

Strengthening Protection for all Ages

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

Expert Paper

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

--

JOINT OPINION

--

ROBIN ALLEN QC

DEE MASTERS BL



www.cloisters.com

18 April 2013

Contents

Executive Summary	6
Central conclusion	6
Reasons for the inclusion of children and young people into anti-discrimination legislation.....	6
Accommodating the special needs of children and young people	8
Practical considerations	9
Remedies.....	13
Debate in Westminster.....	14
Debate in Northern Ireland.....	14
Approach internationally	14
Conclusion	15
A - Introduction	17
A1 Overview of the key relevant principles.....	23
Equal treatment should be the basic rule.....	23
The proposed legislation should enable protective measures for children and young persons	25
Existing legislative measures need not be eroded.....	26
Our suggested approach to the Proposed Legislation would be consistent with the approach taken in other countries with progressive legislation	26
B – The principle of equal treatment	28
B1 Overview.....	28
B2 Northern Ireland and the principle of equal treatment	32
(a) The Convention on the Right of the Child	34
(b) European Convention on Human Rights.....	38
(c) EU law – principle of equality	40
(d) Council of Europe – European Social Charter	45
B3 Conclusions.....	45
C Proposed Legislation and ensuring compatibility with the principle of equal treatment.....	46
C1 The lack of logic in a pre-condition for access to protection only at age 18.....	46
C2 The need for special protective measures because of particular differences	50
Maturity	51

	<i>Lack of economic independence</i>	51
	<i>Safety</i>	51
	<i>Special needs</i>	52
C3	<i>Practicalities of protecting children and young people – providing for exceptions</i>	52
	(a) <i>Positive action</i>	53
	(b) <i>An overarching justification defence</i>	54
	<i>Justifying direct age discrimination</i>	57
	<i>Legitimate aims</i>	57
	<i>Proportionality</i>	59
	<i>Justifying indirect age discrimination</i>	60
	<i>Guidance</i>	61
	(c) <i>The impact of the Proposed Legislation on existing legislation</i>	62
	(d) <i>Statutory authority defence</i>	63
	(e) <i>Education</i>	64
	(f) <i>Financial services and other contractual relationships</i>	69
	(g) <i>Concessions</i>	70
	(h) <i>Age verification</i>	71
	(i) <i>Ad hoc exceptions</i>	71
C4	<i>Remedies for breach</i>	72
D	<i>Analysis of arguments in the UK against protecting children and young people</i>	72
D1	<i>Debate in 2008</i>	72
D2	<i>Debate in 2009</i>	74
D3	<i>Debate in 2012</i>	76
D4	<i>Debate in Northern Ireland</i>	77
	(a) <i>Other jurisdictions</i>	77
	(b) <i>Extent of exceptions</i>	78
	(d) <i>Unintended consequences</i>	79
	(e) <i>Relationships between children/young people and their parents</i>	79
	(f) <i>Parental consent</i>	80
	(g) <i>Children-go-free holidays</i>	80

(h) Age verification	81
(i) Children and access to shops	81
(j) Burden on service providers	82
(k) Differing needs as between children and young people	83
E The prohibition of age discrimination in relation to the provision of goods facilities and services in other jurisdictions	84
E1 Overview	84
E2 Canada	84
(a) Canadian Charter of Rights and Freedoms	84
(b) Canadian Human Rights Act	87
(c) Ontario	90
E3 Australia	93
E4 Belgium	98
F Practical illustrations of the impact of legislation which protects children and young people against age discrimination in the context of goods, facilities and services	101
F1 Discriminatory practices which would be affected by legislation protecting children and young people	101
F2 Discriminatory practices which would be unaffected by legislation protecting children and young people under the scheme set out in this Opinion	103
G Conclusion	104

Appendices

<i>Equality Act 2010</i>	Appendix A
<i>Lester, Pannick & Herberg: Human Rights Law and Practice/Chapter 6 Northern Ireland/B The Impact of the Northern Ireland Act 1998</i>	Appendix B
<i>Convention on the Rights of the Child</i>	Appendix C
<i>Canadian Charter of Rights and Freedoms</i>	Appendix D
<i>Canadian Human Rights Act</i>	Appendix E
<i>Ontario Human Rights Code</i>	Appendix F
<i>Australian Age Discrimination Act 2004</i>	Appendix G
<i>Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (Belgium federal anti-discrimination law)</i>	Appendix H

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 Protection 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.¹ 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.² We recognise that age can be a proxy for financial disadvantage, suffered by for instance the young or those over pensionable age,

¹ 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.

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

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 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

DEE MASTERS BL

deemasters@cloisters.com

CLOISTERS

18 April 2013

A - Introduction

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”.
2. The reason for this project lies in the fact that the Northern Ireland Executive has announced its intention, as part of its Programme for Government 2011-15, to legislate to extend the protection from age discrimination beyond employment³ to cover the provision of goods, facilities and services.⁴
3. We understand that in stating its intention in relation to goods, facilities and services, the Executive has in mind more or less the same areas as those covered by that same phrase when used in existing legislation, that is to say both the activities of private organisations as well as the public sector.⁵ While of course its scope will be defined by the precise terms of any new legislation, its use implies that this proposed legislation is likely to apply to a very wide range of circumstances from, for instance, the provision of banking services, to common retail services, to access to places of entertainment, and perhaps even to matters such as detention.⁶ In short it concerns most aspects of civil society beyond

³ This is provided for by the Employment Equality (Age) Regulations (Northern Ireland) (S.I. 2006/261) as amended by the Employment Equality (Age) (Amendment) Regulations (Northern Ireland) (S.I. 2006/395) and the Employment Equality (Age) (Amendment No. 2) Regulations (Northern Ireland) (SI 2006/453).

⁴ Presently, there is legislation prohibiting discrimination in goods, facilities and service in respect of various other protected characteristics, for example, sex and disability, but not age.

⁵ Thus for example, Article 30 of the Sex Discrimination (Northern Ireland) Order 1976 defines goods, facilities and services, expressly so as to include the services of any local or public authority.

⁶ The extent to which this might cover discrimination in the exercise of powers which are reserved to Westminster and away from the Northern Ireland Assembly is not a matter on which we are currently instructed.

employment.

4. The Executive has described this measure as part of “priority two” that is to say it concerns *“creating opportunities, tackling disadvantage and improving health and wellbeing”*. A public consultation process is due to start in 2013 with legislation proposed to be finalised in 2014/5.
5. One of the key issues will be whether children and young people will be included within the scope of the legislation. This was confirmed as early as 2 October 2012 when the Deputy First Minister Martin McGuinness stated that, *“Consideration is being given to whether young people under 18 years of age should be included in the scope of the legislation”*.
6. We note that on 11 March 2013 a debate took place in the Northern Ireland Assembly at which some speakers expressed the view that under 18’s should be excluded from the proposed legislation. It is apparent from the record of that debate that a number of issues about the place of children in society were raised even though they did not have a direct relationship to the issues with which we are concerned.⁷ We recognise many people have some concern about this new proposed legislation because it will challenge old ideas. This has been the case before the introduction of all anti-discrimination legislation. In this Opinion we shall set out what we believe will be some practical ways forward for refocusing on the precise issue of whether there should be a condition of access to these new protections that a person be 18 or older.
7. Both the Commission and NICCY had already had concerns about this issue and they now wish to inform public debate further. This Opinion will be used, we

⁷ See NI Assembly, Hansard Report, 11 March 2013, Private Members’ Business, Age Discrimination Legislation.

understand, to contribute to that debate by showing the equality, human rights and other legal considerations that will need to be taken into account by policy makers and politicians.

8. In one sense this Opinion is unusual. There is no current draft wording for the proposed legislation in Northern Ireland that might enact this new protection from age discrimination in the field of goods, facilities and services. Accordingly this Opinion is not concerned with reacting to a draft text. It is necessarily a more discursive Opinion concerned with what the legislation could and should provide. While the Opinion will therefore use the phrase “the Proposed Legislation” it should not be understood as referring to any specific text.
9. Nevertheless we must also have in mind the fact that within Great Britain (GB) the Westminster coalition government has brought into force, with effect from 1 October 2012, legislation that makes provision to protect against discrimination on the grounds of age in the field of goods, facilities and services (using that phrase in essentially the same way as indicated above). It did this by bringing into effect provisions of the Equality Act 2010 (“EA 2010”) subject to certain exclusions already in the EA 2010 and subject to certain new ones set out in subordinate legislation. Save to a limited and irrelevant extent the EA 2010 does not extend to Northern Ireland: section 217. The relevant provisions of the EA 2010 are set out at Appendix A.
10. The legislation in GB is complex in that it is limited by a raft of exceptions some of which go a long way to excluding much of the obvious scope of such provisions concerning age discrimination in the field of goods, facilities and services. The provision of financial services is for instance almost completely excluded. Moreover the way the provisions that do have real effect are intended to work is not entirely clear. In particular the relationship with the employment

law provisions is not clear even though in the course of 2012 the Supreme Court considered in some depth how *prima facie* age discrimination, whether direct or indirect, could be justified.⁸ This has had the effect that the law in GB is considered to be particularly uncertain.⁹

11. However about one thing the legislation in GB is quite clear; it does not apply to those of less than 18 years in its most material respects. Thus section 28 of EA 2010 states –

28 Application of this Part

(1) This Part does not apply to the protected characteristic of—

(a) age, so far as relating to persons who have not attained the age of 18;

...

12. It therefore provides an inevitable contrast to the discussion that is to take place in Northern Ireland on the key question: *Should the Northern Ireland law apply to all ages and if not at what age should it commence to apply?*

13. In short the bringing into force of this new legislation in GB, subject to an age limitation of 18, is one central reason why the Commission and the NICCY have concerns about any possibility that the Proposed Legislation will not be extended to children and young people.

14. A concomitant and very important reason is that there is undoubtedly compelling evidence that children and young people do indeed experience age

⁸ See *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16 [2012] IRLR 590, [2012] Eq LR 579 and *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 [2012] IRLR 601, [2012] Eq LR 594. The authors of this Opinion both appeared in *Seldon* and Robin Allen QC also appeared in *Homer*.

