



**RESPONSE TO OFMDFM CONSULTATION
ON PROPOSALS TO EXTEND AGE
DISCRIMINATION LEGISLATION TO GOODS,
FACILITIES AND SERVICES**

SEPTEMBER 2015

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1 Executive Summary

- 1.1 The Equality Commission has consistently called for equality law to be strengthened to prohibit age discrimination outside the workplace.
- 1.2 We consider that there is compelling evidence of age discrimination outside the workplace experienced by older people, as well as children and young people.
- 1.3 We have summarised below our key recommendations as regards OFMDFM's proposals to introduce legislation prohibiting age discrimination outside the workplace, as well as our views on the draft EQIA.

Scope of Legislation: Under 16s

- 1.4 Whilst we welcome the full and public consultation by OFMDFM on its proposals to extend age discrimination legislation outside the workplace, we are disappointed that the current proposals only afford protection against discrimination to people aged 16 and upwards.
- 1.5 We recommend the introduction of age discrimination legislation that gives protection to people of *all ages* against unlawful discrimination when accessing goods, facilities and services.
- 1.6 We consider that there is a robust case for strengthening the rights of *all* children and young people against unlawful discrimination and harassment on the grounds of age in the provision of goods and services
- 1.7 We again call for OFMDFM to set out the key reasons why it is proposed to exclude under 16s from the scope of the legislation.
- 1.8 In the event that it is decided that children and young people aged under 16 are to be excluded from the scope of the legislation, we recommend that the legislation contains a commitment by OFMDFM to commission an independent review of the legislation, with a view to considering the merits of

including children and young people under the age of 16 within the scope of the legislation. The review should be completed within a period of five (5) years from the date of implementation of the age GFS legislation.

Scope of Legislation: Areas

1.9 We agree that the proposed legislation should give protection against unlawful discrimination on the grounds of age in the following areas:

- access to general services;
- exercise of public functions by public bodies;
- private clubs and associations;
- charities;
- accommodation;
- health and social care;
- financial services.

1.10 We also recommend that education and the provision of associated services are covered by the legislation. We consider that the education provisions should apply to children and young people of *all* ages; not just to those aged 16 and over. We recommend that the Education Authority and the Council for Catholic Maintained Schools (CCMS) are also covered by the proposed legislation

Forms of discrimination

1.11 We agree that the proposed legislation should give protection against unlawful direct and indirect discrimination, harassment and victimisation on the grounds of age; as well as other types of discriminatory behaviour.

1.12 We support the proposal that the legislation prohibits direct discrimination due to a person's perceived or actual age, as well as discrimination due to association on grounds of age.

1.13 We support the proposal that direct age discrimination can be permitted where objectively justified.

- 1.14 We agree that the legislation should include provision for an objective justification test. However, we recommend that the legislation should explicitly state that *direct* age discrimination, can only be justified where a *social policy objective* is being pursued; and the measures adopted to achieve that social policy objective are proportionate. A social policy objective is a policy of a 'public interest nature'.
- 1.15 We support the proposed definition of indirect discrimination but recommend changes to the proposed definitions of harassment and victimisation.

Positive action

- 1.16 We agree that the legislation should permit positive action and with the proposed definition of positive action.

Exceptions

General Exceptions

- 1.17 In general, we are of the view that any exceptions to equality legislation should be narrowly construed and objectively justifiable.
- 1.18 Our views on the proposed general exceptions are as follows:
- we agree with the proposed exception for statutory authority;
 - we do not support the proposed exception for immigration;
 - we agree that there should be a exception for charities;
 - we agree with the proposed limited exceptions as regards premises;
 - we do not agree with the scope of the proposed exception as regards care within the family. In particular, we recommend that it does not permit harassment or victimisation on grounds on age.
 - we agree with the inclusion of an exception so as to permit service providers to meet the specific justified needs of a person of a particular age in regard to their education, training or welfare, or any ancillary benefits;

- we consider there may be value in introducing a mechanism whereby *ad hoc exceptions* can be made.

Health and social care

1.19 We agree that there should no specific exceptions for health and social care.

Financial services exception

1.20 We do not agree that there should be a specific exception for financial services. We consider that the onus should be on financial service providers to objectively justify any differentials due to age.

1.21 In the event that a financial services exception is included in the legislation, we recommend that:

- it includes the requirement that any difference in treatment on grounds of age is *proportionate*;
- that OFMDFM undertake within a specific period (5 years from implementation of age GFS legislation) an independent review of how the age financial services exception is operating in NI; with a view to considering whether any clear evidence exists for maintaining such an exception; whether any legislative changes are needed; and whether further non-legislative actions can be taken to address the barriers experienced by people on the grounds of their age in accessing financial services .

Other Specific Exceptions

1.22 Again, we stress that any exceptions to equality legislation should be narrowly construed and objectively justifiable.

1.23 Our views on the other proposed specific exceptions are as follows:

Age -based concessions

- We do not support the proposed blanket exception that permits concessionary services for *all* ages. However, we consider the legislation should make clear that age-based concessions aimed at *children and young people and older people* which have clear *social policy objectives*, are not discriminatory and are permitted on the basis that they are justified.

Age-related holidays

- We do not support the inclusion of the proposed exception for age-related holidays.

Sport

- We agree with the proposed exception for sporting and recreational activities and events.

Residential park homes etc

- We do not support the proposed specific exception for residential park homes. We recommend that retirement villages, sheltered accommodation, supported accommodation and care homes are covered by the legislation and that the legislation does not include a specific exception/s to cover these types of accommodation.

Private clubs and associations

- We support the proposed exception for private clubs and associations. However, we do not agree with the scope of the proposed exception for age- based concessions by private clubs.

Age restricted schemes

- We agree that the legislation should include an exception for age restricted schemes.

Commission's powers and duties

- 1.24 We agree that the Commission should have a range of general duties under the legislation. We also agree with the proposals

as regards the Commission's proposed powers but reiterate our call for wider reform of the Commission's powers.

Draft EQIA

1.25 We welcome the fact that OFMDFM is consulting on the EQIA at the same time as the consultation on the policy proposals.

1.26 While the EQIA appears to follow the 7 steps outlined in the Commission's EQIA guidance¹, we have some advice in relation to the depth/detail of some of the information provided in the EQIA.

1.27 We therefore recommend that OFMDFM ensures the EQIA:

- includes and considers all relevant qualitative and quantitative data/evidence;
- assesses the potential equality impacts of the policy, based on evidence. It is important to not only identify potential adverse impacts, but also to seek opportunities to promote equality of opportunity and good relations.
- further considers mitigating measures and alternative policies;
- outlines proposed monitoring arrangements in the Stage 7 EQIA report.

¹ Section 75 of the Northern Ireland Act 1998, Practical Guidance on Equality Impact Assessment, ECNI, February 2005. [PracticalGuidanceonEQIA2005.pdf](#)

2 Introduction

- 2.1 The Equality Commission for Northern Ireland welcomes the opportunity to respond to the Office of the First Minister and Deputy First Minister's (OFMDFM) consultation on proposals to extend age discrimination legislation to the area of goods, facilities and services (GFS).
- 2.2 Further details on the scope of the Commission's remit and duties is contained in Annex 1.
- 2.3 The Commission has consistently called for equality law to be strengthened to prohibit age discrimination outside the workplace. For example, in its *Proposals for Legislative Reform to Junior Ministers* in 2009 it identified the introduction of age GFS legislation as a priority area for law reform.²
- 2.4 We therefore welcomed the commitment by the Executive in its *Programme for Government 2011-15* to extend age discrimination legislation to the provision of goods, facilities and services.³
- 2.5 In April 2012, we published our proposals for reform of the age GFS legislation '[Proposals for reform: Strengthening Protection for all ages](#)'⁴ which set out our recommendations for reform of the age GFS legislation.
- 2.6 In addition, in 2013, we further refined and developed our policy positions and published our '[Recommendations for reform: strengthening protection for children and young people](#)'⁵ which set out our proposals for reform as regards the strengthening of rights of children and young people against age discrimination when accessing goods, facilities and services. These proposals were jointly published by the Commission with the Northern Ireland Commissioner for Children and Young People (NICCY).
- 2.7 These proposals were informed by an expert legal briefing on the legal implications of including children and young people

² [Proposals for Legislative Reform](#) to Junior Ministers, ECNI 2009

³ Executive's [PfG 2011-2015](#)

⁴ See ECNI [Proposals for reform: Strengthening Protection for all ages](#): Full Report, 2012

⁵ See ECNI & NICCY [Recommendations for reform: strengthening protection for children and young people](#), Full Report, 2013

within the proposed age GFS legislation by Robin Allen QC and Dee Masters BL, jointly commissioned by the Commission and NICCY in April 2013.⁶ More recently, we commissioned Dee Masters BL to produce a short briefing paper (2015)⁷ on OFMDFM's proposals as regards the proposed age GFS legislation.

- 2.8 We have recently updated our recommendations for reform in light of the specific proposals set out in the OFMDFM consultation. This response reflects these updated recommendations; which, for ease of reference, have also been summarised in a short briefing paper.⁸
- 2.9 In responding, we have also drawn on the views raised with us by stakeholders; including at two large conferences on proposals for age legislation outside the workplace in October 2012 and October 2013; as well as at a number of roundtable events jointly hosted with NICCY attended by organisations representing the children and young people sector.
- 2.10 Our recommendations for reform are also informed by the evidence base which shows compelling evidence of age discrimination experienced by children and young people and older people.
- 2.11 This includes independent research commissioned by the Commission in 2008 which found "*numerous examples of direct and indirect age discrimination across the scope of financial services in Northern Ireland*".⁹
- 2.12 It also includes a report by the Institute of Conflict Research (ICR) on *Strengthening protection for all ages against discrimination outside the work place* (2014)¹⁰ which was commissioned by the Commission. It highlighted examples of

⁶ See [Expert Briefing: strengthening protection for children and young people](#) by R Allen and D Masters, April 2014 commissioned by ECNI/NICCY, April 2013 and [Executive Summary](#)

⁷ [Proposals for Reform of Age Discrimination in the Provision of Goods, Facilities and Services](#), Dee Masters, commissioned by ECNI, August 2015.

⁸ [Age GFS Briefing Paper](#) ECNI August 2015

⁹ [Older People's Access to Financial Services](#), B Fitzpatrick, I Kingston, commissioned by ECNI, 2008

¹⁰ [Strengthening protection for all ages against age discrimination outside the workplace](#). ICR commissioned by ECNI March 2014

potential age discrimination experienced by older people when accessing health and social care, financial services and other services, such as retail. The report also illustrated examples of the general barriers and negative attitudes experienced by older people when accessing services.

- 2.13 This response builds on our preliminary comments sent to OFMDFM in May 2015 on its initial draft age GFS consultation document. Our recommendations as regards OFMDFM's draft EQIA on its policy proposals, reflects earlier advice provided to OFMDFM in relation to the preparation of the EQIA.
- 2.14 Finally, whilst we welcomed the commitment by the Executive in its *Programme for Government 2011-15* to extend age discrimination legislation to the provision of goods, facilities and services, we reiterate our call for comprehensive *single equality legislation*.
- 2.15 We consider that single equality legislation would best harmonise and simplify the protections available¹¹. We remain concerned that despite a commitment in the St Andrews Agreement¹² in 2006 to 'work rapidly' towards the development of single equality legislation, this legislation has not been progressed by the Northern Ireland Executive.

¹¹ Response to *UK Government: proposals for a Single Equality Bill for GB, ECNI, 2007* – www.equalityni.org/Single_Equality_Bill_for_GB2007.pdf

¹² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf

3 Evidence of Age Discrimination

Question

Are you aware of any evidence of age discrimination in the provision of goods, facilities and services, charities, premises, education, public functions, and private clubs and associations?

