

## Strengthening Protection for all Ages

### Proposals for reform of Age Discrimination in the Provision of Good, Facilities and Services

27 August 2015

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#### Executive summary

- There is overwhelming evidence of age discrimination in goods, facilities and services. The OFMDFM’s proposed legislation is a *step* towards realising equality in this area. The consultation process is a golden opportunity to support the proposed legislation whilst also pushing for more expansive and meaningful protection.
- There are many positive features to the proposed legislation in that:
  - It defines “age” in an expansive way so that it could be a reference to a particular age (“65 year old”), a range of ages (“over 65”) or the way in which groups are described (“pensioners”, “older people”, “the elderly”).
  - It covers discrimination on the basis of a person’s perceived age rather than simply their actual age. Confirmation is required that it covers discrimination by association.

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<sup>1</sup> This paper draws heavily on ideas developed in conjunction with Robin Allen QC (Cloisters).

- It covers the provision of goods, facilities and services, charities, education, health and social care, the exercise of public functions and selling, letting or managing premises unless a purely private arrangement.
- It is irrelevant whether these services or facilities are provided for free or in return for a payment.
- All forms of discrimination are to be prohibited.
- There are a number of number of exceptions to the over-arching principle of non-discrimination on the grounds of age which would sanction the special treatment of certain age groups where this was necessary to protect them or advance their interests e.g. there is a positive action exception.
- These specific exceptions are supplemented by a general “catch-all” defence which will allow any service provider to objectively justify practices which on their face amounted to direct or indirect age discrimination. Confirmation is required that only social policy aims can justify direct age discrimination.
- However, there are significant weaknesses in the current proposal since the principle of non-discrimination is heavily qualified by broad and unprincipled exceptions as follows:
  - Age-related holidays.
  - Residential park homes.

- Age-based concessions.
  - The financial services industry.
- These far ranging exceptions would lead to arbitrary and damaging age-based practices.
- The proposed positive action exception and objective justification defence will sanction any permissible forms of differential treatment in these areas so there is simply no requirement for a series of broad or blanket exceptions.
- Similarly, the current exception for care within the home is too broad. Whilst there is a private, domestic sphere which should not be regulated, the current proposal does not properly carve out that area.
- There is simply no justification for excluding the under 16's from the proposed legislation. It is inconsistent with domestic, European and international law. It is also illogical.
- The prohibition on age discrimination in GB has not generated any real litigation. This might be explicable on the basis that the law in GB is also subject to heavy exceptions, a lack of publicity or a proactive approach from service providers, such as the NHS, that anticipated the change in the law and reviewed practices in advance.

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## Overview

1. Certain age groups experience age discrimination when it comes to the provision of both public and private services. Within GB, Westminster has already taken steps to eliminate age discrimination by amending the Equality Act 2010 so as to extend the prohibition on age discrimination in the field of employment to the provision of goods and services from 1 October 2012. The European Union is also currently debating a draft Directive in this area which, if introduced, would ultimately compel Northern Ireland to introduce a ban.
2. The legislation outlined in the OFMDFM's paper entitled, "Proposals to extend age discrimination legislation (Age goods, facilities and services)" ("Proposal") is a crucial *step* towards securing equality, regardless of age, in Northern Ireland. However, there are a number of areas where more expansive protection is required in order to truly ensure equality. The consultation process is a golden opportunity to support the proposed legislation whilst also pushing for more expansive and meaningful protection.

## Why equality?

3. The guiding values which underpin the principle of equality are personal autonomy (i.e. the ability to fulfil one's potential and choose one's own path in areas of fundamental importance) and human dignity, since these ideals are infringed when someone is prevented from exercising choice due to a protected characteristic such as age which they have no control or influence over.

4. Equality is a key principle in Northern Ireland and it is already enshrined in legislation such as The Employment Equality (Age) Regulations (Northern Ireland) 2006.<sup>2</sup> It is also a fundamental principle within Europe and on the international stage. Despite that, age is the *only* protected characteristic in Northern Ireland which is not protected within the sphere of goods, facilities and services.<sup>3</sup>

### **What is equality?**

5. The conceptual basis for equality is that people in comparable situations should be treated in the same way.<sup>4</sup> There is no moral or other reason for concluding that different age groups are anything other than comparable and worthy of equality. Indeed, people are already protected against age discrimination when it comes to the field of employment.<sup>5</sup> Accordingly, the starting point for any legislative framework, which respects the principle of equality, is that people of all ages are comparable and should be treated in the same way.