⁹ This was pointed out in an early article in the Law Society Gazette on the new legislation by Daphne Romney QC and Dee Masters: “Beginner’s guide to the ban on age discrimination in goods and services”, available on the web at www.lawgazette.co.uk/in-practice/practice-points/beginner-s-guide-ban-age-discrimination-goods-and-services.

discrimination regularly.¹⁰ This is very important and cannot be ignored. By way of example, it has been shown that older children (i.e. 16-17 year olds) often receive less favourable treatment from health services, including mental health services and in respect of cancer treatment, and from child protection services.¹¹ This is obviously hugely concerning.

15. Thus neither the Commission nor the NICCY wish to see legislation to protect against age discrimination that *is itself* built on an age discriminatory foundation, especially where there is a real case to answer that legislation is needed to protect against such discrimination.

16. We see the force of these overarching concerns. The stark impact of excluding persons under 18 can be very simply explained by reference to a passage from the guidance¹² published by the Westminster government's Government Equality Office ("GB Age Guidance") which states that –

The ban does not apply in respect of children aged under 18. This means that people and organisations can continue to provide different services at different rates or on different terms and conditions for children of different ages, or can refuse to serve children – for example, 'no children' hotels can continue as now and newsagents can still restrict the number of children entering their shops.

17. This is based on the Explanatory Memorandum published with the 2010 Act which explained the aim of section 28 as follows –

Section 28: Application of this Part.

106. ... since the prohibition on discrimination because of age in services and

¹⁰ See for instance "Making the case: why children should be protected from age discrimination and how it can be done: Proposals for the Equality Bill", Young Equals, 2009, available at: <http://www.crae.org.uk/assets/files/Making%20the%20Case.pdf>.

¹¹ Ibid. see pages 8-9 and 10-11.

¹² See "Equality Act 2010 - Banning Age Discrimination in Services: An overview for service providers and customers" GEO, 2012 which can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85004/age-discrimination-ban.pdf.

public functions will not be extended to the under 18s, this section explains that the provisions in this Part do not apply to under 18s in respect of the protected characteristic of age.

18. There is an obvious illogicality in such limited protections which, at their simplest, have an absurd apparent effect. Thus suppose a hotel were to have a policy that no one under 21 was permitted entry. The hotel bars A and B because the manager concludes that both are 17. If A is in fact 18 there can be no doubt that he has a *prima facie* claim under the EA 2010; he meets the threshold condition in section 28. If B is in fact 16, but looks older (hence being thought to be 17), she does not meet the threshold condition in section 28. Yet both have suffered the same treatment.
19. It will of course be necessary in our Opinion to draw a distinction between children and young people on the one hand and adults on the other. Any distinction is of course arbitrary to some degree and different rules are used for different purposes. A person may lawfully have sexual intercourse at 16 but not vote until they are 18 for instance; yet of course some 16 year olds may be rightly considered too immature to understand what the consequences of unprotected sex are while some 17 year olds are well able to appreciate the significance of the franchise. Professor Geraldine Van Bueren has rightly stated that “... *minimum ages are inevitably arbitrary, as they cannot accurately reflect the speed of development of each individual child*”.¹³
20. However for brevity in writing this Opinion we have had to make a choice and we shall therefore refer to “Adults” as persons who are 18 and older. This is not an unreasoned choice; it is in accordance with and based on the definition contained in the Commentary to the European Convention on the Exercise of

¹³ See Van Bueren, “Child rights in Europe”, (2007), see generally p.57-61.

Children's Rights.

21. We also accept that as states must necessarily legislate on the basis of a rationalisation from social facts that are in themselves only generalisations, it is appropriate for states to adopt fixed ages as a proxy for some notions such as maturity/experience/capacity. The administrative burden that would be created by testing all persons in all situations for characteristics such as maturity as a gateway to certain services would be too great. The questions that we shall explore are concerned with the extent to which legislation can *appropriately* use age as a proxy for these attributes in a way which is consistent with human rights norms.
22. The danger from a human rights and equality point of view with all stereotypes is that by definition they cause those who are not well described by the stereotype to be treated inappropriately and to that extent unfairly. In the context of the transition from childhood to youth to adulthood, where the pace of change is so fast and yet so differentiated between one person and another, there is a particular need to be cautious about such stereotypes. Both the Commission and the NICCY are right to recognise exactly this danger and to seek to explore how it can be addressed appropriately.

A1 Overview of the key relevant principles

23. At the outset we shall set out a summary of the principles which underpin this Opinion. We seek to do that in a way that will show their inter-connectedness and how this Opinion is structured so each conclusion leads to the next.

Equal treatment should be the basic rule

24. *Within Northern Ireland, the general rule should be that children and young people should be protected from age discrimination in the provision of goods, facilities and services, equally in comparison to adults.*

25. This is a conclusion that there should be no discrimination in the application of a new age discrimination rule. If it is right to introduce such a rule, it is right to introduce it for all.

26. Indeed at the macro level this follows from the fact that Northern Ireland has rightly consented to implement the general principle of equal treatment and non-discrimination,¹⁴ including in respect of age, as contained in international and European human rights law, by ratification or incorporation.¹⁵ It is therefore not appropriate that it should water down its domestic legislation to a level less than the international commitments that have been made. In particular it is not appropriate that it should legislate so that there is a general inequality before the law. That would be inconsistent with the United Nations Universal Declaration of Human Rights of 10 December 1948.¹⁶

27. The principle of equal treatment in respect of age requires Northern Ireland to treat children and young people the same as adults in analogous or comparable¹⁷ situations unless there is an objective justification for treating them differently. We consider that for the most part adults are in a comparable situation to that of

¹⁴ The principle is variously described as being the principle of equal treatment or the principle of non-discrimination, and sometimes both terms are used together. For brevity we shall simply refer to the principle of equal treatment except where we have quoted from documents which use one of the other phrases.

¹⁵ It has to be recognised of course that the UK, unlike for instance the United States of America has a dualist system of international law. International treaties do not automatically become part of domestic law in any part of the UK, merely by being ratified. The provisions have to be transposed into domestic law by domestic enacting measures. Contrast the United States of America where Article 6 of the Constitution provides for all US Treaties to be part of federal law.

¹⁶ The concept of equality before the law is central to the universality of human rights. It is found in Articles 6 and 7 of the Universal Declaration of Human Rights: "*Article 6. Everyone has the right to recognition everywhere as a person before the law. Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*"

¹⁷ Analogous and comparable are synonyms. The case law in Europe tends to use the adjective comparable whereas elsewhere analogous is more commonly used. We shall use comparable unless analogous is used in a quotation.

children and young persons simply by reason of their humanity. It follows that there is no principled basis for a *blanket* exclusion of children and young people from a ban on age discrimination in the provision of goods, facilities and services. We have found a Canadian case, *Arzem V Ontario (Community and Social Services* 2006 HRTO 17, which adopts exactly this analysis. This case is extensively analysed at [236] – [239] below.

28. Naturally, we recognise that there are many differences that can arise between the situation in which children and young people find themselves in comparison with adults (so that they are not always in a comparable situation) however these differences do not provide a basis for *no* legislative provision and *no* enforceable rights; rather the differences give rise to an obligation to take specific different actions.
29. Essentially these differences arise as a consequence of, or must be seen as part of, the vulnerability that children and young people have *vis-à-vis* adults. The vulnerability may be expressed in many different ways from lack of wisdom and maturity, lack of physical ability, lack of economic or other power over self-determination, lack of education and so on. However in each case they entail legislative measures for their special protection. We cannot see that there is any basis for a conclusion that these differences entail that there should be no legislative measures to protect them from age discrimination on grounds of their age in relation to goods, facilities and services. This seems to us completely false logic.

The proposed legislation should enable protective measures for children and young persons

30. Therefore where there are grounds for specific, closely defined protective measures for children and young people (either collectively or within different age bands) in specific

circumstances, the Proposed Legislation should both permit different treatment of children and young persons vis-à-vis adults, and also recognise that such different treatment may be required.

31. In short, the thrust of these exceptions would be to ensure the best interest of the child. We have suggested some practical proposals as to how this might be done.

Existing legislative measures need not be eroded

32. *It is possible to construct legislation that will ensure that there is no erosion to existing laws relating to children and young people in Northern Ireland for example the Children's (NI) Order 1995.*

33. Indeed existing equality legislation in Northern Ireland may be *inconsistent* with the exclusion of young people and children from the protection of the Proposed Legislation. As explained in greater detail below, there is a duty on statutory bodies to ensure that there is no discrimination on the grounds of age.

Our suggested approach to the Proposed Legislation would be consistent with the approach taken in other countries with progressive legislation

34. *Though such an approach will be inconsistent with the approach taken in GB it is not inconsistent with the approach taken in other significant jurisdictions where children and young people are protected against age discrimination in goods, facilities and services, specifically Australia, Canada and Belgium.*

35. These 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. An analysis of how the law works in these jurisdictions also identifies a wide range of scenarios where a prohibition on age discrimination makes a real difference for children and young people.

36. By contrast the exclusion in GB came about as a result of a late amendment to the Bill that became the 2010 Act in the dying days of the last administration at a point when it was thought better to include a general provision in relation to goods facilities and services and age in a way that did not give rise to general debate.¹⁸

37. More recently the absence of any reasoned debate on this issue in GB can be seen from a consideration of the discussion in the House of Lords when the Equality Act 2010 (Age Exceptions) Order 2012 was put before the Grand Committee of the House of Lords on behalf of the Westminster Government by Baroness Verma¹⁹ on the 17 July 2012.