Response

In summary:

- we consider that there is compelling evidence of age discrimination outside the workplace experienced by older people, as well as children and young people.

Comments

- 3.1 We consider that there is compelling evidence of age discrimination outside the workplace experienced by older people, as well as children and young people.
- 3.2 We have summarised below some examples of key evidence which illustrate the barriers, including prejudicial attitudes, experienced by older people and children and young people when accessing goods and services, due to their age. It includes evidence specific to Northern Ireland, as well as wider evidence from across the United Kingdom. These examples should not be considered an exhaustive list.

Older people

- 3.3 Examples of evidence showing the barriers, including negative stereotypes and ageist behaviours, as well as age discrimination experienced by older people outside the workplace include the following:

- Independent research commissioned by the Equality Commission in 2008 found “*numerous examples of direct and indirect age discrimination across the scope of financial services in Northern Ireland*”.¹³ This research also highlighted some of the general barriers that affect older people when accessing financial services.¹⁴
- A report by the Institute of Conflict Research (ICR),¹⁵ , *Strengthening protection for all ages against discrimination outside the work place* commissioned by the Equality Commission has highlighted examples of potential age discrimination experienced by older people when accessing health and social care, financial services and other services, such as retail. The report also illustrated examples of the general barriers and negative attitudes experienced by older people when accessing services.
- The recent *NI Life and Times Survey* (2014) reveals that 37% of respondents were of the view that older people are, on the whole, treated worse than other people because of their age. More specifically, it found that 31% of respondents were of the view that health and social care workers treated older people worse with regard to the treatment of their illnesses. It also highlighted that over a quarter of respondents disagreed with the view that the rights of older people and the dignity of older people were upheld.¹⁶

¹³ [Older People's Access to Financial Services](#), B Fitzpatrick, I Kingston, commissioned by ECNI, 2008

¹⁴ These included a knowledge gap and lack of familiarity with contemporary forms of managing money, especially online methods; fewer older people holding a bank account or credit cards; a preference for long-established forms of managing money, especially cash; concern about Post Office closures; and a reluctance to ask for help.

¹⁵ [Strengthening protection for all ages against age discrimination outside the workplace](#). ICR commissioned by ECNI March 2014

¹⁶ [Ark NI Life and Times Survey](#) (2015); 26% disagreed/strongly disagreed with the view that the rights of older people were upheld and 27% disagreed/strongly disagreed with the view that the dignity of older people were upheld. Further 26% identified 'lack of respect' as one of the main problems facing older people in Northern Ireland today.

- A report by the NIHRC (2014) found examples of older people experiencing poor quality care and lack of dignity and respect.¹⁷
- The Equality Commission's *Equality Awareness Survey* in 2011 (EQAS 2011) found that almost a quarter of respondents (24%) believed that people over 70 are treated unfairly in Northern Ireland.¹⁸
- The Equality Commission has received a number of enquiries from older people alleging discrimination by service providers on the grounds of age.¹⁹ These enquiries cover a range of areas including health and social care²⁰, and retail services.²¹
- A report by QUB (2009) found evidence of older people experiencing ageism in health and social care;²²
- The *Review into Achieving Age Equality in Health and Social Care*²³ undertaken in Great Britain in 2009 by the Department of Health found that some age groups, especially older people, were more likely to receive poor services. It found that despite recent progress and the good quality of service received by many people of all ages, age discrimination remains an issue for the health and social care system. It also found that examples of both direct and indirect discrimination have a detrimental impact on patients, service users and carers and on public confidence in the system.

¹⁷ NIHRC *In Defence of Dignity* (2014)

¹⁸ [EQAS](#) survey 2011. This is an increase from the 2008 survey which found that 17% believed that people over 70 are treated unfairly in Northern Ireland.

¹⁹ For example, we received 33 enquiries in the area of age GFS discrimination in 2014/15; representing 6.6% of all enquiries.

²⁰ For example from older people as regards the removal/reduction of services when they reached a certain age.

²¹ For example, from older people receiving degrading treatment due to age from retailers.

²² *Making Older People Equal: Reforming the Law on Access to Services in Northern Ireland, Report for the Changing Ageing Partnership*, L. Glennon and B Dickson, February 2009, www.changingageing.org

²³ Carruthers, I. and Ormondroyd, J. (2009) *Achieving age equality in health and social care: A report to the Secretary of State for Health*. London.

http://www.cpa.org.uk/cpa/achieving_age_equality_in_health_and_social_care.pdf

- The English Longitudinal Study of Ageing (ELSA) revealed 33% of all older people experience some form of perceived age discrimination, with poorer, older men being at highest risk.²⁴

Children and young people

- 3.4 In our '[Recommendations for reform: strengthening protection for children and young people](#)'²⁵, jointly produced by NICCY, we outline in detail the evidence base showing the prejudicial attitudes and less favourable treatment that children and young people receive when accessing goods, facilities and services, due to their age.
- 3.5 Examples of evidence of age discrimination, as well as prejudicial negative attitudes, experienced by children and young people outside the workplace include the following.
- The Ark *Young Life and Times Survey 2010*²⁶, a survey of 16 year olds in Northern Ireland, has highlighted the high level of negative attitudes and barriers that young people face when accessing day to day services, including retail shops.
 - A survey conducted by NICCY Youth Panel (2006) into the experiences of children and young people as consumers, revealed that the majority of respondents considered that children and young people were treated more negatively or with less respect by shops staff than adults.²⁷
 - A survey by the Consumer Council on public transport has shown that one reason why children and young

²⁴ English Longitudinal Study of Ageing (ELSA). The study highlighted the high levels of age discrimination faced by older people; a situation that worsens as they age. In particular, 26.6 % of people aged between 52 and 59 reported age discrimination- a figure which rose to 37.2 % for adults aged between 70 and 79. Rippon, I., Kneale, D., De Oliveria, C., Demmakos, P. and Steptoe, A. (2013) *Perceived Age Discrimination in Older Adults. Age and Ageing* advance access publication 26 September 2013. <http://www.ncbi.nlm.nih.gov/pubmed/24077751>

²⁵ See ECNI & NICCY [Recommendations for reform: strengthening protection for children and young people](#), Full Report, 2013

²⁶ *Ark Young Life and Times Survey 2010*, <http://www.ark.ac.uk/ylt/>

²⁷ NICCY survey

people will not travel on buses on a regular basis is due to the negative attitudes of bus drivers and other members of the public²⁸.

- A recent report (2015) has highlighted the concerns raised by children and young people in Northern Ireland as regards the negative stereotypes towards them displayed in the media and the impact of those negative stereotypes on their lives, including when accessing services.²⁹
- *A Review of the Youth Justice system* (2011) in Northern Ireland reported evidence of police officers adopting a judgemental and prejudicial, even antagonistic attitude towards some of the young people they encounter.”³⁰
- Case studies (2013) collected by NICCY include examples of less favourable treatment by children and young people when accessing goods and services.³¹ They include examples of being refused service by retail shops due to their age, being treated, without good reason, to less favourable terms and conditions by gyms due to their age. Complaints to NICCY have also highlighted the indiscriminate use of Mosquito devices³² by a number of retailers.
- A recent report (2015) has highlighted that young people in Northern Ireland feel they are being treated differently and unfairly because they are young. In addition, young people felt unfairly treated by adults who they thought were judging them unfairly based on their age.³³ The report also recommended that the discriminatory

²⁸ *Transport Matters Young People's Experiences, Attitudes and Ideas for Improving Public Transport*, Consumer Council and Youth Action, <http://www.consumercouncil.org.uk/filestore/documents/transportmatters.pdf>

²⁹ *Behind the Headlines: Media Representation of Children and Young People in Northern Ireland, QUB*, 2015. The research found that “all young people’s groups felt excluded and demonised stating that the majority of negative media representations focused on teenagers and young people in their early twenties”.

³⁰ <http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/report-of-the-review-of-the-youth-justice-system-in-ni.pdf>

³¹ NICCY *Age GFS case studies 2013* <http://www.niccy.org/media/1512/gfs-case-studies-july-15.pdf>.

³² Mosquito devices emit high frequency sounds that are most audible to people under 20 years.

³³ *The views and experiences of young people in NI: Exploring participation, knowledge and respect for rights, community life and leisure, and mental health*, Dr K Orr, commissioned by CLC and Save the Children, June 2015

treatment of young people due to age must be addressed, including, for example, *via* the proposed legislation.³⁴

- There is evidence that children and young people experience difficulties in accessing age appropriate health and social care services. For example, complaints to NICCY have shown that a lack of age-appropriate mental health services.
- There is also evidence that children and young people have received in certain health and social care areas poorer services compared to other age groups.

For example, the lack of investment in children's services has been highlighted in *Transforming Your Care: A Review of Health and Social Care in Northern Ireland* (2011).³⁵ In addition, a recent report (2015)³⁶ has highlighted that there is a "*clear disconnect between young people and mental health services available to them*", and that "*CAMHS should be assessed as a matter of priority, both for suitability and sufficiency of provision*".

- Complaints received by NICCY show that children and young people experience difficulties when in transition from one health and social care service to another with the result that their needs have not been met.

In particular, there are variations within the health sector as to the age which children and young people are transferred to adult services; for example, in some instances children and young people are transferred at age 13 to adult services which can restrict their access to various forms of treatment.³⁷³⁸

³⁴ See [The views and experiences of young people in NI: Exploring participation, knowledge and respect for rights, community life and leisure, and mental health](#), at p60, Dr K Orr, commissioned by CLC and Save the Children, June 2015

³⁵ <http://www.dhsspsni.gov.uk/transforming-your-care-review-of-hsc-ni-final-report.pdf>

³⁶ [The views and experiences of young people in NI: Exploring participation, knowledge and respect for rights, community life and leisure, and mental health](#), Dr K Orr, commissioned by CLC and Save the Children, June 2015

³⁷ The [Bamford Review](#) in 2006 into CAMHS had highlighted this issue as regards access to mental health services and made it clear that 'the upper age limits for access to services across and within health, education and social services can lead to difficulties accessing a comprehensive service across disciplines and can also lead to inequality of services.'

- Research by NICCY in 2012 on *Review of Transitions to adult services for young people with learning disabilities*³⁹ found that young people with learning disabilities continued to encounter significant difficulties on transition from school.
Further, complaints to NICCY have also highlighted difficulties experienced by some older school pupils, approaching the end of compulsory school age (age 16), in accessing educational welfare services supplied by education and library boards; the complaints alleging that these services are more readily available to younger pupils.
- Concerns have also, for example, been raised by the National Deaf Children's Society about the lack of preventative tier two services under CAMHS for deaf children in comparison to tier two services for deaf adults.
- Enquiries received by the Equality Commission have also included a number of complaints from children and young people relating to their less favourable treatment by retailers because of their age.⁴⁰

³⁸ In addition, complaints to NICCY reveal there has been a practice among some health professionals to discharge children with ADHD from children's services connected with ADHD, when they reach the age of 14 or 15; as there is no ADHD service for adults.

³⁹ http://www.niccy.org/uploaded_docs/2012/Publications/NICCY%20Transitions%20Report%20-%20final%20Sept%202012.pdf

⁴⁰ For example, less favourable treatment of school age children by retailers due to their age.

4 Proposed scope – Age

Question

How strongly do you agree or disagree with our current proposal to extend protection against age discrimination to those aged 16 and over?

Response

In summary:

- we continue to recommend that the legislation covers *all* ages; and again call for OFMDFM to set out the key reasons why it is proposed to exclude under 16s from the scope of the legislation;
- we consider that there is a robust case for strengthening the rights of *all* children and young people against unlawful discrimination and harassment on the grounds of age in the provision of goods and services;
- in the event that it is decided that children and young people aged under 16 are to be excluded from the scope of the legislation, we recommend that the legislation contains a commitment by OFMDFM to commission an independent review of the legislation, with a view to considering the merits of including children and young people under the age of 16 within the scope of the legislation. The review should be completed within a period of five (5) years from the date of implementation of the age GFS legislation.