6. That said, it is also important to recognise that certain stages in life are accompanied by hurdles (physical, economic or imposed by society's prejudices), so that different age groups stop being comparable (usually the younger or older generations) and in this situation, equality dictates that

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<sup>2</sup> This piece of legislation prohibits age discrimination in the areas of employment, occupation, vocational training and further and higher education.

<sup>3</sup> See, Sex Discrimination (NI) Order 1976 (as amended), Disability Discrimination Act 1995 (as amended), Special Educational Needs and Disability (NI) Order 2005 (as amended), Race Relations (NI) Order 1997 (as amended), Fair Employment and Treatment (NI) Order 1998 (as amended) and the Equality Act (Sexual Orientation) Regulations (NI) 2006 (as amended).

<sup>4</sup> See, for example, C-427/06 *Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH*.

<sup>5</sup> The Employment Equality (Age) Regulations (Northern Ireland) 2006.

different age groups must be treated differently so as to *alleviate or remove the hurdles*. In other words, equality is not concerned with ignoring the valid differences between individuals. This is why a society will embrace equality where it prohibits age discrimination but simultaneously sanctions and encourages the special treatment of vulnerable groups e.g. care homes for the elderly.

7. Similarly, there are some limited situations where even though age groups are in a comparable situation, and should as a matter of principle be treated the same, there will be a compelling reason to treat them differently e.g. creating training schemes for unemployed young people to address the fact that nearly 20% of people under 24 are unemployed compared to 4% of 25 to 49 years old.<sup>6</sup> Accordingly, there always needs to be a mechanism in place to allow for differential treatment but only where it can be objectively justified.
8. The *structure* of the proposed legislation is consistent with the principle of equality since its starting point is that people should be treated in the same way regardless of age (unless they are under 16, which is a significant deficiency in the proposed legislation and is a matter which is addressed further below).
9. It also simultaneously recognises that there are some situations in which equality requires or permits different treatment because age groups stop being in a comparable situation and as such it creates exceptions (although

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<sup>6</sup> <http://www.detini.gov.uk/deti-stats-index/stats-labour-market/stats-labour-market-unemployment.htm>

there are too many exceptions and they are too broad, matters which are addressed below).

10. Finally, it contains a “catch all” objective justification defence so that service providers have a chance to demonstrate that any differential treatment should be permitted.

11. However, it is important to note that the objective justification defence outlined in the proposed legislation is available even where the relevant practice treats people differently because of their age. This is an important point of distinction with other forms of discrimination law in the sphere of goods, facilities and services since ordinarily it is impossible to justify direct discrimination in this way.

### **Scope of the proposed legislation**

12. The proposed legislation defines “age” in an appropriately expansive way since it could be a particular age (“65 years old”), a range of ages (“over 65”) or the way in which groups are described (“pensioners”, “older people”, “the elderly”).<sup>7</sup> It would also cover discrimination on the basis of a person’s perceived age rather than simply their actual age.<sup>8</sup> It is assumed that it would cover discrimination by association e.g. a carer being harassed because he is looking after an elderly person, but this requires confirmation as it is not explicitly addressed in the Proposal.

13. A number of very important areas would be regulated by the proposed legislation which is to be supported (although there are important omissions,

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<sup>7</sup> Proposal, chapter 3, paragraph 2.3.1.

<sup>8</sup> Proposal, chapter 3, paragraph 11.1.

a matter which is developed further below). That is, the proposed legislation covers the provision of goods, facilities and services, charities, education, health and social care, the exercise of public functions and selling, letting or managing premises unless a purely private arrangement.<sup>9</sup> It is irrelevant whether services or facilities are provided for free or in return for a payment.<sup>10</sup> It follows that the scope is consistent with other pieces of equality legislation in Northern Ireland.