38. Thus while Baroness Verma specifically noted that the relevant provisions of the 2010 Act had bipartisan support and also excluded those under 18, she wound up the debate by saying²⁰ –

We agree in principle that older people - *indeed, people of all ages - have to be treated fairly and that there should be no deviation from that principle.* (Emphasis added)

¹⁸ The way in which the debate went can be seen from the differing approaches to the issue by the then Labour government. In their Briefing on the Report Stage of the 2010 Act the human rights organisation Liberty commented “...Initially, the reason given for excluding children from this important protection was that there was insufficient evidence that children suffer age discrimination. The Minister for Women and Equality, Harriet Harman, stated in the House of Commons last year that “there is little evidence of harmful age discrimination against young people. Harmful age discrimination is basically against older people” ... At Committee Stage in the House of Commons, after accepting that evidence of harmful age discrimination against children exists, the Government then put forward another argument that: Nobody would see any need to distinguish between the way they treat a 72- year-old and a 77-year-old, but they would want to treat a two-year-old and a seven-year-old quite differently. There is no doubt that a two-year-old child has different needs to a seven-year-old child. However, the Government’s reasoning applies equally to the differing needs of a sixty-year-old adult as compared to a ninety-year-old adult. People of different ages – no matter which ‘age bracket’ they fall within – will always have different needs. This is not a reason for excluding children under the age of 18 from any protection at ll.” See

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

¹⁹ Baroness Verma was then a Government Spokesperson for the Cabinet Office, International Development and Equalities and Women's Issues in the House of Lords.

²⁰ See Hansard House of Lords 17 July 2012 : Column GC67 which can be found at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120717-gc0001.htm>.

39. As we have pointed out, regrettably, the Westminster Government did not accept the implication of the principle that its spokesperson articulated by bringing all ages within the scope of the new GB legislation.

B – The principle of equal treatment

B1 Overview

40. The principle of equal treatment is a fundamental right that underpins both European and wider international human rights law. It can be expressed in a number of different ways depending on the context. For instance it can concern equality before and under the law, equality of treatment, equality of opportunity and equality of outcome.

41. The central issue in this debate is concerned with equality before the law.²¹ The current legislation in GB, giving protections to adults that it does not give to those who are not adults, simply does not afford children and young persons equality before and under the law. In our Opinion this blanket rule is simply inconsistent with the place of the principle of equal treatment in human rights law.

42. The exact language of the principle of equal treatment varies as between different instruments of human rights law. However, the conceptual and philosophical foundation of the principle is always the same and based on Aristotle's philosophical approach to fairness.²²

²¹ Nothing could be a more basic general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791 and judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I). It is now found expressly in Article 20 of the European Charter of Fundamental Rights.

²² See *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-2; see e.g. *Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH* (C-427/06) European Court of Justice (Grand Chamber), [2009] All E.R. (EC) 113; [2008] E.C.R. I-7245; [2009] 1 C.M.L.R. 5, per Advocate – General Sharpston's Opinion at [44].

43. Advocate General Kokkott in her Opinion for the Court of Justice of the European Union (CJEU) in (C-236/09) *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2012] 1 W.L.R. 1933; [2012] All E.R. (EC) 441; [2011] Eq. L.R. 409 set out this principle in quite general²³ terms at [41] thus –

According to settled case law the principle of equal treatment or non-discrimination...requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified...

44. One question that always arises when applying this principle is: Are these situations comparable? We can see that it might be argued that persons of different ages are too dissimilar to be comparable. However that argument cannot stand because the law does not allow a person to argue that adults are not in a comparable situation merely by reason of their age. In other words, an age discrimination claim cannot be defeated by simply point to the fact that adults and children/young people are different ages.

45. Indeed, Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department and others* [2008] HRLR 41, [2008] 1 WLR 1434, [2008] UKHL 42, [2008] 4 All ER 1127, stressed that a state could not simply argue that a situation was not comparable because of differences which arise from the protected characteristic itself. In other words, it is not enough to argue that children/young people can be treated differently to adults because they are a different age; a more careful analysis is needed which examines whether there are *relevant* differences between

²³ She cited *Sermide SpA v Cassa Conguaglio Zuccheri* (Case 106/83) [1984] ECR 4209, para 28; *R (ABNA Ltd) v Secretary of State for Health* (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04) [2005] ECR I-10423, para 63; *Société Arcelor Atlantique et Lorraine v Premier ministre* (Case C-127/07) [2008] ECR I-9895, para 23; and *R (SPCM SA) v Secretary of State for the Environment, Food and Rural Affairs* (Case C-558/07) [2009] ECR I-5783, para 74. However as she said this is settled case law and it can be found in the jurisprudence of the European Court of Justice from a much earlier stage. These cases that she cited simply refer to earlier cases. One of the earliest cases using this principle is a judgment of the court given on the 12th February 1974: Case 152-73 *Sotgiu v Deutsche Bundespost* [1974] E.C.R. 153.

the two groups. Thus Lady Hale stated at [27] -

There are ... dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on personal characteristics which are inherent in their protected status to argue that their situations are not analogous ...

46. In human rights law, a state is permitted to treat people differently by reference to age even if they are in a comparable position provided that it can demonstrate that there is an objective and reasonable justification for the differential treatment. However the burden of proof is on the state to establish the justification.²⁴ The nature of the test of objective justification was explained by the European Court of Human Rights ("ECtHR") in the *Belgian Linguistic Cases* (1968) 1 EHRR 252 as follows -

It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of

²⁴ *DH and others v The Czech Republic* (2008) EHRR 3 at [177].

proportionality between the means employed and the aim sought to be realised.

47. The further implications of this principle are explored in greater detail below however the key premises for the conclusions in this Opinion can be quite simply stated now. Children and young persons ought to be treated in an equal way to adults when their situations are comparable as they frequently will be. When their situations are not equal they should not be treated worse than adults but afforded different treatment according to appropriate human rights norms.
48. It is not enough to simply say that sometimes they may be treated in an inferior way because they are children and young persons and not adults. Rather, where because they are children and young persons so that more protection is needed because of their status, more should be given; it is therefore discrimination simply to avoid providing any protection at all.
49. Although the provision of goods, facilities and services may engage with EU law, when for instance they are concerned with benefits which are traded across the borders of member states of the Union, that will not always be the case. Accordingly we accept that it is not enough merely to cite EU law in this way for these propositions.
50. Thus it is important to bear in mind that although this principle is stated in such a way in the passage cited above (and in the cases to which reference is made in the footnotes) as to be undoubtedly part of the so-called *acquis communautaire*²⁵, this statement of the principal of equal treatment is not limited to EU law contexts. It is also part of the general law of the ECtHR.²⁶ Indeed the ECtHR has

²⁵ This refers to the total body of EU law formulated to date.

²⁶ See e.g. *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [175], *Willis v United Kingdom* (2002) 35 E.H.R.R. 21 at [48] and *Okpiz v Germany* (2006) 42 E.H.R.R. 32 at [33].

emphasised that -

in certain circumstances a failure to attempt to correct inequality through different treatment may in itself [give rise to a breach of the principle.²⁷]

51. Moreover this approach is simply reflecting general principles of human rights law about equality as will become clear in the development of the comparative law study in this Opinion.

52. We now turn to consider the particular constraints on Northern Ireland when the Assembly comes to make its decision about the proposed legislation.

B2 Northern Ireland and the principle of equal treatment

53. The starting point for present purposes is that Northern Ireland has already consented to comply with the principle of equal treatment in a number of different ways.

54. Perhaps the most well-known statement of that obligation – although not directly applying to the Assembly – is contained in section 75 of the Northern Ireland Act 1998 (“NIA 1988”) –

75.— Statutory duty on public authorities.

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

...

55. It would seem odd to say the least that the Assembly would expect all the other

²⁷ See *DH* op.cit. at [175], citing *Belgian Linguistic Case* (1979–80) 1 E.H.R.R. 252 at [10], *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15 at [44] and *Stec v United Kingdom* (2006) 43 E.H.R.R. 47 at [51].

public authorities to comply with the principle of equal opportunity on grounds of age but when it came to legislating to prevent age discrimination it did not support the principle of equality under the law for children and young persons on the same or no less good basis than as for adults. As will now be shown it would be materially less than is expected at the international level.

56. More generally the Assembly has to act consistently with the provisions of the European Convention on Human Rights (“ECHR”). As both the Commission and the NICCY, and the Northern Ireland Executive will well know, the Northern Ireland Assembly is under a duty to fully comply with the ECHR because the observation and implementation of obligations under the Convention are expressly excluded from the category of excepted matters contained in the NIA 1998.²⁸ Moreover, the NIA 1998 makes it clear that the Assembly has no competence to enact provisions that are incompatible with the ECHR.²⁹ The NIA 1998 contains eight “checks” so as to ensure compliance with the ECHR.³⁰

57. However it has to be recognised that the force of this is not as great as might be hoped. This is because the main part of the ECHR does not have as effective an equal treatment and equality provision as is found in EU law and this has sometimes led politicians to consider that this provides a licence to make legislative provision that only meets a lesser standard of equality. As we shall explain while it is true that there is a lesser standard in the ECHR equality provisions to that in EU law, working to only such a lesser standard gives rise to issues with EU law and certainly is not consistent with a state seeking to legislate to the highest international equality and human rights norms.

²⁸ NIA 1997, Sch 2, para 3.

²⁹ NIA 1998, s.6.

³⁰ These are succinctly summarised at [6.06] to [6.18] of *Lester, Pannick and Herberg: Human Rights Law and Practice*, March 2009 (3rd edition). The relevant excerpt is at Appendix B.

(a) The Convention on the Right of the Child

58. The most important protective provision at the international level for children and young persons is the United Nation's Convention on the Right of the Child of the 20 November 1989³¹ ("CRC"). This requires that the "best interests" of the child be pursued and in that context that there is no discrimination against children and young persons: see Articles 2 and 3.

59. The CRC was ratified by the United Kingdom of Great Britain and Northern Ireland ("UK") in 1991, and even though it has not been fully directly incorporated into the law of Northern Ireland there is no now doubt at all that its principles form a part of the central discourse of public decision making in the UK at least to the extent of limiting the discretion of public authorities.³² In fact it may be said that its principles have been partly expressly incorporated into statute law even if as a whole it has not been fully incorporated.