Comments

Exclusion of under 16s

- 4.1 Whilst we welcome the full and public consultation by OFMDFM on its proposals to extend age discrimination legislation outside the workplace, we are disappointed that the current proposals only afford protection against discrimination to people aged 16 and upwards.

- 4.2 We have consistently called for the extension of the age GFS legislation to cover *all* ages. We consider that people of all ages, including children and young people, should not receive an inferior service or have access to a service unfairly denied simply on the basis of the age.
- 4.3 We note that OFMDFM has indicated in the consultation document that “*we recognise that there will be concerns and disappointment that those aged under 16 are not included at this stage.*”
- 4.4 It further indicates that “*this consultation is a first step to ensure that legislation was brought forward as soon as possible to protect people over the age of 16 from unfair and unjustifiable age discrimination.*” It also states that “*we will continue to work with a wide range of people within the children and young people’s sector to address issues affecting children under the age of 16.*”⁴¹
- 4.5 In our response to OFMDFM’s engagement on a pre-consultation draft age GFS consultation document⁴², we recommended that the consultation document should set out the key reasons why it is proposed to exclude under 16s from the scope of the legislation. We also indicated that would be helpful if the Department clarifies what are the proposed ‘next steps’ and associated measures to action these steps.⁴³
- 4.6 Whilst we welcome the fact that OFMDFM recognises that “*the evidence suggests that children and young people can experience a range of age discrimination and other ageist behaviour...*”⁴⁴, we are disappointed that, despite this recognition and our recommendation, it is not clear from either the consultation document, nor the accompanying EQIA, what the key reasons are for excluding under 16s.
- 4.7 We therefore again call for OFMDFM to set out the key reasons why it is proposed to exclude under 16s from the scope of the legislation.

⁴¹ See p23 and p24 of consultation document.

⁴² ECNI Response to OFMDFM pre-consultation on age GFS, May 2015

⁴³ Ditto

⁴⁴ See p97 of consultation document.

4.8 We are also disappointed that OFMDFM has not clarified what are its proposed 'next steps' and associated measures. We therefore ask the Department again to clarify what are its proposed 'next steps' and associated measures to action these steps.

Robust case for including all ages

4.9 We consider that there is a *robust case* for strengthening the rights of *all* children and young people against unlawful discrimination and harassment on the grounds of age in the provision of goods and services.

4.10 In our '[Recommendations for reform: strengthening protection for children and young people](#)'⁴⁵ (2013), jointly published with the NICCY, we set out joint recommendations as regards the strengthening the rights of *all* children and young people against unlawful discrimination and harassment on the grounds of age in the provision of goods and services.

4.11 These proposals were informed by an expert legal briefing on the legal implications of including children and young people within the proposed age GFS legislation by Robin Allen QC and Dee Masters BL, jointly commissioned by the Commission and NICCY in April 2013.⁴⁶

4.12 Further, we also set out the *key reasons* underpinning our recommendation that *all* children and young people are provided with protection against age discrimination outside the workplace.

4.13 In summary, we considered that :

- there are *no legally compelling reasons* for limiting the scope of the legislation to adults⁴⁷;

⁴⁵ See ECNI & NICCY [Recommendations for reform: strengthening protection for children and young people](#), Full Report, 2013. See also [Summary \(2013\)](#)

⁴⁶ See [Expert Briefing: strengthening protection for children and young people](#) by R Allen and D Masters, April 2014 commissioned by ECNI/NICCY, April 2013 and [Executive Summary](#)

⁴⁷ We address in detail in our joint [Recommendations for reform: strengthening protection for children and young people](#), Full Report, 2013 the concerns on this issue raised as part of the debate in Parliament and in the debate in the Northern Ireland Assembly in March 2013.

- there is *compelling evidence* that children and young people are subjected to less favourable treatment on the grounds of age when accessing goods and services⁴⁸;
- the legislation will help challenge *negative stereotypes, prejudicial attitudes, harassment* and ageist behaviours directed towards children and young people by service providers and others, and help *build a culture* where children and young people are treated with respect and feel valued when receiving a service.⁴⁹
- excluding children and young people from the scope of the legislation would be a *breach of the general principle of equal treatment* and accordingly would itself amount to discrimination.⁵⁰ We also recommend that the NI Assembly legislates in a manner that is consistent with the rights contained within the *UN Convention of the Rights of the Child* (UNCRC) and the recommendations of the UN Committee on the Rights of the Child (2008).⁵¹
- whilst Section 75 of the Northern Ireland Act 1998 does not apply directly to the Assembly, the Assembly, by legislating to give protection to children and young people under the legislation, is *acting in a manner consistent with the Section 75 duty*, which applies to other public authorities;
- there is the opportunity for the NI Executive to adopt a '*model of best practice approach*' that is designed to safeguard and promote children's rights; in line with the approach that has already been adopted in other

⁴⁸ See our response to question 1 above as regards evidence of less favourable treatment experienced by children and young people.

⁴⁹ For example, it will mean that service providers, public bodies and others will proactively examine whether the restriction of services to children and young people of certain ages is justifiable.

⁵⁰ Providing protection for children and young people against discrimination in this area is consistent with the UK Government's obligations under international human rights conventions, including the UN Convention on the Rights of the Child (UNCRC), and the norms of the Council of Europe.

⁵¹ As regards recommendations of the UN Committee in relation to Article 2 (non-discrimination) of the UNCRC, the UN Committee in its Concluding Observations on the UK in 2008 made it clear that it was recommending that the UK: "take all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively, including with disciplinary, administrative or if necessary, penal sanctions."

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

countries; in particular, Australia, Canada and Belgium. Further, the legal systems of these countries, have shown that children and young people of all ages can be protected against age discrimination and suitable exceptions formulated without encountering drafting difficulties or creating any undesirable or unintended consequences.

- 4.14 In addition, we consider that providing protection for *all* children and young people, not just those aged 16 and over:
- will help *improve outcomes* for children and young people and is consistent with the commitments of the NI Executive as set out in the *OFMDFM Strategy for Children and Young People*⁵²; the *Delivering Social Change Framework*⁵³ and the *Together: Building a United Community Strategy*;⁵⁴
 - is consistent with an approach which recognises that age is the very factor that makes children and young people *more vulnerable* than adults. These differences place children and young people at risk or at a disadvantage in comparison with adults and therefore they require *special protective measures*; rather than *no protection* from age discrimination when accessing goods and services.
 - is consistent with *European consumer protection law* which recognises that there should be enhanced levels of protection for vulnerable consumers⁵⁵;
 - will ensure that children and young people have similar protection against discrimination when accessing goods and services as they have under *other areas of equality legislation*; for example, protection against discrimination on

⁵² The *OFMDFM Strategy for Children and Young People* pledges ‘a drive towards a culture which respects and progresses the rights of the child or young person’ *Our Children and Young People: Our Pledge: A ten year strategy for children and young people in Northern Ireland 2006-2016*, OFMDFM, <http://www.ofmdfmi.gov.uk/ten-year-strategy.pdf>

⁵³ The *Delivering Social Change Framework* “aims to deliver a sustained reduction in poverty and associated issues across all ages and is also seeking to secure an improvement in children and young people’s health, well being and life opportunities” <http://www.ofmdfmi.gov.uk/delivering-social-change>

⁵⁴ In the *TBUC Strategy*, children and young people are named as a key priority and where the aim is to “build a community where they can play a full and active role in building good relations”. http://www.ofmdfmi.gov.uk/together_building_a_united_community.pdf, May 2013

⁵⁵ Overall consumer protection law has recognised that because some consumers are vulnerable (for example, because they are older or younger) there should be *enhanced levels* of, but not no, consumer protection.

the grounds of religious belief, political opinion, sex, sexual orientation, disability and race covers children and young people of all ages;

- is in line with the *draft European Commission Directive on the provision of goods and services*;⁵⁶
- can also have *positive impacts* for businesses and public bodies.⁵⁷

4.15 It is also vital that the proposed legislation does not result in *unjustifiable and absurd* inconsistencies of treatment.

4.16 For example, it is illogical for the law to protect an older person, a 18 year old, or a 16 year old from harassment because of their age but consider it perfectly legal for shop owners, health and social care professionals and other service providers to treat a 15 or 14 year old in this manner. The 15 year old must wait until his or her 16th birthday before they can have protection under the proposed legislation.

4.17 It is also inconsistent that under the proposed legislation, for example, a ban on 16 year olds entering a department store would be unlawful direct age discrimination unless justifiable. However, a ban on 15 year olds would be perfectly lawful. There would be no requirement for the store to justify their actions.

4.18 In our view there is no logical basis for such an approach. In both of these examples a 15 year old is in a comparable situation to both a 16 year old and/or an adult. There is no difference between their situations which could justify affording protection to one and not the other.

4.19 The inconsistencies are compounded by the fact that, it is proposed that the legislation will protect young people who are

⁵⁶ In particular, the European Commission did not propose that the Directive should only protect against age discrimination in the provision of goods and services as regards adults. *Draft European Union Directive on equal opportunities and access to goods, services on the basis of age, disability, sexual orientation, and religion or belief*, 2008/0140 (CNS), See Article 3

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>

⁵⁷ Restricting access to services for people of certain ages has economic implications; for example, when children and young people as customers are either refused service or restrictions are placed on their ability to access services, the economy misses out on increased business and revenue.

aged under 16 if they are *perceived* to be 16 or older, even if they themselves have not reached the age of 16.

- 4.20 In addition, under the current proposals, the legislation will protect children and young people under the age of 16 from unlawful direct age discrimination due to their *association* with people of other ages, for example, older teenagers or young adults; even if they themselves have not reached the age of 16.

Clear support for all ages to be covered

- 4.21 Further, there is clear support from across different age sectors for the proposed legislation to cover all ages; including from representatives from the older people's sector.
- 4.22 For example, the Commissioner for Older People (COPNI), Age NI and Age Sector Platform have confirmed their support for the coverage of all ages within the proposed legislation.⁵⁸
- 4.23 In addition, a survey (2014) of older people across Northern Ireland found that 90% of people surveyed aged 65 and over agreed or strongly agreed that the legislation should extend to people of all ages.⁵⁹ Further, the survey showed that amongst the general population, 92% of those surveyed agreed/strongly agreed that the legislation should extend to people of all ages.
- 4.24 There is also strong cross party support amongst political representatives for this legislation to cover all ages; with 79% of MLAs surveyed in 2013 indicating that they believed that the age GFS legislation should apply to people of all ages.⁶⁰

⁵⁸ See Evidence by COPNI to OFMDFM Committee 2 April 2014, [Official Report \(Hansard\)](#) & Age NI & Age Sector Platform [Age Sector Position Paper](#) July 2014.

⁵⁹ Milford Brown Research commissioned by Age NI and Age Sector Platform, May 2014. See Age NI and Age Sector Platform [Briefing Paper](#) July 2014,

⁶⁰ That was broken down to be 85% of nationalist MLAs and 75% of unionist MLAs.

See evidence by COPNI to OFMDFM Committee 2 April 2014 [Official Report \(Hansard\)](#). MLA research panel, December 2013, compiled by Stratagem and ComRes. ComRes surveyed 40 MLAs between 29 October – 25 November 2013 by self-completion postal questionnaire and online. Data is weighted by party group and region).

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4.25 In conclusion, in light of the clear public and political support for the proposed legislation to covers all ages, as well as the compelling reasons outlined above:

- we continue to recommend that the proposed legislation covers *all* ages;
- in the event that it is decided that children and young people aged under 16 are to be excluded from the scope of the legislation, we recommend that the legislation contains a commitment by OFMDFM to commission an independent review of the legislation, with a view to considering the merits of including children and young people under the age of 16 within the scope of the legislation. The review should be completed within a period of five (5) years from the date of implementation of the age GFS legislation.