14. The merit of including education within the scope of the legislation is worthy of additional exploration. Age has traditionally played a significant role in the education sector. Where existing legislation permits or requires age discrimination, e.g. young people must remain at school until they are 16 years old, the proposed legislation would have no impact since it will explicitly state that existing legislation is unaffected. However, other age-based practices would be subject to scrutiny and this is important because there is increasing evidence that ability and aptitude do not necessarily correlate to age, see for example the debate concerning whether summer born children should be permitted to start school later than their peers. If educational services were entirely excluded from the proposed legislation then any inappropriate or arbitrary aged-based rules would be left unchecked. Moreover, discrimination in education is prohibited in respect of all other protected characteristics.

15. In keeping with existing discrimination legislation, the proposed legislation properly covers all forms of discrimination:

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<sup>9</sup> Proposal, chapters 3 to 6.

<sup>10</sup> Proposal, chapter 3, paragraphs 3.9.1-3.9.2.



- a. Direct discrimination: Treating someone less favourably because of their age or perceived age unless the treatment can be objectively justified e.g. a 75 year old woman being ignored by staff in a mobile phone store, “because she is too old to need a mobile phone” or a landlord refusing to rent a flat to a couple in their early 20’s because “young people don’t know how to behave”.<sup>11</sup>
  
- b. Indirect discrimination: Placing barriers in the way of people which puts them at a disadvantage in relation to a service or stops them accessing the service because of their age, where the barrier itself cannot be objectively justified e.g. an optician only allowing customers to pay by instalment where they are currently in work rather than looking at all forms of regular income such as a pension.<sup>12</sup>
  
- c. Harassment: In relation to age (i) creating an intimidating, hostile, degrading, humiliating or offensive environment for someone, or (ii) subjecting someone to unwanted conduct which has the purpose or effect of violating their dignity e.g. a woman wishes to join a social club but she is told that, “members wouldn’t feel comfortable with someone of your age at club events”.<sup>13</sup>
  
- d. Victimisation: Subjecting someone to a detriment because they complained about age discrimination, gave evidence in support of such a

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<sup>11</sup> Proposal, chapter 3, paragraph 11.

<sup>12</sup> Proposal, chapter 3, paragraph 12.

<sup>13</sup> Proposal, chapter 3, paragraph 13.

claim or started litigation e.g. an 18 year old tennis player being banned from a tournament because she complained that under 21's were excluded from a recent social event.<sup>14</sup>

- e. Discriminatory behaviour after a relationship has come to an end e.g. a builder making abusive, ageist comments to a former customer after he had completed work on her house.<sup>15</sup>
- f. Publishing or causing to be published, an advertisement which evidences an intention to discriminate e.g. a radio announcement that only people under 25 will be allowed into a club.<sup>16</sup>
- g. Giving instructions or pressurising someone to commit an act of discrimination e.g. security staff being offered an incentive to ensure that only people under 25 access a night club.<sup>17</sup>

### **Suitable exceptions within the proposed legislation**

16. The proposed legislation quite properly outlines a number of exceptions since there will be situations in which specific age groups are not in a comparable position, for example due to increased vulnerability, and accordingly they require special treatment in order for equality to exist.

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<sup>14</sup> Proposal, chapter 3, paragraph 14.

<sup>15</sup> Proposal, chapter 3, paragraph 15.

<sup>16</sup> Proposal, chapter 3, paragraph 15.

<sup>17</sup> Proposal, chapter 3, paragraph 15.

17. The proposed legislation contains the exceptions outlined below and are very much consistent with the principle of equality as well as the approach adopted in many other areas of equality law. They should be welcomed.

- a. Positive action: Service providers that take measures to treat particular age groups more favourably where those actions are a means of achieving the aim of overcoming disadvantage, meeting the different needs of the particular age group or increasing participation of a particular age group in particular activities e.g. a meningitis vaccination scheme targeting people going to university since this group is particularly vulnerable or free influenza immunisation for older age groups.<sup>18</sup>
- b. Charities: Charities that limit their benefits to a specific age group or to causes which affect people of one age group more than another, so as to tackle the disadvantages faced by that group e.g. a charity that provides free meals to over 70's who struggle to care for themselves.<sup>19</sup>
- c. Non-charities: Other providers that limit their service to a specific age group to meet their particular, specific and justifiable need e.g. a care

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<sup>18</sup> Proposal, chapter 3, paragraph 18.