60. Thus in its most recent submission³³ to the UN Committee on the Rights of the Child, the UK noted the current position as follows³⁴ -

The UK's four Children's Commissioners and the Westminster Parliament's Joint Committee on Human Rights have recommended that the UK Government incorporate the CRC in domestic law. The Government has responded that the UK meets its obligations under the CRC "through a mixture of legislative and policy initiatives."

³¹ TS 44 (1992); Cm 1976.

³² It is not necessary to explore the way in which this has happened. As will be shown it is accepted by the highest appeal courts as a source of law and it is now probably part of international *jus cogens* and therefore of our common law on that account.

³³ This can be found at Appendix 3 to the Queens University Report for UNICEF, by Lundy, Kilkelly, Byrne and Kang, "The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries", November 2012, UNICEF. This can be found at http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf#page=116.

³⁴ House of Commons Hansard, vol. 532, col. 906W, 2011.

61. As an organisation, the NICCY will be well aware that the Commissioner Patricia Lewsley-Mooney must have regard to it,³⁵ as must her counterparts in GB.³⁶ Clear traces of its principles can be seen in for instance the welfare provisions in Article 3 of the Children (Northern Ireland) Order 1995 (S.I. 1995 No. 755 (N.I. 2)).³⁷ Indeed both the Supreme Court and the House of Lords have recognised that the principles enshrined within the CRC are relevant when assessing the lawfulness of the state's actions and form a consideration in interpreting and applying the ECHR.³⁸
62. Sometimes those principles come into conflict with other principles and a balance has to be struck. But that does not mean that they can be ignored altogether. Most recently this was discussed by the Supreme Court in a series of appeals concerned with extradition and rights under Article 8 ECHR to the protection of family life: *H(H) v Deputy Prosecutor of the Italian Republic, Genoa and others* [2012] WLR 90.
63. The Supreme Court recognised that the state must have regard to the principle at the heart of the CRC as a *primary* consideration though it was accepted that though *primary* such considerations would not in every context be dominant. Lord Mance said³⁹ at [98] –

³⁵ See Article 6(3) of the Commissioner for Children and Young People (Northern Ireland) Order 2003 (2003 No. 439 (N.I. 11)).

³⁶ See for section 2 of the Children Act 2004 s 2, section 72A of the Care Standards Act 2000, and regulation 22 of the Children's Commissioner for Wales Regulations 2001 (SI 2001/2787) and section 5 of the Commissioner for Children and Young People (Scotland) Act of 2003.

³⁷ Though that Order does not mean that it has been directly incorporated as Gillen J noted in *Re Northern Ireland Commissioner for Children and Young People* [2007] NIQB 115.

³⁸ In *R v Secretary of State for the Home Department ex parte Venables* [1997] AC 407, Lord Browne-Wilkinson stated at p.499E-F that when considering the lawfulness of statutory provisions regard should be had to the CRC because “it is legitimate ... to assume that Parliament has not maintained on the statute book a power capable of being exercised in a matter inconsistent with the treaty obligations ...”. More recently, the Supreme Court in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa and others* [2012] WLR 90 recognised that the state must have regard to the CRC. This point is made in several places, but one example is [98] in Lord Mance's judgment.

³⁹ This point is made by all the members of the court; Lord Mance's statement is the most succinct.

[T]he UN Convention on the Rights of the Child dated 20 November 1989 ...[makes]... the child's best interests "a primary consideration" in all actions concerning children. This means, in my view, that such interests must always be at the forefront of any decision-maker's mind, rather than that they need to be mentioned first in any formal chain of reasoning or that they rank higher than any other considerations. A child's best interests must themselves be evaluated. They may in some cases point only marginally in one, rather than another, direction. They may be outweighed by other considerations pointing more strongly in another direction.

64. Thus like all fundamental rights the context for the application of the CRC is critical.

65. In this respect it must be recalled that the CRC is part of the UN human rights framework which consists of the Universal Declaration of Human Rights and six other core human rights treaties⁴⁰ and its relationship with these other Conventions is also important. For each of them, country reports are prepared and considered by supervising committees of the UN. The Committee on the Rights of the Child considers reports prepared by the UK as to its compliance with the CRC and makes concluding observations on the government's performance. In this way the UN seeks to secure compliance with the terms of the CRC by those states that have ratified it and therefore – at the international level – submitted to its requirements.

66. Human rights are universal and it is therefore of real importance to recall that no age limits are placed on the application of human rights within the general UN human rights framework although of course our approach in this Opinion is

⁴⁰ These were initially the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. The UN Convention on the Rights of Persons with Disabilities must now be added to this list.

consistent with the CRC's definition of adulthood starting at 18.⁴¹ As the CRC imposes special obligations on states in relation to children and young persons it cannot be read as providing a basis for denying them the benefit of other fundamental rights.

67. In any event in its preamble the CRC explicitly recognises the importance of the principle of equal treatment for children and young people, stating –

... in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

... the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all of the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

68. Article 2(1) provides in the following terms that –

1. State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status

69. This obligation is complemented by Article 4 which provides that –

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention ...

⁴¹ A child is defined at Article 1 of the CRC as a person under 18.

70. It has been argued that Articles 2 and 4 of the CRC are only concerned with equal treatment as between children and adults (or as between groups of children) in respect of the other rights guaranteed under the CRC.⁴² However even if that approach is correct, those rights⁴³ clearly do engage with the provision of goods, facilities and services.

71. Thus for example, Article 13 concerns the right to seek, receive and impart information, Article 15 the right of association, Article 18 protection from neglect and maltreatment, Article 23 the right for mentally and physically disabled children to enjoy a full and decent life, Article 24 the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, Article 26 the right to social security, Article 27 the right to an adequate standard of living, Article 28 the right to education, Article 31 the right to rest, leisure, play and recreational activities and Article 40 rights where a child is suspected of infringing penal law.

72. In our Opinion therefore the minimum aim for the Executive must be to ensure that the Northern Ireland Assembly legislates consistently with the CRC so that to the extent that the Proposed Legislation touches on the rights guaranteed within the CRC there should be no discrimination as between the rights enjoyed by children and young persons on the one hand and adults on the other. The principle in Article 3 enables legislation to provide for better treatment of children and young persons, “*in the best interests of the child*”, but not for worse.

(b) European Convention on Human Rights

73. Article 14 of the ECHR prohibits discrimination by reference to the substantive

⁴² Notwithstanding the language of Article 2, there is a debate as to whether the principle of equal treatment extends to rights beyond those enshrined in the CRC.

⁴³ The full text of these Articles is set out in Appendix C.

rights guaranteed by the Convention.⁴⁴ It states that –

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

74. The phrase “*other status*” certainly includes age.⁴⁵

75. While Article 14 is a fundamental right its reach is limited as recognised by Baroness Hale in *Ghaidan v Mendoza* [2004] UKHL 30 at [131]-[132] where she stated that -

The state's duty under article 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another. Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR 1, 37, para 65. Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority.

⁴⁴ Unfortunately, the UK has declined to ratify ECHR Protocol No 12 which requires the prohibition of discrimination for *all* rights set forth by the law; not simply those protected by the ECHR.

⁴⁵ The point was conceded by the UK as long ago as 2004 in *BB v United Kingdom* (2004) 39 E.H.R.R. 30 at [22].

Democracy values everyone equally even if the majority does not.
--

76. This limitation was recognised by the state parties to the ECHR who have subsequently agreed Protocol 12 which sets out the rights in Article 14 in a free standing way. However the UK has not ratified this Protocol and so it cannot be said that the Assembly must give effect to it. Protocol 12 is therefore qualitatively different.

77. Nevertheless, a number of the free-standing rights within the ECHR that are subject to Article 14 would almost certainly engage with the Proposed Legislation. For example, Article 8 (right to respect for private and family life etc), Article 11 (right to associate), Article 5 (right to liberty and security of the person) and Article 6 (right to a fair trial).

78. It follows that in order for Northern Ireland to act consistently with the ECHR it should ensure that the Proposed Legislation is consistent with the principle of equal treatment in so far as it engages with the rights guaranteed within the ECHR.

(c) EU law – principle of equality

79. The UK is of course a member state of the European Union. As already noted a fundamental principle of EU law is the principle of equality which applies to age. There is no basis for an assertion that this principle only applies to adults. In this respect, we do not accept the suggestion by the UK government to the contrary: see Select Committee on European Scrutiny Session 2007-2008, Thirteenth Report. Indeed the principle can be seen now – in relation to age – as being embodied in Article 19 of the Consolidated Version of the Treaty on the Functioning of the

European Union ("TFEU")⁴⁶ which states that -

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

80. The aim of combating discrimination on these grounds has repeatedly been described as fundamental to the European Union. Indeed it is now quite clear that Article 19 TEU is only a specific statement of the principle of equal treatment and the general principle of equal treatment which is itself a general principle of EU law.

81. Thus in Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2011] 2 CMLR 27, which concerned the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("Directive 2000/78/EC") the CJEU held that –

20 ... the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that that directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age (see [Case C-144/04 *Mangold* [2005] ECR I-9981], paragraph 74).

21 In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, *Mangold*, paragraph 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, Case 43/75 *Defrenne* [1976] ECR 455, paragraph 54).

82. The guiding values behind Article 19 TFEU are personal autonomy and human

⁴⁶ Formerly Article 13 EC was introduced into the former Treaty of Rome by the Amsterdam Treaty. It was immaterially amended by the Nice Treaty and is now Article 19.

dignity. Thus in Case C-303/06 *Coleman v Attridge Law and another* [2008] ICR 1128, Advocate – General Poiares Maduro explained the role of human dignity as underpinning Article 13 EC (now Article 19 TFEU) and Directive 2000/78 at [8] – [11] as follows -

8. Article 13EC is an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination ... The court's case law is clear as regards the role of equal treatment and non-discrimination in the Community legal order. Equality is not merely a political ideal and aspiration but one of the fundamental principles of Community law: see, inter alia, (Joined Cases C-27/00 and C-122/00) *R v Secretary of State for the Environment, Transport and the Regions, Ex p Omega Air Ltd* [2002] ECR I-2569 and the case law cited therein; see also the discussion in Tridimas, *The General Principles of EU Law*, 2nd ed (2007), and *The Principle of Equal Treatment in EC Law* (1997) (eds: Dashwood and O'Leary). As the court held in (Case C-144/04) *Mangold v Helm* [2005] ECR I-9981, para 74, Directive 2000/78 constitutes a practical aspect of the principle of equality. In order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy.