5 Proposed scope - Goods, facilities and services

Question

How strongly do you agree or disagree with how we have defined the concept of goods, facilities and services?

Response

In summary:

- we agree that the legislation should cover the provision of goods facilities and services.

Comments

- 5.1 We agree that the legislation should cover the provision of goods facilities and services to the public or a section of the public (for payment or not).
- 5.2 In line with the approach adopted under other equality legislation , we agree that specific areas should include the following services/ facilities:
- access to and use of any place which members of the public are permitted to enter;
 - facilities for entertainment, recreation or refreshment);
 - facilities for public transport or travel;
 - accommodation in a hotel, boarding house or other similar establishment;
 - financial services (such as services of a banking, credit, and insurance nature);
 - services provided by profession or trade or any local or public authority, including the provision of health and social care;
 - facilities for education and associated services including services provided by schools and the Education Authority.

- 5.3 As we recommend the extension of the age GFS legislation to cover all ages, we consider, as regards the provision of facilities for education, that the law should not be restricted, as proposed, to those who have attained the upper limit of the compulsory school age.⁶¹

Question

How strongly do you agree or disagree with how we have defined the concept of a service provider?

Response

In summary:

- we agree with the proposed definition of 'service provider'.

Comments

- 5.4 We agree that the definition of 'service provider' should cover any person concerned with the provision of goods facilities and services to the public or a section of the public (for payment or not).
- 5.5 This proposed approach is consistent with the approach adopted under other equality legislation in Northern Ireland.

6 Proposed scope - Public functions

Questions

How strongly do you agree or disagree with our current proposals that any future age discrimination legislation should apply to public functions?

⁶¹ As defined under the Education & Libraries (NI) Order 1986 as amended.

How strongly do you agree or disagree with how we have defined the concept of a public function?

Response

In summary:

- we agree the legislation should apply to the exercise of public functions;
- we recommend that the legislation prohibits public authorities from discriminating on grounds of age when carrying out their public functions in *all* areas, except in some clearly defined limited areas;
- we recommend, as regards the exercise of public functions in relation to education, that protection covers *all* ages.

Comments

- 6.1 We agree the legislation should apply to the exercise of public functions.
- 6.2 We recommend that the legislation adopts the approach taken under the disability legislation in Northern Ireland, and the approach adopted in Great Britain under the Equality Act 2010; in that it should prohibit public authorities from discriminating on grounds of age when carrying out their public functions in *all* areas, except in some clearly defined limited areas.
- 6.3 We agree, for example, that there should be some limited exceptions relating to judicial acts, decisions to institute criminal proceedings and the making, confirming or approving of legislation. We also agree, in line with the approach taken in other equality legislation, that a limited number of public authorities should be excluded, such as the Security Service and Houses of Parliament.
- 6.4 As we recommend the extension of the age GFS legislation to cover all ages, we consider, as regards the exercise of public functions in relation to education, that protection in this area should cover *all* ages and not be restricted, as proposed, to

those who have attained the upper limit of the compulsory school age.⁶²

- 6.5 Our recommended approach is consistent with the existing duty under Section 75 of the Northern Ireland Act 1998, which applies to designated public authorities. In particular, designated public authorities must have due regard to the need to promote equality of opportunity on the grounds of age when carrying out their functions. This duty applies to all their functions in Northern Ireland, including *education functions*, and applies to people of *all* ages; not just young people aged 16 and over.

7 Proposed scope - Private clubs and associations

Questions

How strongly do you agree or disagree with our current proposals that any future age discrimination legislation should apply to private clubs and associations?

How strongly do you agree or disagree with the way that we have defined the concept of private clubs and associations?

Response

In summary:

- we agree that the legislation should apply to private clubs and associations;
- we agree with the proposed definition of private clubs and associations.

⁶² As defined under the Education & Libraries (NI) Order 1986 as amended.

Comments

- 7.1 We agree that the proposed legislation should apply to private clubs and associations.
- 7.2 We also agree that private clubs/associations should be defined in line with the approach taken under other equality legislation; namely, have at least 25 members and have admission to membership regulated by its constitution.
- 7.3 We support the proposal that protection against age discrimination by private clubs/associations should extend to existing or potential members and associates, as well as existing or potential guests. This reflects the approach taken under the disability legislation and in Great Britain under the Equality Act 2010.

8 Proposed scope - Charities

Question

How strongly do you agree or disagree with our current proposals that any future age discrimination legislation should apply to charities?

Response

In summary:

- we agree that charities should be covered within the scope of the legislation.

Comments

- 8.1 We agree with the proposed approach that charities are covered within the scope of the legislation.

- 8.2 Including charities within the scope of the legislation is consistent with the approach adopted as regards other equality grounds in Northern Ireland and with the approach adopted in Great Britain under the Equality Act 2010.

9 Proposed scope - Premises

Question

How strongly do you agree or disagree with our current proposals that any future age discrimination legislation should be applied to premises?

Response

In summary:

- we agree that premises should be covered within the scope of the legislation.

Comments

- 9.1 We agree that the legislation should cover age discrimination in the disposal and management of accommodation.
- 9.2 We welcome the proposal that the legislation should apply to both public and private housing and accommodation, including the NIHE, housing associations, and private landlords.
- 9.3 We recommend that retirement villages, sheltered accommodation, supported accommodation and care homes are covered by the legislation and, as outlined in more detail below, we recommend that the legislation does not include a specific exception/s to cover these types of accommodation.⁶³
- 9.4 The extension of protection against age discrimination in housing will, for example, prevent landlords from refusing to let their premises to young adults (for example, students) due to negative stereotypical assumptions about young adults; for

⁶³ See our response to question on residential park homes.

example, that they will damage the property or disrupt other tenants.

- 9.5 Including premises within the scope of the legislation is consistent with the approach taken on other equality grounds in Northern Ireland.
- 9.6 It is of note that in the Republic of Ireland, age discrimination in relation to accommodation is unlawful under the Equal Status Act 2000 (as amended), subject to specific exceptions. Further, legislation in both Australia and Belgium, which prohibits age discrimination outside employment and which covers children and young people, also extends to accommodation. In these jurisdictions, there are only a small number of exceptions which apply to accommodation.
- 9.7 Including premises within the scope of the legislation is also in line with the *draft European Commission Directive* on the provision of goods and services.⁶⁴

⁶⁴ Article 3 of the draft Directive makes it clear that the scope of the Directive covers access to and supply of goods and other services which are available to the public, including housing. In addition, Member States under Article 2 (6) can provide for differences of treatment on grounds of age provided such differences are justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. *Draft European Union Directive on equal opportunities and access to goods, services on the basis of age, disability, sexual orientation, and religion or belief*, 2008/0140 (CNS),

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>

10 Proposed Scope - Education

Questions

Are you aware of any issues which may affect how these proposals would apply in the provision of goods, facilities and services in the education sector?

Are you aware of any issues which would result in any unintended consequences in the provision of goods, facilities and services in the education sector?

Are there any areas where specific exceptions would be required to ensure that certain age-based practices would be allowed to continue under any future age discrimination legislation?

Response

In summary:

- we recommend that education and the provision of associated services are covered by the legislation;
- we do not consider that extending the proposed legislation to cover educational services will result in any undesirable or unintended consequences.
- we consider that the education provisions should apply to children and young people of *all* ages; not just to those aged 16 and over;
- we recommend that the Education Authority and the Council for Catholic Maintained Schools (CCMS) are also covered by the proposed legislation.

Comments

- 10.1 We recommend that education, including education in schools, and the provision of associated services are covered by the legislation.⁶⁵
- 10.2 We consider that it should be unlawful for an educational establishment to discriminate on the ground of a person's age by unjustifiably refusing or failing to accept the person's application for admission as a student, or in terms and conditions on which it is prepared to admit the person as a student.
- 10.3 We are of the view that it should also be unlawful for an educational establishment to unjustifiably deny or limit access to benefits, to expel a student or subject a student to any other detriment simply on the basis of their age.
- 10.4 We do not consider that extending the proposed legislation to cover educational services will result in any undesirable or unintended consequences.
- 10.5 It is important to stress that much of the state education sector is governed by statutory provisions; which means that under the proposed statutory authority exception, differential treatment on grounds of age by the education sector will be permitted where another piece of legislation allows or requires a child or young person to be treated differently because of their age.⁶⁶
- 10.6 The inclusion of education within the proposed legislation will mean that education providers must ensure that age-related criteria or rules are not inappropriate or arbitrary. It will encourage educational authorities to make decisions based on the actual needs of children and young people of different ages. In particular, they must ensure that age-based rules or criteria

⁶⁵ There is already in Northern Ireland protection against age discrimination for students in institutions of further and higher education, such as universities and colleges of further education.

⁶⁶ For example, the *Primary School (Admissions Criteria) Regulations (NI) 1997* allow schools when selecting children for admission, to give priority to children who have attained the lower limit of compulsory school age over those who have not attained the lower limit of compulsory school age.

are capable of objective justification or fall within a particular exception (for example, a positive action exception).

- 10.7 The legislation, if applied to education, will not mean that schools or other education providers cannot use age based rules; only that where they exist they must be capable of objective justification or fall within an exception, such as the positive action exception.
- 10.8 This means that educational authorities will be able to rely on the general justification defence and the positive action exemption. For example, where there is evidence to support the benefits of free or age –targeted services for children and young people, then the positive action exception would apply.
- 10.9 Importantly, it is of note that in Australia, there is a very wide prohibition on age discrimination in education which covers decisions to refuse or failure to accept applications for admission, the terms and conditions on which students are admitted and decisions to expel students are subject then to any other detriment.
- 10.10 Further, in addition to the general justification defence and the positive action exception, under Australian law, there is only one narrow exception relating to education. This exception allows education providers to restrict admission to pupils with certain ages, if that educational institution is established wholly or primarily for students above a particular age.
- 10.11 Legislation in Australia also covers the education of children and young people of *all* ages and it is clear that this has not resulted in undesirable or unintended consequences.
- 10.12 In summary, we recommend that the proposed legislation follows a similar approach to that adopted in Australia; namely that that the legislation applies to education subject to the inclusion of a narrow range of exceptions.
- 10.13 Further, we consider that the education provisions should apply to children and young people of *all* ages; not just to those aged 16 and other.

- 10.14 We consider that the exclusion of children and young people aged under 16 from the legislation, including the education provisions, will result in absurd inconsistencies; with students in higher education and pupils aged 16 or over in schools being able to challenge unjustifiable age based criteria and practices, whereas pupils in schools aged under 16 will remain unable to challenge such unfair treatment.
- 10.15 We also recommend that the Education Authority (previously the Education and Library Boards) and the Council for Catholic Maintained Schools are also covered by the proposed legislation.⁶⁷ This reflects similar responsibilities placed on these bodies under other equality legislation in Northern Ireland.
- 10.16 We note that there is no specific reference in the consultation document to duties being placed on these bodies. We consider these duties are important particularly as it is proposed that young people aged 16 plus will be covered under the 'educational and functions of schools'.

⁶⁷ [*Strengthening protection for children and young people, Recommendations for Reform, Full Report*](#), 2013, ECNI/NICCY

11 Discriminatory behaviour - Direct discrimination

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include direct discrimination?

How strongly do you agree or disagree with the way that we have defined the concept of direct discrimination?

Response

In summary:

- we support the proposal that the legislation prohibits direct discrimination due to a person's perceived or actual age, as well as discrimination due to association on grounds of age;
- we support the proposal that direct age discrimination can be permitted where objectively justified.