<sup>19</sup> Proposal, chapter 3, paragraph 22. There is some ambiguity in the Proposal. One interpretation is that any legitimate charity which limited its activities to a particular age group would be able to benefit from this exception. However, there is also some suggestion that the charity would need to be tackling issues which disproportionately affected the age group in question. This qualification is important because in order to respect the principle of equality, it is crucial that the charity is seeking to assist age groups who have a specific age-related need e.g. a charity which provides age specific counselling services to 16-21 years old because a tailored approach is required for this age group. Otherwise, the charity would simply be arbitrarily excluding people on the grounds of age.

home which provides age-specific residential support to people aged 70 and over.<sup>20</sup>

- d. Existing legislation: Age discrimination which is permitted by existing legislation e.g. restriction on the sale of cigarettes, alcohol and age-based rules within the state education sector.<sup>21</sup>
- e. Age-restricted products: Schemes operated by retailers to prevent the purchase of age-restricted products to people below the legal age e.g. “Challenge 21” and “Challenge 25” schemes.<sup>22</sup>
- f. Competitive activities: Sports, games and other activities of a competitive or strenuously participative nature in which the physical strength, stamina, physique, mobility, maturity or manual dexterity of “average” people of a particular age group would put them at a disadvantage compared to average people of another age group as competitors in events involving the activities e.g. under 21’s football tournaments.<sup>23</sup>
- g. Ad hoc exceptions: Even after extensive debate it may not be possible to anticipate all exceptions that might be required. In Canada, Australia and Belgium, the legislation prohibiting age discrimination has a mechanism by

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<sup>20</sup> Proposal, chapter 3, paragraph 25.

<sup>21</sup> Proposal, chapter 3, paragraph 20. Please note that any proposed legislation must be workable so there are good reasons for an exception which means that existing legislation is unaffected. However, there are some examples of existing laws which discriminate on the grounds of age which may not be justifiable. Out of pragmatism, it makes sense to introduce a ban on age discrimination with an exception for existing laws but it is important to simultaneously commit to reviewing areas of existing law which unjustifiably discriminate on the grounds of age.

<sup>22</sup> Proposal, chapter 6, paragraph 7.

<sup>23</sup> Proposal, chapter 6, paragraph 4.

which ad hoc exceptions can be made to the principle of equal treatment as new scenarios are encountered. The proposed legislation has an amendment mechanism which should allow this to happen in Northern Ireland too.<sup>24</sup>

### **Objective justification defence**

18. These specific exceptions are quite properly supplemented by a general “catch-all” defence which will allow any service provider to objectively justify practices which on their face amount to direct or indirect age discrimination.<sup>25</sup> This type of defence is necessary because sometimes there is a compelling reason to treat groups differently e.g. youth training schemes as referred to in paragraph 7 above.

### ***Legitimate aim***

19. There must be a legitimate aim for the objective justification defence to succeed.<sup>26</sup> In relation to practices which differentiate between people directly on the grounds of their age, the legitimate aim should have a public interest nature e.g. it would be acceptable to create training schemes for young people since unemployment is particularly acute for this age group.

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<sup>24</sup> Proposal, chapter 3, paragraph 27.1.

<sup>25</sup> Proposal, chapter 3, paragraph 17.

<sup>26</sup> It is suggested that enabling people of a particular age group to socialise together would be a legitimate aim: see Proposal, chapter 3, paragraph 17.5. However, additional context is required in order to ensure that this aim is nothing more than a desire to socialise without certain groups due to stereotypical assumptions (“I don’t want to socialise with people over 70 as all they do lecture young people”), prejudice (“I don’t like people over 70”) or ignorance (“I could never have anything to talk about to someone who is over 70”). There are some situations in which social age segregation would be underpinned by a legitimate aim – see paragraph 26 - but it is not right to simply assert that it will always be legitimate to enable people of a particular age group to socialise together since the reality is far more nuanced.