9 At its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. As Ronald Dworkin has recently reminded us, even when we disagree deeply about issues of political morality, the structure of political institutions and the functioning of our democratic states, we nevertheless continue to share a commitment to this fundamental principle: *Dworkin, Is Democracy Possible Here?: Principles for a New Political Debate* (2006), chapter 1. Therefore, individuals and political institutions must not act in a way that denies the intrinsic importance of every human life. A relevant, but different, value is that of personal autonomy. It dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options: see *Raz, The Morality of Freedom* (1986). (For the sake of accuracy it should be noted that some authors include the value of personal autonomy within that of dignity. The same happens with the treatment of these two concepts in the case law of some constitutional courts. This, which might be of relevance in the context of the interpretation of legal provisions that refer only to the value of human dignity, is of no relevance for present purposes.) The exercise of autonomy presupposes that people are given a range of valuable options from which to choose. When we act as autonomous agents making decisions about the way we want our life to develop our "personal integrity and sense of dignity and self-respect are made

concrete": ibid, p 154.

10 The aim of article 13EC and of Directive 2000/78 is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.

11 Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.

83. The principle of equality because of age is also embodied in Article 21 of the Charter of Fundamental Rights of the European Union which provides that –

Non-discrimination

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, generic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

84. The universality of this statement is important. It is not said to apply only to

adults. 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 those who were adults. There is no reason to suppose that the framers of the Charter thought that the provision in relation to age was so limited. Indeed, the under 18's protected under legislation prohibiting discrimination on the grounds of age in the context of employment.⁴⁷

85. The Explanatory Memorandum published in relation to the Charter explains

EQUALITY

...

Explanation on Article 21 — Non-discrimination

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it. There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

⁴⁷ See the Employment Equality (Age) Regulations (Northern Ireland) 2006.

86. Although the European Council has made Directive 2000/78/EC this applies to the principle of equal treatment only in respect to the employment, work and occupation context. A proposed Directive to apply the principle in a broader goods, facilities and services context is still in a draft form.⁴⁸ However, this does not detract from the importance of fundamental principle that member states should ensure that there is equal treatment as regards age.

(d) Council of Europe – European Social Charter

87. It is also important to have regard to the European Social Charter (ESC). This is a Council of Europe Treaty and has been described as “*the economic and social counterpart of the EHRC*”.⁴⁹ Article 17 provides that children should be provided with effective social and economic protection in the following terms: -

Article 17 – The right of mothers and children to social and economic protection

With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.

B3 Conclusions

88. It follows that in order for Northern Ireland to act consistently with the ECHR, the CRC, EU law and the norms of the Council of Europe, 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.

⁴⁸ See for the most recent statement of the position on this draft directive the progress report at <http://register.consilium.europa.eu/pdf/en/12/st16/st16063.en12.pdf>

⁴⁹ Pannick QC and others, *Human Rights Law and Practice* (1999) 1st edition.

C Proposed Legislation and ensuring compatibility with the principle of equal treatment

C1 The lack of logic in a pre-condition for access to protection only at age 18

89. The question which must first be addressed by the Northern Ireland Executive and the Assembly is whether adults and children/young people are in a comparable situation in the context of accessing goods, facilities and services so as to engage the principle of equal treatment. If so, as we have shown above, then they must be treated in the same way under the Proposed Legislation unless Northern Ireland can objectively justify differential treatment and even then there is no basis for any treatment that puts children in a worse position. This question can be approached in at least two different ways.

90. Firstly it is beyond doubt that children and young persons are – in the general sense - as much *consumers* of goods facilities and services as are adults.

91. Of course what goods, facilities and services they consume and in what amounts will differ but so will that differ across different aged adults. In a general sense however they consume health care, transport, food, transport, household goods just as much as do adults and this fact cannot be ignored when determining whether they should be protected at all from discrimination. Different treatment in different specific contexts may be justified but that would be consistent with giving children and young persons the same basic protections as adults. It does not provide a premise for not giving them any rights at all.

92. Our view is therefore that children and young people are in a generally comparable situation to adults because they are all consumers of goods, facilities and services.

93. The effect of excluding persons under 18 from the Proposed Legislation would be to give rise to a blanket exclusion. However it is obvious from this approach to the basic question that there is no principled basis for a blanket exclusion of children and young people from a ban on age discrimination in the provision of goods, facilities and services especially where that blanket exclusion has the effect of denying the protection afforded to children/young people in comparison with adults.
94. This point can also be illustrated by examining some of the anomalies in the approach taken in the EA 2010 to which we have already referred and which does not give an equal protection. The prohibition on age discrimination in goods, facilities and service and the exercise of public functions is contained with the EA 2010. As we have noted it essentially only protects persons aged 18 and over.
95. The effect of these provisions is that a ban on 18 year olds entering a department store would be unlawful direct age discrimination unless it was a proportionate means of achieving a legitimate aim under s.13 EA 2010. Yet, a ban on a 17 year olds would be perfectly lawful and would not engage with the EA 2010 at all. Yet there is simply no logical basis for such an approach. Why should a store owner be required by law to justify one action and not the other? The point is underlined by considering two siblings both banned at the same time but having ages that gave rights to one and not the other.
96. A similar absurd conclusion arises if section 20A of Schedule 3 to EA 2010 is considered. Section 20A says -

20A.— Age

(1) A person (A) does not contravene section 29, so far as relating to age discrimination, by doing anything in connection with the provision of a financial

service.

(2) Where A conducts an assessment of risk for the purposes of providing the financial service to another person (B), A may rely on sub-paragraph (1) only if the assessment of risk, so far as it involves a consideration of B's age, is carried out by reference to information which is relevant to the assessment of risk and from a source on which it is reasonable to rely.

(3) In this paragraph, "financial service" includes a service of a banking, credit, insurance, personal pension, investment or payment nature.

97. Thus it can be seen that a car insurer would not be permitted to discriminate because of age against a person in their 40's seeking insurance when assessing "risk", if the information used to make that assessment, is irrelevant or from a source upon which it would not be reasonable to rely.

98. However, it would be perfectly lawful to discriminate in this way towards a 17 year old seeking to purchase car insurance simply because the EA 2010 would not apply to him or her at all.

99. In both of these examples the 17 year old is in a comparable situation to another person who is over 18. There is no difference (let alone a relevant difference) between their situations which could justify affording protection to one and not the other.⁵⁰ That is not to say that we ignore the fact that there are differences between children and young people in comparison with adults, and it may be justifiable in a particular case to deny insurance to the 17 year old on the same terms as for an older driver.

100. A contrast can be drawn here with the line taken by European consumer protection law. The key provision is the new Consumer Rights Directive

⁵⁰ Plainly, as person approaches the age of 18, the difference between them and an adult will become more limited and eventually become non-existent.

2011/83/EU.⁵¹ Recital 34 to this Directive states –

The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.

101. This was an amending Directive and earlier provisions had been transposed by from the Unfair Trading Regulations 2008. Regulation 2(5) provided that a “vulnerable consumer” was a member of a clearly identifiable group which was –

particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and where the practice is likely to materially distort the economic behaviour only of that group

102. It is interesting to note that the Office of Fair Trading then gave guidance that –

...it may be appropriate to consider a practice from the perspective of an older or younger consumer. For example, the elderly might be particularly vulnerable to certain practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television.

103. Overall consumer protection law has recognised that because some consumers are vulnerable (because perhaps they are older or younger) there

⁵¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

should be enhanced levels of (but not no) consumer protection. Why should age discrimination law follow this logic for older persons but not those under 18? There is no obvious answer.

104. The approach taken in GB to discrimination in the provision of goods, facilities and services has been the complete opposite to this protective approach. It uses the fact that children and young persons have special needs as a reason for denying them protection from discrimination. In our view this is perverse.

C2 The need for special protective measures because of particular differences

105. Obviously, we recognise the need for special protective measures and it is of course essential that the Proposed Legislation should permit them. Human rights principles have always recognised the need for special protective measures.
106. We shall identify the general areas where such special protective measures are necessary. In doing so though, we should add that this does not provide a basis for an argument for denying a right to protection from discrimination.
107. It must of course be acknowledged, for example, there will be a relative lack of emotional maturity, experience and different certain physical characteristics (such as weight, strength, height and sexual maturity). These differences are recognised at the other end of life too; they can be as true of persons of advanced age.
108. We recognise that these differences place children and young people at risk or at a disadvantage in comparison with adults and therefore need special protective measures. In the next few paragraphs we identify those needs in general terms under four headings.

Maturity

109. Children/ and young people will require of course protection because they are not yet fully mature (intellectually, physically, emotionally and sexually). Historically children/young people have been protected in this regard by the introduction of minimum ages e.g. for purchasing alcohol or cigarettes, entering into marriage or sexual relationships, and minimum ages for criminal responsibility.⁵² Similarly, laws concerning compulsory education would probably fall into this category as would the prohibition on driving under the age of 17.

110. There is no reason to change these laws wholesale though it would be sensible to keep them under review. This happens from time to time in public discourse and it may be that the Proposed Legislation would wish to formalise that review process. However we do not suggest that it is necessary to do away with all legislative protective measures.

Lack of economic independence

111. Children and young people require protection because they are not capable of being economically independent. One way in which protection is offered in this arena by placing obligations on the state, for example, to ensuring that adequate accommodation is provided, or by making provision for social care. Provisions that have this effect would not be discriminatory.

