

# Strengthening Protection for all Ages

Protecting children and young people against unlawful age discrimination in the provision of goods and services

## Expert Paper (Summary)

ROBIN ALLEN QC

DEE MASTERS BL

April 2013



**IN THE MATTER OF**

**THE RIGHTS OF CHILDREN AND YOUNG PEOPLE**

**AND**

**PROPOSED LEGISLATION IN NORTHERN IRELAND**

**TO PROTECT**

**AGAINST AGE DISCRIMINATION**

**IN THE PROVISION OF**

**GOODS FACILITIES AND SERVICES**

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**JOINT OPINION**

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**18 April 2013**

## *Executive Summary*

1. We have been instructed jointly by the Equality Commission for Northern Ireland (“the Commission”) and the Northern Ireland Commissioner for Children and Young People (“NICCY”) to provide legal advice as part of their project entitled, “Strengthening Protecting for Children and Young People against age discrimination outside of the workplace – Making the case for reform”.

### *Central conclusion*

2. We conclude that it is not appropriate for the Northern Ireland Executive to propose, nor for the Assembly to adopt, legislation that excludes persons under 18 generally from protection from age discrimination in goods, facilities and services.
3. We do however accept that it should be possible to seek to justify acts of *prima facie* age discrimination and that some special measures should be allowed so as to protect the interests of vulnerable age groups.
4. This executive summary will outline the reasons for this conclusion. A detailed analysis of our reasons is set out in full in our Opinion.

### *Reasons for the inclusion of children and young people into anti-discrimination legislation*

5. **Our first reason is simple:** excluding all children and young persons from the scope of legislation prohibiting discrimination in goods, facilities and services would be a breach of the general principle of equal treatment and accordingly would itself amount to discrimination. We do consider that anti-discrimination

legislation should itself be as free of discrimination as possible. Northern Ireland has already agreed to respect the principle of equal treatment in certain fields through its obligations under the UN Convention on the Rights of the Child, the European Convention on Human Rights, the European Social Charter, the European Charter of Fundamental Rights and through its membership of the EU.

6. Human rights, including the principle of equality, are universal and no age limits are placed on the application of that principle in the legal instruments outlined above. It would be unthinkable that discrimination law in relation to other grounds such as sex, race, colour, ethnic or social origin, generic features, language, religion or belief, only applied to adults. Anti-age discrimination legislation is no different.
7. In order for Northern Ireland to act consistently with both these international conventions and the norms of the Council of Europe set out at [5] above, it should ensure that the proposed legislation is consistent with the principle of equality in respect of age and that children/young people are provided with effective social and economic protection in the same way as adults. This would accord with seeking to legislate to the highest international equality and human rights norms.
8. **Secondly**, it must be recalled that there is a statutory duty on public authorities to promote equality of opportunity between persons of different ages under s.75 of the Northern Ireland Act 1998. The Northern Ireland Assembly cannot expect all public authorities in Northern Ireland to comply with the principle of equality whilst itself failing to prevent age discrimination against children and young people when prohibiting age discrimination in goods, facilities and services.
9. **Thirdly**, including children and young people is consistent with European

consumer protection law which recognises that there should be enhanced levels of protection for vulnerable consumers. The approach taken in Great Britain to discrimination in the provision of goods, facilities and services is not consistent. It uses the fact that children and young people have special needs as a reason for denying them all protection from discrimination, without addressing the need for special protective measures.

10. **Fourthly**, if children and young people are excluded from protection, as in Great Britain, there will be unjustifiable and absurd inconsistencies of treatment. For instance, it is an absurd consequence of the current legislation in Great Britain that two persons aged 17 and 19 could suffer exactly the same discrimination by being refused admission to a hotel, because they were both thought to be under 21, yet only the latter could bring a claim.

#### *Accommodating the special needs of children and young people*

11. We wish to make it clear that we do not conclude that children and young persons should *always* be treated in the same way as adults. Of course, we recognise that children and young people have different levels of wisdom, maturity, physical ability, education, economic power and other means of self-determination. Vulnerability is a special feature of those stages of life prior to adulthood.
12. Whilst the principle of equal treatment requires treating like situations alike, it also requires that different situations should be treated differently unless an objective justification for the differential treatment can be shown.
13. In short, where children and young people require more protection because of their status, more should be given. It is however perverse to reason in the

opposition direction and to adopt the other extreme, as in GB, and to provide no protection at all because there are some differences between adults and children/young people.

