

Response to the Office of the First and Deputy First Minister's (OFMDFM's) Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services)

It is the Government's clearly stated intention that Age Discrimination Legislation (Age, Goods, Facilities and Services) (Age GFS legislation) will not apply to children and young people under the age of 16. Children and young people already enjoy protection from discrimination on the basis of their age in employment and vocational training¹ and on the grounds of sex, sexual orientation, religion and political opinion, race and disability when accessing good, facilities and services in Northern Ireland.

There has been a failure to take account of compelling evidence in taking forward proposals for Age GFS legislation. Both the Northern Ireland Commissioner for Children and Young People (NICCY) and the Equality Commission for Northern Ireland (ECNI) have provided a wealth of compelling evidence to Government which clearly highlights the need to include children and young people of all ages within the scope of the Age GFS legislation. The Equality Coalition does not believe that any of the comprehensive evidence provided by the two Commissions has been taken into account in developing the current proposals regarding under 16s.

The Programme for Government commitment was not age based. The Northern Ireland Executive's commitment in the Programme for Government 2011-2015² to extend age discrimination legislation to the provision of goods, facilities and services³ is welcomed but the Programme for Government commitment does not state that the Age GFS legislation should only be extended to certain age groups. It is extremely disappointing that the Government is proposing to exclude under 16s from the scope of this legislation.

The proposed legislation must comply with children's and human rights standards. The United Nations Convention on the Rights of the Child (UNCRC) should serve as the underpinning framework for all decisions concerning children's lives.

¹ As provided for by the Employment Equality (Age) Regulations (Northern Ireland) (2006). These protections apply to children from the age of 13 as this is the age at which children are legally allowed to work in Northern Ireland.

² Extended to 2016.

³ Priority 2, Pg 40, Northern Ireland Executive's Programme for Government 2011 – 2015.

The proposed exclusion of under 16s from the legislation is not in compliance with three of the principles of the UNCRC, Articles 2 - the right of the child to protection from discrimination on any basis, 3 – the best interests of the child and 6 – the right to develop and fulfil maximum potential. Nor is it compliant with Article 14 of the ECHR - the right to protection from discrimination in the enjoyment of all of the other Convention rights.⁴ Neither of these Conventions places an age range on protection from discrimination; both the UNCRC and the ECHR, as incorporated by the Human Rights Act 1998, apply to everyone, regardless of their age.

The Committee on the Rights of the Child has addressed the issue of discrimination faced by children and young people. It also expressed its concern at the general climate of intolerance and negative public attitudes towards children, including in the media, highlighting that this may often be the underlying cause of further infringements of their rights.⁵ The Committee made a recommendation that the Government ensure full protection against discrimination on any grounds, including by taking, “...urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including in the media”⁶ The Committee also recommended that the Government 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.”⁷

In the recent Report of the UK Children’s Commissioners to the UN Committee on the Rights of the Child for the Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland the Commissioners recommended that, “*The State Party and devolved governments should provide equal legislative protection for children against age discrimination and remove all exemptions relating to children under their equality legislation, unless these can be objectively justified.*”⁸

⁴ Article 14 of the ECHR prohibits discrimination with respect to rights under the Convention, i.e. an applicant must prove discrimination in the enjoyment of a specific right that is guaranteed elsewhere in the Convention.

⁵ Concluding Observations on the United Kingdom of Great Britain and Northern Ireland. CRC/C/GBR/CO/4. Para. 24.

⁶ *Ibid*, Para. 25(a).

⁷ *Ibid*, Para. 25(c).

⁸ UK Children’s Commissioners UNCRC Report, 1 July 2015 [available at <http://www.childcomwales.org.uk/uploads/publications/564.pdf> page 10, accessed Oct 2015]

Political decision has already been taken on the scope of the legislation despite overwhelming support for the inclusion of all ages in the legislation. Comments made by the Junior Ministers⁹ and Officials¹⁰ are clear that the scope of the legislation is a decision which has been arrived at through political consensus. Little indication has been given that there is any potential to change the scope of the legislation, despite the current consultation exercise. Research shows overwhelming support for the inclusion of people of all ages in future Age GFS legislation. A survey carried out by Age NI and Age Sector Platform found that 90% of people aged 65 and over agree or strongly agree that the legislation should extend to people of all ages. This figure was higher among the general population with 92% agreeing/strongly agreeing that the legislation should extend to people of all ages.¹¹ Research has also shown significant political support for the legislation, with 87% of MLAs agreeing that it must be a priority for this current NI Executive to deliver legislation outlawing age discrimination.¹²

There is significant evidence that children and young people experience discrimination. The 2010 Young Life and Times Survey found that 83% of respondents agreed that young people are judged negatively just because they are young. This is in contrast to 43% and 37% of respondents to the 2008 and 2014 Northern Ireland Life and Times Survey respectively who felt that older people are treated worse than people in the general population because of their age. Children across Northern Ireland suffer disproportionately high levels of mental ill health. In a survey of 752 young people, 27% stated that they have had a concern about their mental health.¹³ In Northern Ireland in 2013/14, only £19.4m was allocated to Child and Adolescent Mental Health Services (CAMHS), which equates to 7.8% of the total planned mental health expenditure for that period,¹⁴ despite the fact that children and young people under 18 represent almost a quarter of Northern Ireland's population.