Safety

112. Children and young people require protection on safety grounds. This is often addressed outside of a formal legal context. For example, dedicated soft-play centres available to the over 2's only, because children under this age are

⁵² In order to complement this type of legal protection, laws allowing processes of age verification are also required, which we discuss below at [172].

generally not strong, tall or co-ordinated enough to safely use the equipment with older children in attendance. Measures which ensured the safety of children and young persons would never be found to be discriminatory.

Special needs

113. Children and young people require protection because they have different needs to adults which require positive action to ensure that those needs are met. For example, there is evidence that very young children and babies have difficulty accessing public transport and public buildings and that some facilities are unsuitable such as absence of family-friendly changing facilities and toilets.⁵³

114. In scenarios where children/young people have specific needs then of course any prohibition on age discrimination outside of the employment context must contain exceptions or limitations which allow steps to be taken specifically for those children and young people so as to protect them.

C3 Practicalities of protecting children and young people – providing for exceptions

115. We recognise the need to draft legislation that carefully and reliably identifies situations in which children and young people should be afforded additional protection. We identify some possible solutions to that problem below. We should stress that we have not looked at all areas where exceptions might be desirable but instead we have focused on areas that have been identified in our instructions as being of concern. We are clear that crafting legislation that specifically excepted protective measures that addressed these issues would not be particularly difficult. Moreover, we do not believe that legislation would be unworkable simply because there would be numerous exceptions. Discrimination legislation often contains a whole raft of exceptions, the EA 2010

⁵³ See “Making the case: why children should be protected from age discrimination and how it can be done: Proposals for the Equality Bill” (2009), Children’s Rights Alliance for England.

being a good example, and this has not rendered the legislation unworkable. Provided exceptions are clearly and carefully drafted there should not be any difficulties. This is explored in greater detail at [194] –[197] below.

(a) Positive action

116. The Proposed Legislation should include an exception to the general effect of the principle of equal treatment and non-discrimination in respect of positive action. A provision to this effect exists in GB in the EA 2010 and permits all forms of discrimination in respect of goods, services and facilities as well as the exercise of public functions in certain carefully defined circumstances as follows:

158 Positive action: general

(1) This section applies if a person (P) reasonably thinks that—

(a) Persons who share a protected characteristic suffer a disadvantage connected to the characteristic,

(b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or

(c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

(a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,

(b) meeting those needs, or

(c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

117. We consider that this provision is constructed in a way that would allow organisations to implement or continue with programmes that enhanced

children's rights by allowing favourable treatment where there was a social or economic need to do so.⁵⁴ For example, we consider that the following situations would fall within this exception: immunisation programmes, screening programmes targeted at certain age groups, breakfast clubs.

(b) An overarching justification defence

118. In common with legislation that already exists in Northern Ireland and GB in the field of employment, the Proposed Legislation should include a general justification defence where there is *prima facie* direct or indirect age discrimination in the context of goods, facilities and services.

119. The justification defence in the Employment Equality (Age) Regulations (Northern Ireland) (S.I. 2006/261) (the "NI 2006 Age Regulations") is found in regulation 3(1) –

3.— Discrimination on grounds of age

(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —

(a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

⁵⁴ Interesting, in Germany some local laws have adopted a different conceptual approach and have introduced a duty to make reasonable adjustments so as to alleviate the disadvantage experienced by children. In the UK, reasonable adjustments have been limited to disability. There is no conceptual reason why this device could not be used to protect children and young people although we would not recommend pursuing that route here because it would probably unnecessarily complicate the drafting of the Proposed Legislation as it would be a novel approach towards age discrimination and might be controversial. See "Making the case: why children should be protected from age discrimination and how it can be done: Proposals for the Equality Bill" (2009), Children's Rights Alliance for England.

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

(Emphasis added)

120. This provision is in the same form as the provision in regulation 3 of the Employment Equality (Age) Regulations 2006 (S.I. 2006/1031) (the “GB 2006 Age Regulations”) which was the first age discrimination legislation in GB. The EA 2010 has now repealed that legislation and re-enacted its provisions though it has separated out direct and indirect discrimination into sections 13 and 19.⁵⁵ These sections provide -

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A

treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or

practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in

⁵⁵ The Explanatory Memorandum makes it clear at [53] – [58] and [77] – [81], that it was not intended to make any substantive change.

relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) The relevant protected characteristics are —

age;

... (Emphasis added)

121. As we shall explain, there is no doubt that though the same text had been used to provide for justification for both direct and indirect age discrimination in the GB 2006 Regulations, case law has determined that a stricter test must be applied for justification for direct age discrimination than for indirect age discrimination.

122. This has had the effect of creating a controversy as to the right test to be applied under the EA 2010 in GB: in short there is a lack of clarity as to what may amount to a legitimate aim under both s.13 and s.19 and the nature of the justification defence when applied in the context of goods facilities and services as opposed to employment.⁵⁶

123. We are clear that a similar controversy can be avoided in Northern Ireland by ensuring that the legislation is drafted appropriately. However in order to avoid the controversy its nature must be shortly explained; in the process we can also explain a legislative choice which Northern Ireland has.

⁵⁶ For a more extensive discussion of the controversy see Romney and Masters, *op. cit.* fn 9.

Justifying direct age discrimination

124. As explained above, laws prohibiting direct age discrimination in both GB and Northern Ireland have been made to give effect to Directive 2000/78/EC. This Directive only allowed direct discrimination to be justified where member states had made an express derogation from the provisions of the Directive.

125. Applying and interpreting the provisions of the Directive, the Supreme Court in *Seldon v Clarkson, Wright and Jakes* [2012] ICR 716 recently explained the correct approach to justification under the 2006 GB Age Regulations (and section 13 EA 2010) in so far as it applies to the employment and work context. In short it is necessary that the aim of the direct discrimination is in accordance with an identifiable social policy of the state.

Legitimate aims

126. The Supreme Court explained in *Seldon* at [50] that a social policy objective was a policy which was of a “*public interest nature*”. A purely private aim, such as cost reduction or improving competitiveness, was not acceptable. By contrast it was clear that this limit on the aims that could be advanced in a direct discrimination case did not apply in the context of indirect discrimination.

127. The controversy that now arises is whether because the same text defines the right to justify *prima facie* direct discrimination in the field of age and in other fields it is necessary in those other fields *also* to advance only aims which are consistent with social policy. No doubt at some time this point will be resolved by litigation but there is no reason why the Northern Ireland Executive and Assembly should not make their own decision on this issue explicit in the legislation in Northern Ireland. Indeed there is every reason of clarity and legal certainty why they should.

128. In relation to no other protected ground in equality law is it permitted to justify direct discrimination. Treating a person less favourably because of a protected characteristic is wrong because it does not recognise the whole person but only some limited aspect. That is why in relation to gender, race, religion and belief, political opinion, sexual orientation, and disability justifying direct discrimination is not permitted. There is no good reason to give an open ended licence to approach direct age discrimination differently wherever it may occur.
129. Moreover as the ruling in *Seldon* will apply in relation to direct age discrimination in Northern Ireland it would only create a wholly undesirable confusion to use the same words with different meanings in the field of employment and in the field of goods, facilities and services.
130. Accordingly our firm opinion is that the best course is that the test for justification for direct age discrimination should be expressly formulated so as to ensure that children and young people (or indeed any group) can be treated differently only where a social objective is being pursued and the measure adopted to achieve that aim can be objectively justified. In short the *Seldon* approach should be applied.
131. We consider that given that there is a real possibility that the European Union will also legislate in this field and is therefore likely to take a similar approach as in Directive 2000/78 (which *Seldon* interpreted and applied), taking such an approach will provide some future-proofing for the Northern Ireland legislation.
132. The purpose of justifying direct age discrimination is to give organisations the opportunity to identify and remedy situations where differential treatment is required but where the positive action exception does not or may not easily be

applied, for example, toilet/changing facilities reserved for children and young people, children's libraries, youth groups or buggy parking areas on public transport which take priority over other passengers. These are public interest reasons and so a justification for less favourable treatment should be advanced to counter them.

133. In parallel with this legislation explicitly setting out the need for a social policy aim approach to justifying direct age discrimination we consider that this is an area where statutory guidance will be both appropriate and necessary so as to give good examples of appropriate aims and help provide a useful resource to ensure that the provisions of the legislation are practicable. This is a common approach in discrimination legislation, which necessarily must be expressed in general terms even though it has to be applied in specific situations. It is an approach which has worked very well in relation to legislation for other protected characteristics.

Proportionality

134. It is not necessary to develop at length the approach that should be taken to the proportionality of measures taken to achieve an aim which is legitimate at any length. We consider that the starting point for testing the proportionality of an asserted objective justification should be the same way in which this matter has been analysed in the context of employment and work drawing on European law. The approach is well known and now well settled; it does not need further exposition in legislation.

135. Thus in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 Mummery LJ explained at [151] -

... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and

be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.

136. Mummery LJ continued at [165] by referring to a passage in a speech in the judicial committee of the House of Lords in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 -

First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?

137. Statutory guidance could though provide additional help in the application of this approach in the field of direct age discrimination in relation to the provision of goods, facilities and services.

138. We should stress that we do not consider that there should be any special factors or considerations when applying the justification defence in the context of young people and children as opposed to adults.

Justifying indirect age discrimination

139. The purpose of protecting from indirect age discrimination is different to direct discrimination. This is as true of age discrimination as it is of any other protected characteristic.

140. Indirect discrimination will arise where what appears to be a neutral policy places certain age groups at a disadvantage. It is concerned with structural barriers which are not intended to disadvantage anyone (otherwise they would amount to direct discrimination) but which nevertheless have that effect. Those barriers will however normally have arisen for a reason and therefore a balance

has to be struck between their rationale and the effect that they have.

141. We do not consider that there needs to be a limitation on the types of aims which can be relied upon for the purpose of justifying indirect age discrimination as this would be too restrictive.

142. The kinds of barriers which give rise to *prima facie* indirect discrimination (be they policies, provisions, practices, criteria or whatever) will have a multitude of rationales and will not necessarily have any relationship with any social policy aim. This has never prohibited them from being put forward for justification in cases concerning other protected grounds. To take a stricter approach in relation to age would therefore introduce an incoherence in discrimination law. There are no policy reasons why this is necessary.