Comments

- 11.1 We support the proposal that the legislation prohibits direct discrimination due to a person's perceived or actual age, as well as discrimination due to association on grounds of age. This reflects the approach adopted under the legislation prohibiting age discrimination in employment.
- 11.2 We also support the proposal that direct age discrimination can be permitted where objectively justified; i.e. the less favourable treatment is a proportionate means of achieving a legitimate aim. Again this reflects the approach adopted under the legislation prohibiting age discrimination in employment.
- 11.3 As explained in more detail below, we recommend that the legislation should explicitly state that *direct* age discrimination,

can only be justified where a *social policy objective* is being pursued; and the measures adopted to achieve that social policy objective are proportionate.

12 Discriminatory behaviour - Indirect discrimination

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include indirect discrimination?

How strongly do you agree or disagree with the way that we have defined the concept of indirect discrimination?

Response

In summary:

- we support the proposal that the legislation prohibits indirect discrimination on grounds of age;
- we agree with the proposed definition of indirect discrimination.

Comments

12.1 We support the proposal that the legislation prohibits indirect discrimination on grounds of age.

12.2 We welcome the proposal to introduce a wider definition of indirect discrimination so as to prohibit provision, criterion or practices which puts or '*would put*' people of the same age group at a particular disadvantage. This is in line with the approach adopted under the race equality legislation, which was recently amended to reflect this change.

12.3 As highlighted in the consultation document, this will mean that protection against people who have not actually received the service, but have been deterred from seeking the service

because of a discriminatory provision, criterion or practices will have protection against indirect age discrimination.

13 Discriminatory behaviour - Harassment

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include harassment?

How strongly do you agree or disagree with how we have defined the concept of harassment?

Response

In summary:

- we agree that the legislation should prohibit age related harassment;
- we recommend that the legislation prohibits harassment '*related to*' age rather than 'on grounds of age' as proposed;
- we recommend that the legislation prohibits harassment due to a person's association with someone of a particular age.

Comments

- 13.1 We agree that the proposed legislation should prohibit age related harassment.
- 13.2 However, we disagree with the proposed definition of harassment. In particular, we recommend that the definition of harassment prohibits unwanted conduct '*related to*' age; as oppose to the OFMDFM proposal that harassment is defined as unwanted conduct '*on grounds of age*'.

- 13.3 Our recommendation is in line with the definition of harassment under the sex equality legislation in Northern Ireland⁶⁸; as well as the definition of harassment under the age GFS legislation in Great Britain under the Equality Act 2010. We have also recently called the definition of racial harassment under the race equality legislation to be similarly amended.⁶⁹
- 13.4 Further, we note there is no reference in the consultation document that it is proposed that the legislation will protect against *harassment due to a person's association with someone of a particular age*. There is only reference to a proposal to protect against direct discrimination due to a person's association with someone of a particular age
- 13.5 We recommend that the legislation prohibits harassment due to a person's association with someone of a particular age. Our recommendation is consistent with the approach adopted under the age discrimination in employment legislation, which protects against harassment due to association.
- 13.6 Discrimination on grounds of association due to age would, for example, prohibit a service provider from harassing a person due to his/her association with relative or friend who is of a particular age, such as their association with an older person. This would, for example, cover harassment by a service provider of a carer because they s/he is looking after an older person.
- 13.7 We note that OFMDFM has indicated that it is proposed that none of the proposed exceptions should cover harassment and

⁶⁸ The definition of harassment under the sex equality legislation in Northern Ireland was amended in 2008 to prohibit unwanted conduct that is 'related to' a woman's sex or that of another person. It is important to note that the definition of harassment under the sex equality legislation in Northern Ireland was amended as a result of a decision in the sex discrimination case of *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*. In that case the court was of the view that effect of the wording of the definition of harassment within the amended Equal Treatment Directive meant that an employer could be held liable on appropriate facts for the conduct of third parties, for example, suppliers or customers. In particular, it considered that an employer could be held liable for failing to take action where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against. See Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2008.

⁶⁹ See ECNI [Recommendations for Law Reform](#), August 2014

that “we do not consider that there is ever any justification for allowing someone to be harassed because of their age.”⁷⁰

- 13.8 We would, however, draw to the Department’s attention the fact that the proposed exception relating to ‘care within the family’ is so broad that it will permit harassment (as well as victimisation) on grounds of age.⁷¹

14 Discriminatory behaviour - Victimisation

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include victimisation?

How strongly do you agree or disagree with the way that we have defined the concept of victimisation?

Response

In summary:

- we agree that the legislation should prohibit victimisation;
- we recommend that there is no requirement for the person alleging victimisation to show that they have been “treated less favourably” as is proposed.

Comments

- 14.1 We agree with the proposal that the legislation should prohibit victimisation.
- 14.2 However, we disagree with the proposed definition of victimisation. In particular, we recommend that there is no requirement for the person alleging victimisation to show that they have been “treated less favourably”.

⁷⁰ See para 13.3 p.39

⁷¹ See comments below in response to proposed exception for care in the family.

- 14.3 Under the proposed definition a person must show that they have been “treated less favourably” than another person in the same circumstances.
- 14.4 This means that a person has to compare his or her treatment with that of a person who has not made a complaint of discrimination or supported a complaint under the proposed legislation. This places an additional burden on individuals who believe that they have been subjected to victimisation.
- 14.5 Our recommendation is in line with age GFS legislation implemented in Great Britain under the Equality Act 2010. Under the Equality Act, a person is victimised if they are subjected “to a detriment”. There is no requirement for the person to show that they have been subjected to “less favourable treatment”. We have also recently called the definition of victimisation under the race equality legislation to be similarly amended.⁷²
- 14.6 Further, we note that OFMDFM has indicated, as with harassment, that it is proposed that none of the proposed exceptions should cover victimisation.”⁷³ We would, however, draw to the Department’s attention to the fact that the proposed exception relating to ‘care within the family’ is so broad that it will permit victimisation (as well as harassment) on grounds of age.⁷⁴

15 Other types of discriminatory behaviour

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include certain types of discriminatory behaviour ;in particular, discrimination after a relationship has come to an end, discriminatory practices,

⁷² See ECNI [Recommendations for Law Reform](#), August 2014

⁷³ See para 14.4 p.40

⁷⁴ See comments below in response to proposed exception for care in the family.

discriminatory advertisements, instructions to discriminate, pressure to discriminate and aiding unlawful acts?

Response

In summary:

- we agree that that the legislation should include certain types of discriminatory behaviour; in particular, discrimination after a relationship has come to an end, discriminatory practices, discriminatory advertisements, instructions to discriminate, pressure to discriminate and aiding unlawful acts.

Comments

- 15.1 We agree that that the legislation should include certain types of discriminatory behaviour; in particular, discrimination after a relationship has come to an end, discriminatory practices, discriminatory advertisements, instructions to discriminate, pressure to discriminate and aiding unlawful acts.
- 15.2 This proposed approach is consistent with the approach taken in legislation on other equality grounds in Northern Ireland.

16 General provisions - Objective justification

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include a provision for an objective justification test?

How strongly do you agree or disagree with how we have defined the 'objective justification' test?

Response

In summary:

- we agree that the legislation should include provision for an objective justification test;
- we recommend that the legislation should explicitly state that *direct* age discrimination, can only be justified where a *social policy objective* is being pursued; and the measures adopted to achieve that social policy objective are *proportionate*. A social policy objective is a policy of a 'public interest nature'.

Comments

- 16.1 We agree that the legislation should include provision for an objective justification test.
- 16.2 However, in order to provide clarity for service providers on their responsibilities under the proposed legislation, we recommend that the legislation should explicitly state that *direct* age discrimination, can only be justified where a *social policy objective* is being pursued; and the measures adopted to achieve that social policy objective are proportionate.
- 16.3 A social policy objective is a policy of a '*public interest nature*'; as oppose to a purely private aim of a service provider.
- 16.4 For example, facilitating access to employment for young people through the creation of youth training schemes, in circumstances where unemployment is particularly acute for

this age group, is likely to be a legitimate aim of a public interest nature.

- 16.5 Our recommendations are consistent with the approach adopted by the Supreme Court in 2012 in the case of *Seldon v Clarkson, Wright and Jakes*⁷⁵. In this case, which considered the approach to be adopted to *direct* discrimination in the context of direct age discrimination in the area of employment, the court held that in order to justify direct age discrimination, the legitimate aim must be in accordance with an identifiable social policy of the state.
- 16.6 The court explained that a purely private aim, such as cost reduction, or improving competitiveness, was *not* acceptable. It further indicated that a social policy objective was a policy of a ‘*public interest nature*’.
- 16.7 Whilst we recognise that to date there has been no court decision in Great Britain, following the enactment of age GFS legislation in October 2012, as to whether this is also a requirement in relation to goods, facilities and services, we consider that it would be illogical to adopt a different approach to that adopted by the Supreme Court in the field of employment.
- 16.8 Critically, we consider that by expressly including this in the proposed legislation, it will provide *clarity* for service providers and *legal certainty* as to what constitutes a legitimate aim.
- 16.9 It is important to stress that we recommend that *only* the test for justification in respect of *direct* age discrimination in the provision of goods and services is limited in this manner. We recommend that the test for justifying *indirect* age discrimination is *not* limited to pursuing social policy objectives.
- 16.10 Further, as highlighted above, any measures adopted to achieve that social policy objective must be *proportionate*.

⁷⁵ [Seldon V Clarkson](#) [2012] ICR 716,

16.11 We further recommend that guidance on what constitutes objective justification and what are examples of appropriate aims, could helpfully be provided through Codes of Practice and/or good practice guide(s) in this area, as has been the case in other areas of equality law.

17 General provisions - Positive action

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include a provision for positive action?

How strongly do you agree or disagree with the way that we have defined the concept of positive action?

Response

In summary:

- we agree that the legislation should permit positive action and with the proposed definition of positive action.

Comments

- 17.1 We agree that the legislation should include provision for positive action. We agree that service providers should be permitted to take proportionate action if it is aimed at; overcoming or minimising a disadvantage; meeting the needs of a particular age group; or so as enable or encourage members of a particular group to participate in an activity where their participation is proportionally low.
- 17.2 We actively encourage service providers to take lawful positive action to address disadvantage on other equality grounds; so it is important that the proposed legislation expressly permits this form of action.
- 17.3 The taking of positive action by service providers is also compatible with the principles underpinning the statutory duties under Section 75, which are aimed at encouraging public bodies to take action that promotes equality of opportunity for people of different age groups.

- 17.4 We also support the proposed definition of positive action. We welcome the fact that OFMDFM has adopted a definition that is wider than that which exists under other equality legislation on other equality grounds, including race. We have recently called the definition of positive action under the race equality legislation to be similarly amended.⁷⁶
- 17.5 We also welcome the fact that OFMDFM has adopted a definition that is in line with changes already implemented in Great Britain; where there, there is currently a greater scope for service providers in Great Britain to take positive action to promote equality than those in Northern Ireland.
- 17.6 In addition, the proposed definition of positive action is in line what is permissible under EU law.

⁷⁶ See *ECNI [Recommendations for Law Reform](#)*, August 2014

18 General exceptions - Exception for statutory authority

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for statutory authority?

Response

In summary:

- we agree that the legislation should include an exception for statutory authority.

Comments

- 18.1 We agree that the legislation should include an exception for statutory authority.
- 18.2 We agree that the legislation should explicitly state that the prohibition on age discrimination in goods, facilities and services is secondary to other legislation which imposes age limits and that this would apply to legislation which both predates and post-dates the date on which the proposed legislation comes into force.
- 18.3 This proposed approach is consistent with the approach adopted under equality legislation on other grounds.

19 Other general exceptions

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include general exceptions for immigration; charities; premises; care within the family, services provided for persons who share a protected characteristic; and other general exceptions.