14. Thus we advocate that while legislation prohibiting age discrimination in goods, facilities and services in Northern Ireland should extend to children and young people, it should be drafted so as to permit exceptions from the principle of non-discrimination in situations where those under 18 require special protection.
15. This alternative approach is consistent with the principle of equal treatment and with the best interests of children and young persons that lies at the heart of the UN Convention on the Rights of the Child.

### *Practical considerations*

16. This Opinion addresses the practical ways in which the proposed legislation could be drafted so as to conform to this alternative model: namely, a general prohibition on age discrimination in goods, facilities and services for everyone but with sufficient flexibility that special measures which enhance protection for vulnerable age groups, such as children and young people are lawful. We shall summarise them now.
17. **First of all**, the proposed legislation should include an exception in respect of positive action. Such an exception already exists in the equivalent legislation in GB so that there is no unlawful age discrimination where (i) persons of the same age or within the same age group suffer a disadvantage connected to their age (“the disadvantaged group”), (ii) their needs are different to those of different ages or within different age groups, or (iii) there is a disproportionately low level of participation in an activity by members of the disadvantaged group and in response to that problem, a service provider takes any action which is a

proportionate means of (i) enabling or encouraging the disadvantaged group to overcome or minimise that disadvantage, or (ii) meeting the disadvantaged group's needs, or (iii) enabling or encouraging persons who share the protected characteristic to participate in that activity.

18. A wide range of scenarios, in which measures are taken for the special needs of children and young people, would be rendered lawful by such a provision, for example, immunisation schemes for babies and children (as they are for the elderly) and drop-in schemes for children from disadvantaged backgrounds.
19. **Secondly**, there should be a general justification defence so that treatment which was on its face either *directly* or *indirectly* discriminatory because of age would be lawful, if there was an objective justification for the discriminatory treatment.
20. Specifically, treatment which is less favourable because of age would not be unlawful *direct* age discrimination if the service provider was pursuing a legitimate aim and the means of achieving that aim were proportionate, namely appropriate and necessary. However, we conclude in cases of *direct* discrimination that a legitimate aim should be closely defined so as to mean social policy aims. This is the approach taken in respect of justification in the employment context following the Supreme Court decision in *Seldon v Clarkson, Wright and Jakes* [2012] ICR 716.
21. A similar but not identical approach should be taken for *indirect* discrimination. A provision, criteria or practice which placed persons of a certain age or within a certain age group at a particular disadvantage would not be unlawful indirect age discrimination if the service user was pursuing a legitimate aim and the means of achieving that aim were proportionate, that is to say appropriate and necessary. However, we conclude that it would *not* be necessary to limit the definition of a legitimate aim for a measure which was *indirectly* discriminatory

to be a social policy aim only.

22. **Thirdly**, it would be sensible to introduce an exception to the proposed legislation which would have the effect that the prohibition on age discrimination in goods, facilities and services would be secondary to existing legislation. In this way, there would be no disruption to current laws. Important legislation such as that relating to the age of consent, minimum ages for purchasing alcohol etc. would remain unaffected.
  
23. **Fourthly**, it would be advisable to introduce an exception which meant that any act or omission by private or public service providers so as to ensure compliance with the mandatory provisions of a statute or instrument made under a statute (by Parliament or the Assembly) for the time being in force in Northern Ireland was lawful even if it would otherwise amount to age discrimination. The practical effect of such a provision would be to allow public and private organisations to fulfil their legislative obligation without fear of litigation under anti-discrimination legislation.
  
24. **Fifthly**, there should be no blanket exclusion for the education sector within the proposed legislation. This would promote decisions based on the actual needs of children rather than focusing on arbitrary ages or dates, like birthdays, to determine access to services. However, this would not preclude the use of age as a proxy within the education sector. For example, important schemes aimed at promoting the interests of specific age groups which are run by organisations like SureStart would still be able to continue by virtue of the positive action defence – see [17] above. Similarly, assessing eligibility by age, for example, a musical scholarship available to persons over 16 only, might be continue to be lawful under the general justification defence – see [19] above. Indeed it would not preclude justified *direct* age discrimination in proper proportionate pursuance of

a social policy.