143. Thus in our Opinion we do not consider that *prima facie* indirect discrimination should only be permissible to the extent that it can be objectively justified by the limited class of aims available for direct age discrimination in employment cases. We do not see the argument in *Seldon* as applying here anymore than the Supreme Court did when it considered the first indirect age discrimination case to reach it and which it considered consecutively with *Seldon*: *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 [2012] IRLR 601, [2012] Eq LR 594.

Guidance

144. However we emphasise that in relation to justifying both direct and indirect discrimination, we do consider that this is an area where statutory guidance could provide additional assistance to the public when applying this Proposed Legislation. Indeed we note that in GB the Equality and Human Rights Commission has been asked by the Government Equalities Office to prepare

equivalent guidance (although at present this is non-statutory) now that the provisions of the EA 2010 have been brought into force in relation to age discrimination in the provision of goods facilities and services.⁵⁷

145. We should stress that we do not consider that there should be any special factors or considerations when applying the justification defence in the context of young people and children as opposed to adults.

(c) The impact of the Proposed Legislation on existing legislation

146. We recognise that even just the discussion of the Proposed Legislation will fuel a debate as to the extent to which children should be prevented from engaging in activities, many of which will have no immediate connection with the provision of goods, facilities and services. It seems likely from the first discussions around this issue that the debate may range to issues such as the age at which people can lawfully vote, marry, or drink alcohol, or the age at which people can be criminally responsible, consent to medical treatment or enter into different types of contracts.

147. However we emphasise that the age at which people under 18 should be able to participate in these activities is a social, cultural and political question which falls outside of this Opinion. In short if it is lawful for children and young persons (i.e. those under 18) to carry out these activities then there is no reason why they should not be protected from age discrimination in relation to the provision of any service related to them. If on the other hand it is not lawful for them to carry out these activities no issue arises as to discrimination in the provision of services associated with them.

⁵⁷ We are both involved with others in helping to draft this guidance.

148. This is a short point about the way in which a general law would engage with specific prohibitions contained in other legislation. However we recognise that though it may seem a clear and short point to a lawyer it may come into the wider discourse about the merits of the Proposed Legislation.

149. Therefore, by way of a practical proposal, we recommend that the most sensible way forward is to adopt the model in GB whereby the EA 2010 makes it explicit that the prohibition on age discrimination in goods, facilities and services is secondary to other legislation which imposes age limits.⁵⁸ This is the case regardless of whether the legislation postdates 1 October 2012 when the new legislation came into force in GB.

150. Once the legal position is clarified in this way then a political decision can be taken as to whether the debate concerning age limits outside the goods, facilities and services should be focused within a formal review of all existing legislation.

(d) Statutory authority defence

151. A related point is that service providers should also be able to rely on a statutory authority defence. That is, all acts or omissions by a service provider pursuant to a statutory provision are deemed to be unlawful even if *prima facie* there would be age discrimination. A similar mechanism exists in GB in the EA 2010⁵⁹ and in Northern Ireland by virtue of the Employment Equality (Age) Regulations (Northern Ireland) 2006 which states at regulation 28 that, “*Nothing in Part 2 or 3 shall render unlawful any act done in order to comply with requirement of*

⁵⁸ Schedule 22, para 1

⁵⁹ See Schedule 22 at para 1. This part of the EA 2010 also covers any Measure of the General Synod of the Church of England as such engages with religious decisions as well as state actions. We have not commented in this Opinion as to the extent to which religious bodies should be included in any prohibition on age discrimination in goods, facilities and services as we believe that this matter falls outside our Instruction.

any statutory provision". A "*statutory provision*" is defined within Interpretation Act (Northern Ireland) 1954 to mean "*any provision of a statute or instrument made under a statute (by whatsoever Parliament or Assembly) for the time being in force in Northern Ireland*". We consider that this model would work well within the Proposed Legislation. The practical effect of such a provision would be to allow public and private organisations to act in compliance with statutory provisions without fear of litigation under anti-discrimination legislation.⁶⁰

152. In this way, we do not anticipate that there would be any difficulties for either the Northern Ireland Administration or the UK Government in terms of the exercise of their powers or functions.

(e) Education

153. The extent to which education should be covered by the Proposed Legislation is bound to be subject of debate. We should say at the outset that much of the state education sector is governed by statutory provisions and so under the statutory authority exception outlined at [151] – [152] above, age discrimination pursuant to any such provisions would be lawful.⁶¹ However, that aside, in broad terms, there are five areas where age plays a role within the education sector which require more detailed consideration:

- (i) Admission criteria: Age based admission criteria for the allocation of pre-school, school, college or university places will be *prima facie*

⁶⁰ Naturally, this is subject to the approach taken by the House of Lords in *Hampson v Department of Education and Science* [1990] ICR 511, in which Robin Allen AC appeared, where it was held that a narrow construction of statutory provisions should be adopted.

⁶¹ See, for example, the Primary School (Admissions Criteria) Regulations (Northern Ireland) 1997 introduces age based rules in the event that a school is over-subscribed. Interestingly, pre-school settings are no longer required to give priority in their admission criteria to children born in July or August as it was considered to be discriminatory, rather they must prioritise on the basis that (i) the child has socially-disadvantaged circumstances and is in their final pre-school year and then (ii) the child is in their final pre-school year – see Pre-School Education in Schools (Admission Criteria) (Amendment) Regulations (Northern Ireland) 2012.

discriminatory. These types of criteria are controversial because recent research has identified differences in the way in which children with birthdays at the beginning of the school year proceed in comparison with those with birthdays at the end for instance.⁶² This has attracted criticism as there are arguments for allowing a more flexible approach for children and young persons to proceed through the education system. Likewise it may be better for a child to go into a higher or lower year for other reasons concerned with their particular ability and aptitude.

- (ii) Maximum ages: Sometimes maximum ages are used within the education system in Northern Ireland, for example, young people must remain at school until they are 16 years old.
- (iii) Free services: Age based criteria for free services are common in the education field, for example, free pre-school places for 3 year olds.⁶³
- (iv) Targeted services: Age based criteria for targeted services are also common. For example, SureStart is a government led initiative aimed at giving every child the best possible start in life and which offers a broad range of services focusing on Family Health, Early Years Care and Education and Improved Well Being Programmes to children aged 4 and under.⁶⁴ Early Years employs over eighty staff in seven projects across Northern Ireland.

⁶² See Research by the Institute for Fiscal Studies, October 2011.

⁶³ The Pre-school Education Programme (2013/14) in Northern Ireland is targeted at children born on or between 2 July 2009 and 1 July 2010 who will reach their 3rd birthday on or before 1 July 2013 so that they enter pre-school, the year before starting formal education.

⁶⁴ <http://www.early-years.org/surestart/>

- (v) Distribution of funds according to value for money: We appreciate that budgets for education are not finite and difficult decisions need to be made concerning the funding of projects, schemes or aspects of the curriculum. Making decision based on “best value” might give rise to *prima facie* discrimination. For example, an education provider might receive a fixed donation for the purpose of improving reading in children and young people under 16. That education provider might conclude that spending the money on very young children, say books for the under 3’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.

154. Notwithstanding the prevalence of age-based practices in the education sector, our view is that educational services should be included within the prohibition on age discrimination which will be contained in the Proposed Legislation. We have reached this conclusion based on two strands of reasoning.

155. First of all, we are concerned about age being used as a proxy in the context of education especially where there is increasing evidence that ability and aptitude do not necessarily correlate to age or more importantly arbitrary age-based cut off points, for example, children born before or after 1 September. We consider that a more flexible approach which allows decisions to be made on the basis of merit or need is more appropriate. If educational services were entirely excluded from the Proposed Legislation then there would be little incentive to abandon inappropriate or arbitrary age-based rules.

156. Secondly, we do recognise that using age as a proxy within the educational sector may be appropriate because (i) sometimes age will be a reasonable proxy and (ii) age-based rules reduce the administrative burden on bodies such as

schools because it is far easier to make decisions based on objective facts such as birthdays than to assess subjective ability.

157. Accordingly, we are not advocating that age based rules are abandoned entirely, only that where they do exist, they must either fall within the positive action exception – see [116] – [117] above or they must be capable of objective justification – see [118] – [145].

158. How would this system work in practice in respect of age-based criteria for admissibility? A blanket rule that “*students must be at least 16 years old to apply for a scholarship to attend a private sixth form*” (which accepts students who are younger provided that they pass the requisite exams) because the head teacher believes that 16 is the minimum age at which a student is mature enough to apply himself or herself with sufficient commitment to be worthy of a scholarship would be *prima facie* direct age discrimination. However, if the head teacher could show that the minimum age of 16 could be objectively justified in that 16 was a good proxy for maturity and there was no other proportionate means of assessing maturity⁶⁵, then the practice would be lawful.

159. Similarly, in our example of a private donation to improving reading in the under 16’s, set out at [153(v)] above, the education provider would probably be able to demonstrate that prioritising under 3’s was objectively justifiable and therefore lawful.⁶⁶

160. In respect of the provision of free or age-targeted services, the positive action exception would apply so as to ensure that these practices could continue where

⁶⁵ For example, testing all potential scholars for the extent to which they are mature enough to receive a scholarship.

⁶⁶ See *O’Brien v Ministry of Justice* [2013] UKSC 6 in which Robin Allen QC appeared, which confirms that *prima facie* age discrimination can theoretically be justified where a finite budget is allocated with a view to age.

they were appropriate. For example, the provision of free pre-school places to children in the year before formal education starts has been introduced as there is research to suggest that children have more positive experiences of education long-term if they are afforded this benefit.⁶⁷ Where there is evidence to support the benefits of age-targeted or free services linked to age then the positive exception outlined at [116] – [117] above will apply.⁶⁸

161. Importantly, 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 or conditions on which students are admitted and decisions to expel students or subject them to any other detriment. But, there is one narrow exception (in addition to the positive action exception) whereby it is not unlawful to discriminate against a person on the grounds of the person's age in respect of admission to an educational institution established wholly or primarily for students above a particular age, of the person is not above that age.⁶⁹

162. We certainly do not rule out that it may be appropriate in Northern Ireland to follow the Australian model and have carefully selected and narrow exceptions whereby the prohibition on age discrimination in goods, facilities and services would not apply in the education sector. Indeed, there are many social and cultural issues at play which may mean that exceptions beyond positive action and the general justification defence are required. However, in this Opinion, we have identified the main areas where we expect the debate to focus.