How strongly do you agree or disagree with how we have defined the following concepts:

Are there any other activities or functions that you consider should be covered by a general exception

Response

In summary:

- In general, we are of the view that any exceptions to equality legislation should be narrowly construed and objectively justifiable.
- Our views on the proposed general exceptions are as follows:
 - we do not support the proposed exception for immigration;
 - we agree that there should be a exception for charities;
 - we agree with the proposed limited exceptions as regards premises;
 - we do not agree with the proposed scope of the proposed exception as regards care within the family. We recommend that it does not permit harassment or victimisation on grounds on age.
 - we agree with the inclusion of an exception so as to permit service providers to meet the specific justified needs of a person of a particular age in regard to their education, training or welfare, or any ancillary benefits;
 - we consider there may be value in introducing a mechanism whereby *ad hoc exceptions* can be made.

Comments

- 19.1 In general, we are of the view that any exceptions to equality legislation should be narrowly construed and objectively justifiable.
- 19.2 Further, we adopt the position that unless there is a clear and justifiable need for an exception, service providers should be required to satisfy the objective justification defence.
- 19.3 In addition, we consider that none of the proposed exceptions should permit harassment or victimisation because of a person's age. As highlighted in more detail below, we are concerned that the proposed exception relating to care within the family will permit harassment and victimisation on grounds of age.

Immigration

- 19.4 We do not support the proposed exception for immigration. Any exception to the principle of non-discrimination in the field of immigration should only be applied where objectively justifiable.
- 19.5 We recognise that the age discrimination legislation in Great Britain contains a similar immigration exception to that proposed by OFMDFM and that immigration is a reserved matter and remains the responsibility of the Westminster Government.
- 19.6 We have recently recommended the removal of a similar immigration exception which allows for discrimination on the grounds of ethnic or national origin in the exercise of immigration functions.⁷⁷
- 19.7 We consider that any age-related differences in treatment by immigration authorities should only be allowed on a case-by-

⁷⁷ See ECNI. [Recommendations for Law Reform](#), August 2014

Our recommendation is in line with the recommendations of international human rights monitoring bodies in this area.

case basis and where the reliance on an age-related factor can be sure to be objectively justifiable.⁷⁸

Charities

- 19.8 We agree that there should be an exception for charities permitting them to lawfully provide benefits only to persons of a particular age, provided the charity is acting in pursuance of a charitable instrument and if the restriction is imposed by reason of, or in the grounds of, the charitable instrument.
- 19.9 We also agree that where the objectives of a charity do not specify a beneficiary group on the basis of age (either directly or indirectly) then the exception should not apply.
- 19.10 We would, however, draw OFMDFM's attention to the fact that, unlike in Great Britain, there is no indication that it is proposed that charities have must show that the provision of benefits is a proportionate means of achieving a legitimate aim or for the purpose of compensating for a disadvantage linked to age.
- 19.11 The approach adopted in Great Britain aligns with our view that any exceptions to equality legislation should be narrowly construed and objectively justifiable.

Premises

- 19.12 We agree with the proposed limited exceptions as regards premises. In particular, we agree with the proposed exception as regards the disposal of premises on a private basis; provided that the person does not use the services of an estate agent or advertise the disposal.
- 19.13 We also agree with the proposed exception as regards certain small dwellings so as to allow people to choose who they live with in their own homes.
- 19.14 These exceptions are consistent with the approach adopted under other equality grounds.

⁷⁸ See EHRC *Response to GEO consultation on age exceptions*, 2009

Care within the family

- 19.15 We do not agree with the proposed scope of the proposed exception as regards care within the family.
- 19.16 In particular, we note that it is proposed that this exception will permit harassment and victimisation of a person on grounds of age; despite the fact that in relation to other proposed exceptions, OFMDFM make clear that harassment or victimisation on grounds on age should never be permitted.
- 19.17 We recommend that the proposed exception does *not* permit a carer, who is providing care to person in their own home, to harass or victimise that person on grounds of his/her age.
- 19.18 Under the proposals, this, for example, would mean that a paid carer of an older person who provides such care in the *carer's own home* would *not* be prohibited from harassing an older person due to their age when providing this care.
- 19.19 In contrast, it is proposed that under the legislation a carer who provides paid care to an older person in the *older person's home*, would be prohibited from harassing the older person on grounds of age when providing care.
- 19.20 Whilst we are not proposing that the age GFS legislation should cover the treatment of parents when caring for their children, we consider that the proposed exception is too broad and would permit unacceptable forms of age discrimination; specifically harassment or victimisation on grounds on age.

Education, training and welfare

- 19.21 We agree with the inclusion of an exception so as to permit service providers to provide goods, facilities and services to meet the specific justified needs of a person of a particular age in regard to their education, training or welfare, or any ancillary benefits.
- 19.22 This is in line with similar exceptions that exist under other equality grounds. For example, the sexual orientation GFS legislation allows for the provision of goods, facilities and services to meet the specific and justified needs of a person of

a particular sexual orientation in regard to their education, welfare or other ancillary benefits.

Ad hoc exceptions

19.23 Finally, we are of the view that there may be value in introducing a mechanism whereby *ad hoc exceptions* can be made to the principle of equal treatment as new scenarios are encountered. Legislation prohibiting discrimination on the grounds of age in Australia and has already adopted such a mechanism.⁷⁹

19.24 Such exceptions may, for example, allow service providers on a temporary basis or as part of a pilot scheme to restrict services to certain ages, with the aim of assessing and reviewing the impact on certain ages at the end of the temporary period. In line with the approach taken in these other countries, temporary exceptions could be granted by the Equality Commission.

20 Health and Social Care

Question

How strongly do you agree or disagree with our current proposal that health and social care should be included in the scope of any future age discrimination legislation, without any specific exceptions?

Response

In summary:

- we agree that health and social care should be covered by legislation, without any specific exceptions.

⁷⁹ For example, in Australia the legislation contains a process by which individuals and organisations can seek “temporary exemptions” by applying to the Australian Human Rights Commission. The Australian Human Rights Commission has developed guidelines outlining the criteria it applies.

Comments

- 20.1 We agree that health and social care should be covered by legislation.
- 20.2 There is clear evidence that older and younger people experience significant barriers when accessing health and social care services due to their age; including ageist attitudes and behaviour by providers of health and social care services.
- 20.3 For example, an independent report (2014) commissioned by Commission outlines a range of case studies⁸⁰ highlighting numerous examples of where older people had experienced unfair practices due to their age when accessing health and social care.
- 20.4 We also agree that there should no specific exceptions for health and social care. Any age based practices and rules within health and social care should be assessed against the objective justification test.
- 20.5 We consider that the beneficial or justifiable use of age, for example, public health programmes, screening or immunisation programmes which target particular ages, should continue. They would be permissible under the objective justification test.
- 20.6 This proposed approach is in keeping with the approach adopted in Great Britain under the age discrimination legislation outside the workplace, as it applies to adults.

⁸⁰ ECNI [Strengthening protection for all ages against age discrimination outside the workplace](#). ICR commissioned by ECNI March 2014

21 Financial Services

Questions

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include a specific exception for financial services?

How strongly do you agree or disagree with the proposed exception to allow financial service providers to continue to use age as a criterion to design and price financial products, provided that all assessments of risk, insofar as it involves a consideration of age, must be based on relevant information from a source on which it is reasonable to rely?

Response

In summary:

- we do not agree that there should be a specific exception for financial services. We consider that the onus should be on financial service providers to objectively justify any differentials due to age.
- in the event that a financial services exception is included in the legislation, we recommend that:
 - it includes the requirement that any difference in treatment on grounds of age is proportionate;
 - that OFMDFM undertake within a specific period (5 years from implementation of age GFS legislation) an independent review of how the age financial services exception is operating in NI; with a view to considering whether any clear evidence exists for maintaining such an exception; whether any legislative changes are needed; and whether further non-legislative actions can be taken to address the barriers experienced by people on the grounds of their age in accessing financial services.

Comments

Inclusion of exception

- 21.1 Firstly, we do not agree with the Department's proposal that any future age discrimination legislation should include a specific exception for financial services.
- 21.2 We consider that, as a matter of principle, there should be *no* financial services exception; and that the onus should be on financial service providers to objectively justify any differentials.
- 21.3 In general, as stated earlier, we adopt the position that unless there is a clear and justifiable need for an exception, service providers should be required to satisfy the objective justification defence.
- 21.4 In particular, the burden should therefore be on financial service providers to demonstrate that age is a relevant factor in the assessment of risk and that any difference in treatment is proportionate.
- 21.5 We note that OFMDFM indicates that if there was no exception, and financial service providers were required to satisfy the objective justification defence, it was concerned "*that this would have a number of unintended and unwanted consequences that would be detrimental to the financial services sector and to customers*".
- 21.6 These concerns include the possibility of:
- higher administrative and other costs for financial service providers as a result of being required to produce very detailed data at individual firm level, rather than aggregate data at industry level in order to meet the objective justification test;
 - more cautious underwriting by financial service providers, due to increased risk of legal challenge, resulting in increased costs being passed on to customers; and

- a hindering of the development of new financial services products because providers would not be able to provide sufficient evidence to objectively justify new schemes.

- 21.7 We note that the primary reasons underpinning the stated objections to relying on an objective justification defence on the grounds of age appear to be the economic impact on financial service providers and customers.
- 21.8 It is, however, not clear, that there will be these unintended and unwanted consequences as forecast by OFMDFM, as no evidence has been provided in the consultation document to support the Department's view.
- 21.9 In addition, there is no clear evidence that the prohibition on using gender as a factor when assessing risk by financial service providers, following the *Test-Achats* case⁸¹ which resulted in the sex discrimination legislation being amended, has led to a significant negative impact on either the insurance industry or customers.⁸²
- 21.10 It is also of note that in other countries, such as Sweden, there is a blanket prohibition on age discrimination in relation to

⁸¹ It will be noted that the European Court of Justice (ECJ) in the *Test-Achats* case ruled that the unlimited derogation from the principle of equal treatment between men and women in the field of insurance, contained in the Gender Directive⁸¹ was unlawful. It held the financial services exception was incompatible with the principles of non-discrimination and equality guaranteed respectively by Articles 21 and 23 of the Charter. The Court dismissed the arguments that the derogation introduced by Article 5(2) did not conflict with the principle of equality between men and women as men and women are in objectively different situations with regard to premiums and benefits in view of the insured risk. Accordingly, the Court ruled that derogation from the principle of equal treatment between men and women in the field of insurance, provided for by this provision, was unlawful in so far as the derogation is not subject to a time limit.

⁸² For example, in September 2014 Insurance Europe presented its views on the implementation issues raised by the *Test-Achats* ruling to the European Commission's Gender Forum. It explained that it is difficult to get an accurate picture of the economic impact of the ban on the use of gender in insurance underwriting. It indicated that as there were many different concurrent developments that affect the price and coverage of insurance products, such as legal and regulatory changes at EU and national level, new risk factors and new product features, it is very challenging to isolate the effect of the ban and to provide a correct estimation of its sole impact on pricing and benefit design.
<http://www.insuranceeurope.eu/potential-impact-implementation-test-achats-ruling-insurance-sector>

insurance without any significant adverse impact on the industry.