20. It is important to note here that the Consultation paper suggests that the objective justification defence will follow established principles of equality law and follow the model in GB. In GB, there is a lack of clarity concerning the type of legitimate aims which should be permitted under the Equality Act 2010 when it comes to the justification of direct age discrimination. The Supreme Court decision of *Seldon v Clarkson, Wright & Jakes* [2012] ICR 716 states that direct age discrimination in the field of employment law can only be justified where there is a social policy objective which is of a public interest nature. There has yet to any decision as to whether this is also a requirement in relation to goods, facilities and services but it would be illogical to adopt a different approach. This is a point which should be addressed explicitly in the proposed legislation so as to introduce certainty.

21. There is no restriction on the range of acceptable legitimate aims for practices which are indirectly discriminatory provided that the aim itself is not discriminatory e.g. it would be acceptable for students and pensioners to be offered a 30% discount on coach travel during off-peak hours so a coach company can increase profitability by filling seats that would otherwise be empty.

### ***Real need***

22. The legitimate aim must correspond to a real need e.g. youth unemployment must be a genuine issue, for the objective justification defence to succeed.<sup>27</sup>

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<sup>27</sup> *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213.

### ***Proportionality***

23. Finally, the measure must be a proportionate means of achieving the legitimate aim for the objective justification defence to succeed.<sup>28</sup> An important aspect of proportionality is that a practice will only be proportionate if there are no other less or none discriminatory means of achieving the aim.

### ***Practical examples***

24. Examples of how age-based practices would be analysed within the confines of an objective justification defence are as follows:

- a. A holiday company has found that there is an increased risk of damage to its cottages where groups of people under 21 rent them. It would be disproportionate and therefore contrary to the proposed legislation to ban all people under 21 since simply requiring the provision of a higher deposit to be set off against damage where a group consists of 2+ people aged between 16 and 21 would also address the company's concerns and would be far less draconian.
  
- b. An education provider receives a large donation for the purpose of improving reading in children and young people under 18. The education provider concludes that spending the money on very young children i.e. books for the under 5's, would have a greater long term effect because there is research that reading ability is most positively affected by early exposure to books so this would represent the best use of the money. On

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<sup>28</sup> Ibid.

the face of it, this decision would amount to indirect age discrimination but in the circumstances it would be capable of objective justification.

## **Problematic exceptions in the proposed legislation**

### ***Age-related social activities and accommodation***

25. The proposed legislation contains exceptions concerning certain social activities and residential accommodation e.g. age-related holidays<sup>29</sup> and residential park homes<sup>30</sup>.

26. There are some leisure activities and forms of accommodation where the exclusion of certain age groups or the differential treatment of age groups is consistent with the principle of equality and so should be permitted. Examples include:

- a. Holidays camps for disadvantaged young people aged 16 and 17 where all people over 18 are excluded, for child protection reasons, unless they have been subject to rigorous background checks;
- b. Activities intended to combat barriers to participation e.g. dance classes for the over 70's since people of that age group feel self-conscious undertaking physical activities with younger people;
- c. A requirement that people can only attend a strenuous walking holiday if they have a particular level of mobility and fitness in order to protect their safety; and

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<sup>29</sup> Proposal, chapter 6, paragraph 3.

<sup>30</sup> Proposal, chapter 6, paragraph 5.



- d. Care homes, sheltered accommodation and supported accommodation for young people or older people which are tailored to their particular needs.

27. The objective justification defence and the positive action exception would permit these forms of differential treatment.

28. However, there is no justification for the blanket exceptions contained within the proposed legislation since they would sanction many forms of objectionable age discrimination, such as:

- a. Age-related package holidays: A travel operator could exclude all people over 40, “because they will ruin any fun the younger people are having”.
- b. Residential park homes: An owner of a site could exclude all people aged between 16 and 19, “because teenagers are rude and loud”.

29. These forms of age segregation, which are based on discriminatory stereotypes, should never be permitted but sadly the legislation as currently proposed would sanction them.

30. Moreover, it creates an inconsistency within the legislation since other forms of similarly offensive discrimination would be banned e.g. there is no exception which would allow a designer label from banning people over 70 from its shop because, “it will put fashion-conscious customers off”. This inconsistency undermines the legitimacy of the proposed legislation.

