- **What is proportionate?**

The discriminatory effect of any age-based practice should be significantly outweighed by the importance and benefits of its legitimate aim, and the employer/service should have no reasonable alternative. If the legitimate aim can be achieved by less, or non-discriminatory means, then these must take precedence.

- **What constitutes a legitimate aim?**

A wide variety of aims may be considered legitimate, but they must correspond with a reasonable need on the part of the service. Economic factors such as business needs and efficiency may be legitimate aims, but arguing that it could be more expensive not to discriminate, will not in itself be a valid justification.

2.5 Formulae

The DoH is undertaking further work to ensure resource allocation formulas such as the Quality Adjusted Years formula, can be objectively justified under the proposed legislation.

3. Regulation

The Equalities and Human Rights Commission (EHRC) is the main equalities regulator and will be preparing codes of practice and information, guidance and advice for the new law. Shortly after implementation of the Act, it is expected that it will look specifically at age equality issues within health and social care.

4. Support

SGHD are maintaining close links with DoH to inform developments and avoid duplication. Their programmes of work, in particular those looking at screening programmes and delivering services to particular age groups, will provide valuable evidence and the toolkits they are developing will be considered for use across NHSScotland.

The Patients and Quality Division, who lead on equalities issues for NHS Scotland propose that implementing the ban on age discrimination and a public duty on age should build on previous work in the NHS for other equality strands such as race, gender and religion.

4.1 NHS Board meetings

NHS Health Scotland (Equality, People and Performance) has been asked by the Scottish Government Health Directorate to progress meetings with Health Boards to provide support for the implementation of the anticipated ban on age discrimination.

These meetings in 2010 will provide an opportunity for boards to reflect on the duty, identify potential vulnerability and in particular to:

- Understand what is proposed by the Equality Bill and the implications for service delivery with a ban on age discrimination;
- Identify what the local issues may be to meet this legal requirement; and to
- Identify the support needs of boards.

SGHD will also work with NHS Health Scotland EPD, to organise seminars with other key stakeholders including, the Royal Colleges, 3rd Sector Organisations e.g. Age UK and staffside representation to identify what further guidance may be required to support the NHS to meet the requirements of the age components of the Equality Act.

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