- 21.11 Further, the European Court of Justice (ECJ) has consistently held “that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified”.⁸³
- 21.12 We recognise that there can be some differences between people of different ages as regards certain financial products which have a causal link to age. For example, as regards motor insurance the risk profile of a 17 year old will be very different to that of a 50 year old. In such circumstances the financial service provider will have the opportunity to justify any difference in premium under the objective justification defence.
- 21.13 However, we consider that there are situations where people of different ages are in a comparable situation when it comes to financial products which have a causal link to age; for example, there is no comparable difference between a 29 year old and a 30 year when it comes to travel insurance. In such circumstances, in line with the principle of equal treatment, financial service providers should not be permitted to treat people in comparable situations differently.
- 21.14 We note that the Department points to the fact that any *“deviation from the GB position would cause practical problems in implementation and an uncertain position for financial service providers and customers in Northern Ireland.”*
- 21.15 It is, however, not clear from the consultation document the exact reasons as to why it is not feasible to have an approach in the legislation in Northern Ireland that differs from Great Britain. The consultation document does not set out the evidence base outlining the nature and extent of the “practical problems in implementation” that OFMDFM indicate will result in deviating from the Great Britain position.

⁸³ European Court of Justice (ECJ) [decision](#) in the *Test-Achats* case 1 March 2011.

- 21.16 We also do not agree with the Department's view that there is "*insufficient justification for financial services to be included in any future age discrimination legislation.*"
- 21.17 We consider that there is clear evidence that people experience discrimination when accessing financial services due to their age.
- 21.18 For example, independent research commissioned by the Commission (2008) '*Older people's access to financial services: A review*⁸⁴ found "*numerous examples of direct and indirect age discrimination across the scope of financial services in Northern Ireland.*"
- 21.19 This research highlighted that "*one notable example of direct discrimination was where age was being used as a proxy for risk, and people over a certain age were precluded from accessing financial services, solely on the basis of their age.*"⁸⁵
- 21.20 The report also highlighted that "*there are substantial barriers to obtaining travel insurance by policyholders over certain ages. There are substantial differentials between products offered by insurance providers, depending on the age of the client and even more substantial differences between providers for those clients in the same age group. Further, there also appears that the most competitive insurance cover offers are those that are only available online.*"⁸⁶
- 21.21 Further, more recently, in 2014, a report commissioned by the Equality Commission highlights case studies⁸⁷ which gave examples where older people had experienced unfair practices due to their age when accessing financial services.

⁸⁴ *Older people's access to financial services: A review*: B Fitzpatrick and I Kingston commissioned by ECNI

⁸⁵ *Ibid* page 13

⁸⁶ *Ibid* page 11

⁸⁷ ECNI Case Studies: *strengthening protection for older people, ICR commissioned by ECNI 2014*

21.22 It is also clear that young people experience barriers not only in terms of high premiums that they pay for certain types of insurance, but also in terms of accessing insurance.⁸⁸

Scope of proposed exception

21.23 We note that OFMDFM is proposing an exception that would allow financial service providers to continue to use age limits or bands. Further, it is proposed that financial service providers would be allowed to continue to specialise in providing products only to certain age groups, for example, by providing financial services only for people aged over 50, and to continue to refuse to provide insurance or other financial service product to a person who has reached a certain age.

21.24 Under this proposed exception, older (or younger) people would only be able to challenge a financial service provider if they believe that the risk assessment, so far as it involves a consideration of a person's age, is not based on relevant information and from a source on which it is reasonable to rely.

21.25 We draw OFMDFM's attention to independent report (2014) commissioned by Commission which outlines a range of case studies⁸⁹ highlighting numerous examples of where older people had experienced unfair practices due to their age when accessing financial services.

21.26 These case studies highlighted instances of older people being;

- refused insurance completely because they reached a certain age- which in one instance resulted in the older person been unable to continue in employment because he was refused motor insurance;
- older people experiencing what they consider to be excessive rises in their insurance premiums simply because it reached a certain age; or being quoted excessive travel insurance premiums but with wide variations between insurance providers;

⁸⁸ For example, complaints to the Consumer Council for NI has revealed the difficulties experienced by young people in gaining car insurance. <http://www.consumercouncil.org.uk/newsroom/753/>

⁸⁹ See [Strengthening protection for all ages against age discrimination outside the workplace](#). ICR commissioned by ECNI March 2014

- older people have been refused access to a credit card when they reached a certain age.
- 21.27 In fact, a large proportion of the overall case studies outlined in the report related to concerns about older people’s treatment when accessing financial services.
- 21.28 It is clear that, due to its proposed scope, if the proposed exception is introduced, many of the older people highlighted in those case studies will not be able to challenge the treatment they received from financial service providers.
- 21.29 Crucially, there is no requirement under the proposed exception, that any difference in treatment on grounds of age must be *proportionate*.
- 21.30 We therefore recommend that, in the event that an exception is included in the legislation, it includes the requirement that any difference in treatment on grounds of age is *proportionate*.
- 21.31 Further, in light of the clear evidence that both older and younger people continue to face discrimination when accessing financial services, and our concerns about the proposed breath of the exception, we recommend that if the proposed exception is introduced,
- that the legislation places a duty on OFMDFM to carry out an *independent* review of how the age financial services exception is operating in NI; and
 - this review should be undertaken within a specific period (5 years from implementation of age GFS legislation); with a view to considering whether any clear evidence exists for maintaining such an exception; whether any legislative changes are needed; and whether further non-legislative actions can be taken to address the barriers experienced by people on the grounds of their age in accessing financial services .
- 21.32 Finally, in the event that an exception is included in the legislation, we agree that any exception should not apply to harassment or victimisation; as there should be no

circumstances in which law should permit financial service providers to harass or victimise a customer due to their age.

22 Other specific exceptions

Age-based concessions

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for age-based concessions?

Response

In summary:

- we do not support the proposed blanket exception that permits concessionary services for *all* ages;
- however, we consider the legislation should make clear that age- based concessions aimed at *children and young people and older people* which have clear *social policy objectives*, are not discriminatory and are permitted on the basis that they are justified.

Comments

- 22.1 We do not support the proposed blanket exception that permits concessionary services for *all* ages.
- 22.2 We recommend that the legislation permits age- based concessions, such as discounts or offers open only to people of a particular age group, *where justifiable*.
- 22.3 We have already made clear that *direct* age discrimination should only be capable of being justified where a *social policy objective* is being pursued; and the measures adopted to achieve that social policy objective are proportionate.
- 22.4 We consider that concessions aimed at children and young people and older people *which have clear social policy objectives*, for example, to alleviate financial disadvantage or

address under-participation experienced by those age groups, should be allowed, on the basis that they are justifiable.

- 22.5 Many children, young people and older people face financial disadvantage and are vulnerable to experiencing poverty. Older people, in particular, can be vulnerable to social exclusion and isolation.
- 22.6 So, for example, free or reduced entrance fees for children and young people or older people at leisure centres would be consistent with the social policy objectives of promoting healthy lifestyles or social inclusion.
- 22.7 In addition, in our view, many ‘public sector’ concessions, such as the winter fuel allowance for older people, would be permitted under the proposed statutory authority defence. These concessions are proportionate measures which have clear social policy objectives.
- 22.8 In light of this, in the interests of clarity, we consider the legislation should make clear that age- based concessions aimed at *children and young people and older people* which have clear *social policy objectives*, are not discriminatory and are permitted on the basis that they are justified.
- 22.9 We note that in Canada, the legislation makes it clear that concessions aimed at children, young people and older people are not discriminatory.
- 22.10 We are of the view that guidance for service providers on the types of concessions which are likely to be justifiable could also be provided through Codes of Practice and/or good practice guide(s) in this area.

Age-related holidays

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for age-related holidays?

Response

In summary:

- we do not support the inclusion of the proposed exception for age-related holidays.

Comments

- 22.11 We do not support the inclusion of the proposed exception for age-related holidays.
- 22.12 As set out above, we consider that all exceptions to equality legislation should be narrowly construed and justifiable.
- 22.13 We consider that age related holidays are essentially concerned with the exclusion of other age groups and therefore potentially based on discriminatory attitudes; namely on the basis that people of certain ages do not want to socialise with other people of a different age group.
- 22.14 We do not, for example, support the actions of nightclubs or similar service providers that exclude older people on the basis that younger people should be allowed to socialise together; unless permissible under the objective justification defence or the positive action exception.
- 22.15 We therefore do not support the inclusion of the proposed exception for age-related holidays on the basis that the exception supports age segregation without any clear justifiable reason and as such is contrary to the principle of equality.

- 22.16 In addition, the exception could result in customers in similar age ranges to those at whom the holiday is marketed and who has the same interests, being refused the holiday for no clear justifiable reason.
- 22.17 For example, the exception would mean, that a holiday provider could refuse to allow a person aged 49 to be excluded from holidays for people aged 50 or over. The holiday provider, if challenged, would not have to justify its action in those circumstances.
- 22.18 Further, whilst holiday providers should be able to advertise or market a holiday service at a specific age group, they should not be permitted, unless they can objectively justify it, to limit access to the holiday to those within that specific age group.
- 22.19 The ability to market/target a holiday at a particular age group will mean that customers will 'self-select' and result in the overwhelming majority of customers falling within that age group.
- 22.20 The targeted marketing of certain age groups is likely to mean that customers will only express an interest to go on a holiday where they perceive the holiday will meet their needs/interests.
- 22.21 It is therefore unlikely that a large number of customers will want to partake in a holiday targeted at certain ages that does not meet their needs/interests. For example, it is very unlikely that an older person will seek to go on a holiday targeted at 18-30 year olds and vice-versa.
- 22.22 If there is good reason for a holiday provider to exclude a person of a particular age from a holiday targeted at certain ages, then they will be able to rely on the 'objective justification' defence proposed under the legislation.
- 22.23 Finally, this proposed exception is not consistent with the approach adopted in legislation on other equality grounds in Northern Ireland; namely there is no similar exception for holiday providers under any other equality ground in Northern Ireland.

Sporting events

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for sporting and recreational activities and events?

Response

In summary:

- we agree with the proposed exception for sporting and recreational activities and events.

Comments

22.24 We agree with the proposed exception for sporting and recreational activities and events.

22.25 We consider that service providers should be permitted to use age limits and age bands within sports at all levels, from grass roots to elite.

Residential park homes

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for residential park homes?

Response

In summary:

- we do not support the proposed specific exception for residential park homes inclusion of the proposed exception for age-related holidays;
- we recommend that retirement villages, sheltered accommodation, supported accommodation or care homes should also be covered by the legislation; and that there does not need to be a specific exception/s to cover these types of accommodation.

Comments

- Residential park homes*
- 22.26 We do not support the proposed specific exception for residential park homes.
- 22.27 Our views are on the basis of similar reasoning outlined above in relation to the proposed exception for age-related holidays. We consider that residential park homes designed to meet the social preferences of people with regards to age should not automatically be permitted.
- 22.28 If there is good reason for a provider to exclude a person of a particular age, then they will be able to rely on the 'objective justification' defence or the positive action exception (i.e. a proportionate means of meeting the different needs of that age group) proposed under the legislation.
- 22.29 As highlighted above as regards age related holidays , the ability of providers of residential park homes to market at /target

a particular age group will mean that customers will ‘self-select’ and result in the overwhelming majority of customers falling within that age group.

Sheltered accommodation/retirement villages

- 22.30 We note that there is no reference in the consultation document to any proposals as regards a possible specific exception for retirement villages or similar accommodation. The document only refers to the proposal that private dispositions of property are to be excluded; in line with similar exceptions that exist under other equality grounds.
- 22.31 We recognise that there are, for example, a number of housing associations that restrict potential residents to people aged over 60. Further, there are a number of forms of accommodation designed to meet the particular needs of older people, such as sheltered accommodation, supported accommodation or care homes.
- 22.32 Clearly, we consider there are likely to be strong grounds for the owners of sheltered accommodation, supported accommodation or care homes to rely on the ‘objective justification’ defence in order to justify limiting accommodation of this nature to people of certain ages.
- 22.33 Alternatively, they are likely to be able to show that such restrictions are a form of positive action (i.e. a proportionate means of meeting the different needs of older people); or that they are allowed under the proposed exception that permits the provision of services to be provided only to people in a particular age group in order to meet their specific and justifiable welfare and other needs.
- 22.34 On the basis of similar reasoning we have outlined above in relation to the proposed exception for age-related holidays and residential park homes, we recommend that retirement villages, sheltered accommodation, supported accommodation or care homes should also be covered by the legislation; and that there does not need to be a specific exception/s to cover these types of accommodation.