31. It is also important to be clear that in the current proposal there is nothing prevent companies from marketing to particular age groups e.g. “This walking holiday will particularly appeal to people over 60 because ...”. Accordingly, there would be no limitation on businesses who had a target market linked to age provided that they did not exclude different age groups who also wanted to enjoy the experience or product.

### ***Home, family and private life***

32. There is a blanket exception within the proposed legislation for care within the home (adoption, fostering, healthcare)<sup>31</sup> which is too broad and would sanction unacceptable forms of age discrimination.

33. Plainly, there are many private, family or home based activities which should not be regulated e.g. the care that a parent provides to his child. However, the proposed legislation seeks to “carve out” that area through a broad exception which relates to all care within the home even if it is commercial or quasi-commercial including all harassment and victimisation. This is too broad since there are some situations which would fall within the current exception but which should be regulated, for example:

- a. It should be unacceptable for a foster parent to harass a child because of his age.
  
- b. It should be unacceptable for a child-minder to victimise a disabled 16 year old in her care.

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<sup>31</sup> Proposal, chapter 3, paragraph 24.

34. A definition of goods, facilities and services which plainly excludes the core of family and private life would be preferable to the approach currently contained in the proposed legislation.

### ***Age-based concessions***

35. The blanket exception for age-based concessions contained in the proposed legislation is not consistent with the principle of equality since it will lead to arbitrary and unjustifiable age discrimination.

36. It is very common for organisations to offer age-based concessions e.g. reduced admission to museums for retirees, under 18's or students. Many of these age-based concessions are consistent with the principle of equality, for example:

a. Age-related characteristics can be a proxy for relative financial disadvantage e.g. students and retirees can be more susceptible to financial hardship. Accordingly, offering reduced admission to these groups, with the aim of boosting their attendance at museums, will almost certainly be consistent with the principle of equality and would either fall under the positive action exception or the general objective justification defence.

b. Similarly, age itself can be a proxy for relative financial disadvantage e.g. under 18's can be more susceptible to financial hardship as they will be in education, at the start of their careers or unemployed due to the current problem with youth unemployment. Accordingly, offering reduced

admission to these groups, with the aim of boosting their attendance at museums, will also be consistent with the principle of equality and would either fall under the positive action exception or the general objective justification defence.

37. However, there are some age-based concessions where there is no proper basis for treating age groups differently and breaching the principle of equality e.g. cheaper drinks for people under 21 at a music venue so as to encourage a younger audience at a concert as the sponsor for the event (a drinks company) wants its brand to be associated with “attractive” people.

38. Accordingly, there should be no exception for age-based concessions but service providers, such as the museum in paragraph 36 above, should be allowed to rely on the positive action exception or objectively justify any concessions.

39. In practice, all age-based concessions which are intended to address the relative financial insecurity of children, young people and pensioners, would fall within the positive action exception or the remit of the objective justification defence. Accordingly, in order to introduce certainty, it would be sensible to have a very limited exception within the proposed legislation for age-based concessions for children and young people and older people where the true aim was to alleviate financial hardship.

### ***Financial services***

40. The exception for the financial services industry within the proposed legislation is not consistent with the principle of equality. Any acceptable age-based practices which should continue, notwithstanding the prohibition

on age discrimination, will be allowed to continue by virtue of the objective justification defence.

41. Many financial products are heavily shaped by considerations of age e.g. travel insurance, car insurance, mortgages, loans and interest rates. The proposed legislation indicates that there will be an exception for financial services which is modelled on the provision used in GB which states that direct and indirect age discriminations is excluded from the Equality Act 2010 in so far as it relates to financial services although there is a small qualification in that where there is an assessment of risk (there is no requirement to show that deciding to conduct a risk assessment must be capable of objective justification) and this involves considerations of age, the information relied on must be relevant and the source must be reasonable to rely on.

42. This provision is only compatible with the principle of equality if either:

- a. Different age groups are sufficiently different, in relation to the provision of financial products, that they completely lack comparability all of the time, so that there is no need for equal treatment; or
- b. There will always be objective justification for the myriad ways in which a service provider might want to treat different age groups differently.

43. Plainly, these propositions cannot be true e.g. it cannot be credibly argued that all 29 year olds (or an average 29 year old) are in a very different position to all 30 year olds (or an average 30 year old) in relation to travel insurance.