⁹ Committee for the Office of the First Minister and deputy First Minister Official Report (Hansard) Age Discrimination Legislation: OFMDFM Junior Ministers and Officials, 15th April 2015.

¹⁰ Meeting with Age Sector organizations and OFMDFM, Castle Buildings, 20th April 2015, Age GFS Consultation event, City Hotel, Derry, OFMDFM, 28th July 2015, Age GFS Consultation event, Grosvenor Hall, Belfast, OFMDFM, 18th August 2015.

¹¹ Millward Brown Research, commissioned by Age NI and Age Sector Platform, 29 May 2014

¹² MLA research panel, December 2013, compiled by Stratagem and ComRes. (MLA Research Panel, Dec 13 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).

¹³ Children's rights survey to inform young person's report to the Committee on the Rights of the Child, January 2015, Children's Law Centre and Save the Children.

¹⁴ Information received by the Children's Law Centre from the Health and Social Care Board, dated 17th February 2015.

No rationale has been provided for the proposed exclusion of under 16s within the scope of the legislation. This presents significant challenges in attempting to address the reasons why it is proposed that children under 16 should not be protected in future Age GFS legislation. The Equality Coalition does not believe that there is any legal or practical reason for this exclusion. It has been suggested one of the reasons for the exclusion of under 16s from the scope of the legislation is a fear of undermining parental rights. The Equality Coalition believes that this fear is unfounded. It is our experience that parents are supportive of their children being protected from age discrimination in accessing goods, facilities and services, particularly where this protection should ensure equal access to vital services in areas such as health, including mental health and education.

The exclusion of under 16s from the legislation may result in further cuts to vital children's services. NICCY has expressed serious concerns about what the proposed exclusion of under 16s from Age GFS legislative protections will mean for children and young people's services. Research by NICVA has found that children and young people are the group hardest hit by funding cuts.¹⁵ It is obvious that where legislative protections from age discrimination in accessing services exist for one group, this group will be protected from less favourable treatment in accessing these services. The Equality Coalition is therefore extremely concerned that when decisions are made regarding the allocation of extremely limited funding for services, children's services will be disproportionately cut as they are the only group not protected. This is potentially one of the most serious issues with regard to the proposed exclusion of under 16s from the scope of the Age GFS legislation and comes at a time of already devastating cuts to education and youth services and chronically underfunded child and adolescent mental health services.

Accelerated Passage will not allow for adequate scrutiny of the legislation. The Equality Coalition believes that the use of the Accelerated Passage procedure with regard to the Age GFS legislation and the consequent removal of the vital role of the OFMDFM Committee have the potential to result in flawed and inadequately tested law. The draft EU Commission Directive on the provision of goods and services 2008/0140¹⁶ proposes to ban discrimination on a number of grounds including age. We are aware that discussions are ongoing regarding the Directive and there is no agreed date for adoption.

¹⁵ NICVA CutsWatchNI [available at <http://www.nicva.org/article/cutswatchni-results-are-coming> accessed Oct 2015]

¹⁶ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2008/0140.

However, if this Directive is adopted the UK Government and its devolved administrations will be required to extend their legal frameworks to extend Age GFS protections to children and young people within 2 years of adoption. In light of this the Equality Coalition would encourage the NI Executive to extend the legislation to cover all age groups now.

The Equality Coalition agrees that Age GFS protections should include education and health and social care without exceptions. All children should have access to protection from age discrimination regardless of their age. NICCY has provided detailed evidence to OFMDFM regarding the difficulties young people face in accessing age appropriate health and social care services and education.¹⁷ None of these have been included in the consultation document. Examples include the continued admission of children into adult psychiatric wards, the lack of availability of certain services including crisis intervention and drug and alcohol services and tier two CAMHS services for deaf children, inconsistencies in the age at which young people transition into adult services, no forensic inpatient psychiatric facility for under 18s in Northern Ireland, difficulties in accessing educational welfare services, children with learning disabilities transitioning in education and the use of arbitrary age limits to access certain education services such as literacy support.

The proposed financial services exception is too broad as it will continue to allow financial service providers to use a person's age as a criterion in designing financial services products. This will not address the issue of young people being able to access a range of financial services on an equal basis to everyone else, including moped and car insurance for 16 and 17 year olds.

Section 75 is intended to be used as a policy formulation tool however, the Equality Coalition is highly concerned that there is limited potential to change the proposed scope of the Age GFS legislation, despite the views expressed by consultees and advice given to the Department. The proposed exclusion of under 16s from the scope of the legislation has significant potential for adverse impact on this group, who are protected under the age category in section 75 (NI Act 1998).