Private clubs and associations

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include exceptions for private clubs and associations?

Response

In summary:

- we support the proposed exception for private clubs and associations;
- however, we do not agree with the scope of the proposed exception for age- based concessions by private clubs.

Comments

- 22.35 We support the proposed exception for private clubs and associations.
- 22.36 We agree that private clubs and associations should be allowed to restrict membership to certain age groups; for example, clubs for young teenagers.
- 22.37 However, we do not agree with the scope of the proposed exception for age- based concessions by private clubs. We do not support a blanket exception which permits private clubs to target concessions at certain ages.
- 22.38 The proposed exception will allow, for example, a club to offer free or cheaper access to its facilities to people of a particular age; regardless of whether there are justifiable reasons for doing so.
- 22.39 We have, for example, received complaints that some private health clubs offer reduced fees for adults aged 30-40 years. In our view, under the proposed legislation, the private health club should be required to objectively justify offering such a concession to this particular age group.

- 22.40 However, as already highlighted above, we consider the legislation should make clear that age- based concessions aimed at *children and young people and older people* which have clear *social policy objectives*, are not discriminatory and are permitted on the basis that they are justified.
- 22.41 We recommend that concessions which have clear social policy objectives, for example, to alleviate financial disadvantage or address under-participation experienced by certain age groups, should be allowed, on the basis that they are justifiable. So, for example, free or reduced entrance fees for children and young people or older people by private leisure clubs would be consistent with the policy objectives of promoting healthy lifestyles or social inclusion.

Age restricted schemes

Question

How strongly do you agree or disagree with our current proposal that any future age discrimination legislation should include an exception for age restricted schemes?

Response

In summary:

- we agree that the legislation should include an exception for age restricted schemes.

Comments

- 22.42 We agree that the legislation should include an exception for age restricted schemes.
- 22.43 We agree, for example, that the legislation should allow businesses which sell age-restricted goods such as alcohol, fireworks, cigarettes, etc, to continue to ask for proof of age,

where a customer appears to be younger than a particular age, for example, 18.

22.44 We agree that the exception should not permit harassment or victimisation by a service provider on grounds of age.

23 Implementation and enforcement

Question

How strongly do you agree or disagree with our current proposals for the enforcement and implementation provisions of any future age discrimination legislation?

Response

In summary:

- we agree that the Commission should have a range of general duties under the legislation;
- we agree with the proposal as regards the Commission's proposed powers but reiterate our call for wider reform of the Commission's powers.

Comments

- 23.1 We agree that the Commission should have a range of general duties under the legislation.
- 23.2 We recommend that the Commission is granted the following general duties under the legislation:
- to work towards the elimination of age discrimination and harassment;
 - to promote equality of opportunity between persons of differing age groups; and
 - to keep under review the working of the legislation and, when it is so required by OFMDFM or otherwise thinks it necessary, draw up and submit to the OFMDFM proposals for amending the legislation.
- 23.3 We agree with the proposal that the Commission is granted the following powers under the legislation:
- provision of legal advice and assistance to complainants;
 - undertake research/educational activities;
 - issue Codes of Practice and guidance ;

- power to conduct formal investigations and to make recommendations for change following those investigations;
- power to advise OFMDFM on necessary changes to the legislation;
- power to challenge persistent discrimination⁹⁰; pressure to discriminate; instructions to discriminate; discriminatory advertisements and discriminatory practices.⁹¹

23.4 We reiterate our call for reform of the Commission's powers in relation to the age employment legislation⁹²; including, for example, the need for powers to conduct formal investigations under the age employment regulations.

23.5 We further consider that current weakness in the Commission's powers and duties that exist in legislation relating to the provision of goods and services under other equality strands should *not* be carried through to this proposed legislation.

23.6 We have, for example, called for wider reform of our powers/duties; for example, as set out in our race law reform proposals.⁹³ These include changes that will enhance our ability to undertake formal race investigations by removing unnecessary procedural barriers.⁹⁴

⁹⁰ Persistent discrimination under other equality legislation is where during a period of 5 years (from the service of a non-discrimination notice or a court finding of discrimination) it appears to the Commission that unless restrained a service provider is likely to commit further acts of discrimination, then the Commission can apply for an injunction to restrain them from doing so.

⁹¹ For example, the Commission has the power under the race equality legislation to bring enforcement proceedings, obtain injunctions, secure enforceable undertakings, and conduct investigations in relation to discriminatory advertising, instructions to discriminate, pressure to discriminate, and discriminatory practices. It also has the power to secure undertakings and obtain injunctions in relation to persistent discrimination.

⁹² See *ECNI response to OFMDFM pre-consultation draft Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011* on changes to default retirement age in 2011 (unpublished). See also recommendation in [ECNI Response to OFMDFM consultation on SEB](#) in 2004 in which the Commission called for harmonisation of its powers of investigation across all equality grounds.

⁹³ See ECNI [Recommendations for Law Reform](#), August 2014. For example, the Commission has recently called for the reform of its powers under the race legislation so as to remove unnecessary procedural barriers that exist in relation to its powers to conduct formal investigation.

⁹⁴ We have, for example, recommended, in line with provisions under the fair employment legislation, that our power to conduct a formal 'named person' investigation under the race legislation, does not require a "belief" that an act of discrimination has occurred.

24 Draft Equality Impact Assessment

Question

Please provide any further comments or views that you may have in relation to this Equality Impact Assessment.

Response

In summary:

- we welcome the fact that OFMDFM is consulting on the EQIA at the same time as the consultation on the policy proposals. While the EQIA appears to follow the 7 steps outlined in the Commission's EQIA guidance¹, we have some advice in relation to the depth/detail of some of the information provided in the EQIA.

- we therefore recommend that OFMDFM ensures the EQIA:
 - includes and considers all relevant qualitative and quantitative data/evidence;
 - assesses the potential equality impacts of the policy, based on evidence. It is important to not only identify potential adverse impacts, but also to seek opportunities to promote equality of opportunity and good relations.
 - further considers mitigating measures and alternative policies;
 - outlines proposed monitoring arrangements in the Stage 7 EQIA report.

General Comments

- 24.1 We welcome the fact that OFMDFM is consulting on the EQIA at the same time as the consultation on the policy proposals. While the EQIA appears to follow the 7 steps outlined in the

Commission's EQIA guidance⁹⁵, we have some advice in relation to the depth/detail of some of the information provided in the EQIA and we have outlined these comments below.

- 24.2 The Commission met with OFMDFM in April 2015 and provided pre-consultation advice on the proposed age legislation policy proposals and EQIA. Further pre-consultation advice was provided to OFMDFM by the Commission in July 2015. It is not however clear what changes, if any, have been made to the EQIA, to take on board the Commission's advice. The key points of this advice are set out below.
- 24.3 The EQIA is entitled '*Draft EQIA*'. As this is OFMDFM's formal consultation on the age legislation proposals and associated EQIA it is unclear why the EQIA is referred to as a 'draft EQIA.'

Consideration of available data and research

- 24.4 While the EQIA references data and research, such as at Annex B; i.e. a list of research with weblinks, little quantitative /qualitative data is set out in the EQIA.
- 24.5 The EQIA acknowledges that there are limitations to, and gaps in, the evidence that is currently available, particularly in relation to younger people and specifically to Northern Ireland.
- 24.6 The EQIA does not set out plans to address these gaps but instead places a focus on consultees to identify further relevant evidence/research.
- 24.7 We referred in our pre-consultation advice to OFMDFM, to a number of evidence/data sources, including the Patient & Client Council, the Financial Ombudsman, the Health & Social Care Trusts' complaints information and attitudinal research.
- 24.8 All relevant information should be considered as part of the EQIA and where gaps in data/research have been identified, the Department should set out how they intend to address

⁹⁵ Section 75 of the Northern Ireland Act 1998, Practical Guidance on Equality Impact Assessment, ECNI, February 2005. [PracticalGuidanceonEQIA2005.pdf](#)

these gaps. For example, commissioning research or establishing new monitoring arrangements to gather more data (qualitative or quantitative) as necessary.

24.9 We understand that the issue that OFMDFM has received the most comment is around the policy proposals relating to the age range covered by the legislation ie over 16's.

24.10 In our pre-consultation advice we recommended that the EQIA should include relevant rationale/evidence for this particular policy proposal as well as for all policy proposals contained within the consultation. The EQIA does not appear to include the rationale/evidence for this policy proposal.

24.11 We recommend that OFMDFM outline in the EQIA and policy consultation document the rational /evidence relied upon for this policy proposal.

Assessment of impacts and consideration of mitigation/alternative policies

24.12 The purpose of an EQIA is not only to identify whether there are adverse impacts in relation to a proposed policy, or in this case legislative reform proposals, but also to actively seek opportunities to promote equality of opportunity and good relations.

24.13 The EQIA lists the research/evidence sources considered in the EQIA and reference is made to each of the Section 75 categories, with *some* analysis provided regarding the potential impacts of the legislative proposals.

24.14 Analysis however is limited in some areas due to a lack of research/evidence, for example: sexual orientation and multiple identities (e.g. younger people in education, older gay/lesbian people in health and social care).

24.15 The EQIA identifies a potential adverse impact on children and young people under 16 years old and OFMDFM proposes to try to mitigate the impact of this by seeking to ensure that other Government initiatives offer protection and help to reduce inequalities for under-16s.

- 24.16 The mitigation includes, for example, the new Strategy for Children and Young People, which is currently under development.
- 24.17 However the EQIA does not identify the types of measures that OFMDFM may include in this Strategy by way of mitigation.
- 24.18 In addition, OFMDFM states that it will work with representatives from the children and young people's sector to identify and address issues for under-16s and outlines that it will consider potential mitigating measures highlighted by consultees.
- 24.19 This, as noted in the evidence section comments above, appears to place the onus on consultees to identify mitigating measures, rather than OFMDFM making proposals for comments / additional suggestions.
- 24.20 Therefore we recommend OFMDFM sets out more specific mitigating measures and consideration of alternative policies, within the Stage 7 EQIA report.

Monitoring for adverse impact

- 24.21 We welcome OFMDFM's commitment in the EQIA to monitoring and reporting on any adverse impact the policy may have, in accordance with the commitments contained in its equality scheme.
- 24.22 However, there is no indication of the arrangements which will be put in place to gather the necessary monitoring information. We recommend that the Stage 7 EQIA report should therefore set out clear monitoring arrangements that will be put in place to monitor the policy that is adopted.
- 24.23 In addition, this report should include a commitment to reviewing the results of monitoring annually. OFMDFM may find

it useful to refer to the *Commission's Practical Guidance on Undertaking an EQIA*⁹⁶.

Equality Commission
29 September 2015

⁹⁶ Ibid

25 Annex 1: The Equality Commission for Northern Ireland

1. The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
2. The Commission's remit also includes overseeing the statutory duties on designated public bodies under Section 75 of the Northern Ireland Act 1998 (Section 75) and to promote positive attitudes towards disabled people and encourage participation by disabled people in public life under the Disability Discrimination Act 1995.
3. The Commission's general duties include:
 - working towards the elimination of discrimination;
 - promoting equality of opportunity and encouraging good practice;
 - promoting positive / affirmative action
 - promoting good relations between people of different racial groups;
 - overseeing the implementation and effectiveness of the statutory duty on public bodies;
 - keeping the legislation under review.
4. The Equality Commission, together with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the rights of Persons with Disabilities (UNCRPD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of the Convention in Northern Ireland.