Accordingly, there is no justification for the proposed, broad exclusion of financial services from the ban on age discrimination. This is particularly so in light of the wide-ranging evidence that discrimination in the financial services sector is a particular barrier to older people.

44. That said, since there are clearly some differences between people when it comes to financial products which will have a causal link to age e.g. a 17 year old is likely to have a different risk profile to a 50 year old when it comes to car insurance due to a lack of experience, it is important that service providers have the opportunity to justify differential treatment in the usual way through the objective justification defence.

45. Situations in which service providers within the financial services industry might be able to provide objective justification are as follows:

- a. A 17 year old is charged a proportionately higher car insurance premium in comparison with a 35 year old because credible statistics reveal that he is very much more likely to be involved in a serious accident because of his age/lack of experience.
- b. An insurance company which charges higher premiums for travel insurance in accordance with the number of years a person has actively driven (i.e. a practice which on its face is indirectly discrimination on the grounds of age) because there is compelling evidence that more experienced drivers are less likely to have accidents.

- c. Travel insurance is made available to people over 70 but only if they have consented to a medical examination which will assess their risk of ill health whilst on holiday and the premiums are then fixed in a proportionate way. This system does not exist for people under 70 because there is compelling evidence that this age group is likely to experience health problems abroad and they are likely to be less costly when problems do arise.
- d. A 70 year old is refused a 95% mortgage on a home because she is no longer in employment and has no other source of income or assets which would allow her to pay off the debt within a 10 year time frame.

46. The Proposal suggests that Northern Ireland should be consistent with GB otherwise practical problems will arise including a lack of certainty.<sup>32</sup> It is not clear what these practical problems would be and why carefully crafted legislation would not provide certainty.

47. The Proposal also suggests that including financial services within the ban *might* have a detrimental impact on consumers, smaller providers and innovation.<sup>33</sup> No evidence has been provided to support those concerns and it is worth noting that gender discrimination was banned recently following the CJEU decision in *Test-Achats* yet there is no publicly available evidence that this had caused any real problems.<sup>34</sup> Similarly, other countries such as

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<sup>32</sup> Proposal, chapter 5, paragraph 7.2.

<sup>33</sup> Proposal, chapter 5, paragraph 7.4.

<sup>34</sup> For example, Insurance Europe produced a presentation in Brussels on 10 September 2014 which stated that it was “impossible to isolate the effect of the gender ban on pricing and benefit design”.

Sweden appear to have a functioning insurance market which does not discriminate on the grounds of age.<sup>35</sup>

48. Accordingly, it is difficult to see that there is any compelling reason to depart from the principle of equality in this area.

***Exclusion of under 16's<sup>36</sup>***

49. The exclusion of under 16's from the ban on age discrimination, currently outlined in the proposed legislation<sup>37</sup>, has no rational basis and should be strongly resisted.

50. The proposed legislation should apply to everyone for six reasons:

- a. It is contrary to the United Nation's Convention on the Rights of the Child and the European Convention on Human Rights to discriminate against children and young people.
  
- b. Legislation which gives protection to only one age group does not create equality. It would be unthinkable to only provide protection against discrimination (e.g. race, sex, disability, religion) to adults. It is particularly nonsensical to purport to introduce age equality whilst simultaneously excluding children and young people.

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<sup>35</sup> See research by AGE platform.

<sup>36</sup> A fuller analysis of these issues is set out in the Opinion produced by Robin Allen QC and Dee Masters at:  
[http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/ExpertPaper\\_FULLAge-GFS\\_ProtectingAllAges-IncCYP\\_v1\\_18413.pdf](http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/ExpertPaper_FULLAge-GFS_ProtectingAllAges-IncCYP_v1_18413.pdf)

<sup>37</sup> Proposal, chapter 3, paragraphs 2.1-2.1.