¹⁷ Proposals for reform. Strengthening Protection for all Ages. Protecting children and young people against unlawful age discrimination in the provision of goods and services, NICCY and the ECNI, June 2013, Pgs. 20-26.

The Equality Coalition has serious concerns about how genuine this consultation exercise is and believes that there is significant evidence to indicate that the outcome of this consultation with regard to the scope of the legislation has been pre-determined from the outset.

It is vital that child accessible documentation is produced and direct consultation is carried out with children of all ages as a matter of priority, there are concerns that there may be limited consultation with children as part of this process, particularly given the statement in the EQIA that, “...*this policy will not directly impact those aged under 16, as this age group is not included in these proposals*”.¹⁸ The Equality Coalition disagrees entirely with this and firmly believes that this policy will significantly directly impact on children and young people under 16 through their proposed exclusion.

Young people will have only have 10 weeks to respond to this consultation document, falling short of the obligations outlined above under OFMDFM’s Equality Scheme. Given the significance of this policy on the lives of children and young people, we are concerned that the young person friendly version of the consultation document was not made available from the beginning of this consultation process and consulted upon for a minimum of 12 weeks.

We consider the content of the young person friendly version of the consultation document to be incomplete. While information on the main proposals has been included in the document, there has been no attempt to include information in this version which relates to the EQIA, including the types of discrimination children and young people face on grounds of their age. It would therefore appear that OFMDFM is not seeking the views of young people on the EQIA in its young person friendly version of the consultation document. This is not in compliance with OFMDFM’s Equality Scheme.

There is a statutory obligation, under Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998, on all public authorities to take into account any EQIA and consultation carried out in relation to the policy.

¹⁸ Pg. 99, Proposals to extend Age Discrimination Legislation (Age Goods, Facilities and Services) – consultation document, OFMDFM, July 2015.

A commitment to this is included within OFMDFM's approved Equality Scheme.¹⁹ It is essential that OFMDFM fully complies with this commitment and can clearly show how views expressed through consultation on the current proposals and the EQIA have been taken into account in progressing future Age GFS legislation.

It is the Equality Coalition's firm view that the sole proposed 'mitigating measure' for under 16s who will be excluded from the legislation falls far short of what is required under section 75 of the Northern Ireland Act 1998. The section in the EQIA on mitigation of adverse impact refers to ongoing work on the Ten Year Strategy for Children and Young People. The Children's Strategy will not provide any legislative protection for under 16s from age discrimination in accessing goods, facilities and services. We do not believe that this can be viewed as mitigating in any way against the significant adverse impact which will be suffered by under 16s on grounds of age and multiple identity under 16s on grounds of disability, sexual orientation, race, people with dependents and gender.

As adverse impacts have been identified and neither mitigation of adverse impact on the enjoyment of equality of opportunity or promotion of equality of opportunity are proposed in the EQIA, this failure is a breach of OFMDFM's approved Equality Scheme. There is a statutory obligation on OFMDFM to take action to mitigate against adverse impact as well as to proactively promote equality of opportunity in order to comply with section 75.

Case law in Britain is clear that consultation must be fair. In the recent Supreme Court case of *Moseley R (ota) v. London Borough of Haringey*²⁰ the court endorsed the long standing core principles of consultation as the embodiment of fairness, known as the Gunning principles.²¹ These are that consultation must be at a time when proposals are still at a formative stage; the proposer must give sufficient reasons for its proposal to permit intelligent consideration and response; adequate time must be given for consideration and response and the product of consultation must be conscientiously taken into account in finalising any statutory proposals. The current consultation proposals are not at a formative stage as the decision to exclude under 16s from future Age GFS legislation has been taken, despite the ongoing consultation process.

¹⁹ Para 4.2, Practical Guidance on Equality Impact Assessments, Equality Commission for Northern Ireland, February 2005.

²⁰ [2014] UK 56

²¹ [1985] 84 LGR 168

In addition, no rationale or reasons have been provided by OFMDFM for the exclusion of under 16s from future Age GFS legislation, thus preventing consultees from being able to intelligently consider and respond to this. Neither do we believe that there is any potential to change the scope of the legislation regardless of the level of support expressed through consultation for the inclusion of under 16s in the legislation. If this is the case, OFMDFM will also be unable to show that the product of consultation was conscientiously taken into account in finalising its statutory proposals.

OFMDFM must take sufficient cognisance of its statutory equality and common law obligations in taking forward future Age GFS legislation. In the *Moseley R (ota) v. London Borough of Haringey* case, it was held that it was unfair and unlawful not to invite and consider views about possible alternatives to the proposal contained in the consultation which was presented as if there was no alternative and consultees had no choice. The Equality Coalition believe there are notable parallels to be drawn with the current consultation and believes that the manner in which this consultation has been carried out raises serious questions about its fairness and consequently, lawfulness which could give rise to legal challenge.

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