25. **Sixthly**, if financial services are brought within the scope of the proposed legislation then there should be no exclusion of children and young people from that protection.<sup>1</sup> However, it is recognised that it may be prudent to allow financial institutions to offer financial products on terms which discriminate between adults and children/young people where a credible and reliable risk assessment has been conducted which would justify the differential treatment. For example, offering insurance at a different premium to protect a 4 year old in comparison with an 80 year old. This could be a justified exclusion for children and young persons as it is already in GB for adults.
26. **Seventhly**, in respect of other contractual relationships, when a child or young person has the relevant legal capacity to enter into a contract, then age discrimination should be prohibited in the same way as it will be for adults. Similarly, if a child or young person lacks legal capacity to enter into a contract so that the primary contractual relationship is between a third party and a trustee/parent, then again age discrimination should be prohibited in the same way that it will be for adults.
27. **Eighthly**, there should be no *blanket* exception within the proposed legislation for concessionary services.<sup>2</sup> We recognise that age can be a proxy for financial disadvantage, suffered by for instance the young or those over pensionable age, so that permitting exceptions to the principle of equal treatment in order to alleviate that financial disadvantage can be socially useful when it enhances the protection of the vulnerable. However, introducing a blanket and by definition

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<sup>1</sup> There is a broad exclusion for the financial services sector in Great Britain in respect of legislation prohibiting age discrimination in goods, facilities and services.

<sup>2</sup> There is a broad exclusion for concessionary services in Great Britain in respect of legislation prohibiting age discrimination in goods, facilities and services.

arbitrary exception for concessionary services is inconsistent with the principle of equality. On the other hand, an exception permitting concessions for young children would mean that children-go free holidays could continue. We do not rule out certain specific exceptions of this kind (see below).

28. **Ninthly**, it would be sensible to formulate an exception within the legislation that would allow service providers to verify the age of people seeking to purchase goods or make use of services that are prohibited on the grounds of age by other legislation. A similar provision exists in the Great Britain.

29. **Finally**, this Opinion also concludes that it would be prudent to introduce a mechanism whereby *ad hoc* exceptions could be identified and implemented as and when new scenarios are identified where exceptions to the prohibition on age discrimination in goods, facilities and services seem appropriate. This mechanism has been adopted in Canada, Australia and Belgium.

30. We see no practical problem with having a significant number of exceptions. It would not render the proposed legislation unworkable nor would it render it meaningless. Indeed, in Australia, the prohibition on age discrimination extends to children and young people as well as including numerous exceptions yet there is no evidence that this has created any difficulties.

### *Remedies*

31. It is also advisable to ensure that children and young people are able to enforce their rights. At present, minors can pursue litigation with the assistance of adults. However, we also recommend that the organisation responsible for enforcing the legislation should have a power to allow it to bring proceedings in its own name.

### *Debate in Westminster*

32. In this Opinion, we analyse the debate in Westminster concerning the adoption of

anti-discrimination legislation in Great Britain through the introduction of the Equality Act 2010 leading to the decision to exclude children and young people from the prohibition on age discrimination in the provision of goods, facilities and services. We also consider the further debate on the implementation of these provisions. We conclude that no good reasons were identified for excluding children and young people. Specifically, there is no merit to the argument that there would be unintended consequences in the sense of service providers being forced to withdraw socially useful and important services for persons under 18. This is because these types of services would in many cases be permissible under the positive action exception outlined at [17] above or the general justification defence outlined at [19] above.

33. However, we do consider that extending the prohibition on age discrimination in goods, facilities and services might have an “unintended consequence” of enhancing protection for adults in comparable situations. However, we do not consider that there are any *negative* unintended consequences.

#### *Debate in Northern Ireland*

34. We have also analysed the recent debate in the Northern Ireland Assembly. For reasons we have explained in more fully in our Opinion, we conclude that the arguments advanced for excluding children and young people do not withstand detailed scrutiny, when considered against human rights norms and the steps effectively taken in other countries.

#### *Approach internationally*

35. Overall we recommend the approach advocated in this Opinion because it is not novel and is indeed one which other countries specifically Australia, Canada and Belgium have adopted without any visible signs of unacceptable social stresses arising. Our examination of those legal systems demonstrate that children and young people can be protected against age discrimination and suitable

exceptions formulated without encountering drafting difficulties or creating any undesirable and unintended consequences. In our analysis of how the law works in these jurisdictions we also identify a wide range of scenarios where a prohibition on age discrimination makes a real difference for children and young people.

### *Conclusion*

36. We are grateful for the opportunity to advise the Equality Commission for Northern Ireland and the NICCY. We are happy to discuss our conclusions with them and engage in the broader debate in Northern Ireland as is thought appropriate.

**ROBIN ALLEN QC**

[ra@cloisters.com](mailto:ra@cloisters.com)

**DEE MASTERS BL**

[deemasters@cloisters.com](mailto:deemasters@cloisters.com)

**CLOISTERS**

**18 April 2013**