- c. It would be consistent with s.75 of the Northern Ireland Act 1998 since that provision places an obligation on public bodies to have due regard to the need to promote equality regardless of age.
- d. It creates illogical and arbitrary distinctions. The effect of the proposed legislation is that a ban on 16 year olds entering a department store would be unlawful direct age discrimination unless it was a proportionate means of achieving a legitimate aim. Yet, a ban on a 15 year old would be perfectly lawful and would not engage with the proposed legislation at all. There is no sensible reason for such an arbitrary distinction.
- e. There is evidence that children/young people are discriminated against frequently due to age and so require protection.
- f. Legislation protecting children would also have a normative effect and help to build a culture of respect for children's rights.

51. It is undeniable that the situation of children and young people is often incomparable to an adult. This means that the law must allow special protective measures which permit differential treatment on the grounds of age, for example:

- a. Maturity: Children and young people will require protection because they are not yet fully mature (intellectually, physically, emotionally and sexually). Accordingly, there are lower age limits for the purchase of alcohol, entering marriage, criminal responsibility and driving. Similarly, there are laws concerning compulsory education. There are also well-

known practices which protect children e.g. requiring parental consent before administering vaccinations.

- b. Economic independence: Children and young people require protection because they are not capable of being economically independent. One way in which protection is afforded in this arena is by the creation of age-dependent state benefits e.g. child benefit, so as to provide some financial security. Other initiatives include breakfast clubs for children from socially disadvantaged backgrounds and free nursery places for certain age groups.
- c. Relative economic hardship: Families with children will experience additional financial burdens. It is common to recognise this disadvantage by offering discounts on admissions, transport and holidays.
- d. Safety: Children and young people require protection on safety grounds. This is often addressed outside a formal legal context e.g. dedicated soft-play areas for children under 2 because children under this age are not generally strong, tall or co-ordinated enough to use the equipment safely with older children in attendance.
- e. Special needs: Children and young people require protection because they have special needs which require positive action, e.g. buggy areas on buses, nappy-changing facilities, vaccination schemes, children's libraries.

52. These differences do not mean that children/young people should be excluded from protection. Rather, they are powerful illustrations of the

importance of the positive action exception and the objective justification defence, which would sanction the beneficial forms of age differentiation outlined at paragraph 51 above.

### **Practical implications of the proposed legislation**

53. In order to ensure that the proposed legislation has teeth, it is crucial that there is a meaningful enforcement mechanism. The current proposal is that the ban on age discrimination would be enforceable in the same way as other forms of discrimination in the field of goods, facilities and services. That is, claimants will be able to litigate in the County Courts and seek financial redress.<sup>38</sup> However, it is important that the role of the ECNI is clarified and that confirmation is given that its powers will mirror its duties in respect of other protected characteristics, for example, a power of formal investigation.

54. There has been a ban on age discrimination in goods, facilities and services in GB since 1 October 2012. There has been very little by way of litigation. This is surprising bearing in mind the overwhelming evidence concerning age discrimination. There has been no formal research into why there has been so little litigation. It could be explicable on the basis that:

- a. It is an area of law which has a low profile in GB.
- b. There are broad exceptions within the legislation, most notably for the financial services industry, and this has eroded its effectiveness.

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<sup>38</sup> Proposal, chapter 7.

- c. The NHS took significant steps to anticipate the ban by assessing its practices and introducing guidance for example, an Age Equality Audit Tool for health care and social care.<sup>39</sup> Since this is one of the organisations where litigation might otherwise have been expected since decisions about the allocation of resources are often shaped by considerations of age, this proactive approach could account for the lack of litigation.

55. The approach adopted by the NHS demonstrates that service providers can similarly minimise the risk of litigation by adopting a proactive approach should a ban on age discrimination be introduced in Northern Ireland. It would be advisable for service providers to:

- a. Risk assess / review its service for likely age discrimination issues;
- b. Amend practices where necessary; and
- c. Produce guidelines and / or train staff to identify and eliminate age discrimination.

56. Changes in the law can be confusing for organisations. It would be sensible for the government to produce Guidance which would accompany any legislation and provide practical examples of discrimination and how to avoid it.

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<sup>39</sup> <http://age-equality.southwest.nhs.uk/>

## **Conclusion**

57. The proposed legislation is a hugely important step towards eliminating discrimination. However, to introduce true equality, the legislation needs to be broader, bolder and more coherent by removing the various exceptions and limitations highlighted in this paper.

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