⁶⁷ <http://www.deni.gov.uk/index/pre-school-education-pg/16-pre-school-education-whatparentsneedtoknow-pg.htm>

⁶⁸ Of course, if any of these services are allowed by virtue of a statutory provision then they would also fall under the statutory authorities defence outlined above.

⁶⁹ Age Discrimination Act 2004, s.28(3).

(f) Financial services and other contractual relationships

163. We recognise that the extent to which the Proposed Legislation will impact on financial services requires careful thought because children and young people may lack legal capacity to enter into certain contracts for financial services or otherwise.⁷⁰ We shall start with the issue of capacity.

164. Our view is that 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 that it is 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 is for adults.

165. The more difficult question relates to the extent to which there should be a blanket exclusion of the provision from financial services in the same way as GB has legislated. This is a wider political and legal question than the comparative treatment of children and young persons on the one hand and adults on the other under the Proposed Legislation.

166. What we do advise is that if financial services are brought within the scope of the Proposed Legislation we do not see any reason for a general exclusion of children and young persons from this part of the new law.

⁷⁰ Chitty on Contracts vol. 1, states at [8-049] that in general “... a minor cannot be sued on his contracts, but this rule leaves open the question whether he may be made to make restitution to the other party for benefits conferred on him under the contract. Such benefits may consist of the receipt of money, goods, interests in land or services. Common law, equity and statute have different answers to this question of a minor’s liability in restitution.” See Chitty op. cit. at Part 3 - Capacity of Parties, Chapter 8 - Personal Incapacity for a fuller discussion.

167. We do however recognise that there could be an argument that it would be sensible to allow financial institutions to offer financial products on terms which discriminate between adults and children/young people where a reliable and credible risk assessment has been conducted which would justify such differential treatment. For example, offering insurance at a different premium to protect a 4 year old in comparison with an 80 year old.

168. We emphasise that the assessment would have to be reliable and credible. That is the minimum basis on which risk assessments which consider different risks posed by groups defined by a protected characteristic have hitherto been permitted. Even that has been controversial in the context of gender where the Court of Justice has now ruled that it will not be permitted in relation to insurance or other financial services. As a result it has been disallowed prospectively in the UK and throughout the Union.⁷¹

(g) Concessions

169. The provisions of the EA 2010 provide a blanket exception for concessionary services in GB.⁷² This means that offers on a whole range of products and services can be discounted or offered on more favourable terms even if that would otherwise amount to direct or indirect age discrimination.

⁷¹ See Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2012] 1 W.L.R. 1933; [2012] All E.R. (EC) 441; [2011] Eq. L.R. 409 in which, the Court ruled that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (“the Gender Directive”) is invalid with effect from 21st December 2012, and note the changes brought into effect consequentially in Northern Ireland by The Sex Discrimination Order 1976 (Amendment) Regulations 2012 (SI 2012/462), and in GB by The Equality Act 2010 (Amendment) Regulations 2012 (SI 2992/2012). The Gender Directive had provided by Article 5(2) that Member States might permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. That is no longer the case.

⁷² EA 2010, Sch 3, s.30A. This exclusion is only limited to direct and indirect age discrimination; it does not render harassment lawful.

170. In our view, this is a weakness in the legislation in GB. We certainly accept 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 is socially useful in that it enhances the protection of the vulnerable. However, we cannot see that allowing a blanket exception for concessionary services is obviously consistent with a human rights and equality framework.

171. We consider a more tailored exception such as the one used in Canada – set out at [230]-[232] below – which would allow for certain limited concessionary services to be provided for identified vulnerable age groups.

(h) Age verification

172. We also consider that it would be sensible to formulate an exception within the Proposed Legislation that would allow service providers to verify the age of people seeking to purchase goods or make use of services which are prohibited on the grounds of age by other legislation. A similar provision exists in GB in the EA 2010 and we consider that this would be a good starting point for such an exception.⁷³

(i) Ad hoc exceptions

173. Finally, it must be recognised that, even after extensive debate, it will probably not be possible to anticipate all exceptions that might be required.

174. In Canada, Australia and Belgium, the legislation prohibiting discrimination on the grounds of age, has a mechanism by which *ad hoc* exceptions can be made to the principle of equal treatment as new scenarios are encountered. See [230] – [231], [247] – [249] and [256]. We consider that this would be a useful measure to

⁷³ Sch 3.

introduce into the Proposed Legislation to ensure that it is effective both on enactment and in the longer run.

C4 Remedies for breach

175. Inevitably, the downside to this system is that children and young people are dependent upon the goodwill, resources and enthusiasm of adults. In this regard, we consider that the organisation responsible for enforcing the legislation should have a power to allow it to bring proceedings in its own name. This would be an extremely useful mechanism which would enhance the protection of children and young people by ensuring that important issues were litigated where a claimant who was under 18 did not have an adult support network to pursue the litigation.

D Analysis of arguments in the UK against protecting children and young people

D1 Debate in 2008

176. Initially when the EA 2010 was published as a Bill it did not include any draft provisions in relation to discrimination on grounds of age in the field of goods, facilities and services. Such a protection was not then considered to be relevant. However as the debate about the significance of increased longevity increased the possibility of a need for such legislation also developed and with it there was an increased debate about the issue of inter-generational fairness, i.e. equal treatment to all whatever age, and balancing rights between ages.

177. The Government at Westminster indicated as early as 2008 that it intended to exclude children and young people from the anti-discrimination provisions within the EA 2010. Harriet Harman, then Minister for Women and Equality,

explained during a Parliamentary debate that⁷⁴ -

The provisions will not cover people under 18. It is right to treat children and young people differently, for example through age limits on alcohol consumption, and there is little evidence of harmful age discrimination against young people.

178. In our view this reasoning is flawed for four reasons.

179. First of all, simply because there are uncontroversial situations in which children and young persons should be treated differently in order to protect them (as with a minimum age for the consumption of alcohol) does not of itself justify a blanket exception of all children and all young people from this protection. Such a blanket exception is a wholly disproportionate response to a specific need, as we have explained above.

180. This is especially so where there are so many contexts in which the situation of adults and children and young people are indeed truly comparable (like wishing to enter a premises – see [18] above).

181. Secondly, there is evidence of harmful age discrimination against young people⁷⁵.

182. Thirdly, this analysis does not reflect the principle of equal treatment as between adults and children/young people which we have set out above by reference to international and European equality and human rights law or the importance of enhancing the protection of children rather than undermining it.

⁷⁴ 26 June 2008, Hansard Column 504.

⁷⁵ See, for instance, “Making the case: why children should be protected from age discrimination and how it can be done” at fn 10.

183. Finally it creates anomalies which are obvious once considered. It means for instance that exactly the same age discriminatory rule can be applied in exactly the same circumstances to an adult and a child, which because of the nature of the rule, affects each adversely, yet only the adult would have enforceable rights. We have exemplified this point at [18] above.

D2 Debate in 2009

184. A further objection raised in Westminster as a reason for denying protection to people under 18 was a fear that it would undermine protection of children and young people. This is recorded in the report of the Joint Committee on Human Rights of the House of Lords and House of Commons entitled “Children’s Rights”⁷⁶ in the following terms at [39] and [44] to [45]:

39. Many examples of different types of discrimination were raised with us. These included:

- 16 and 17 year olds finding it difficult to access social services and mental health services, and failing in the gap between provision for children and adults.
- children and young people not being taken seriously when reporting a criminal or calling emergency services;
- children and young people being treated unfairly in public spaces, particularly in shops, using public transport or where “mosquito” devices are in use to disperse crowds;
- public places such as leisure centres, libraries and transport facilities being unfit for adults with babies and young children;
- discriminatory attitudes of medical professionals towards disabled children;
- fertility of disabled children restricted by use of non-essentially medical intervention;
- high incidence of bullying of children with a learning difficulty; and
- Difficulties for young Gypsy and Traveller children in accessing suitable accommodation, public transport, GP surgeries and safe places to play.

⁷⁶ Twenty-fifth Report of Session 2008-2009, HL Paper 157, HC 318.

40 – 43. ...

44. The Government is not in favour of extending age discrimination to the provision of goods, facilities and services to the under-18s arguing that this could have the “unintended effect of diluting protections[s] that are in place” rather than enhancing them. We asked the Minister to explain how extending protection against age discrimination to children would dilute existing protections. She reiterated the Government’s concern that by extending protection it might not be able to provide age-appropriate services aimed specifically at children or at children of specific ages.

45. We doubt that prohibiting age discrimination against children would have the unintended consequences mentioned by the Minister. In particular, we consider that it would be possible to draft an appropriate provision which would prohibit all discrimination on the grounds of age in relation to goods, facilities and services, except where it can be justified. This would allow age-appropriate services to be provided where there was good reason for doing so, such as to respond to the needs of a young child. We recommend that the Equality Bill be amended to extend protection from age discrimination to people regardless of their age in relation to the provision of goods, facilities and services, except where discrimination on the grounds of age can be justified.

185. We note that concerns of a similar nature to that expressed to the Joint Committee on Human Rights have been identified in Canada.⁷⁷ However, we wholeheartedly agree with the conclusion of the Joint Committee on Human Rights. Our practical proposals in this regard are outlined above at Section C3.

186. There is one matter however which should be addressed in respect of unintended consequences which is the impact on services offered to *adults* if children and young people are protected by the Proposed Legislation. That is, if a situation arises where children or young people in a comparable situation to an

⁷⁷ See *Arzem V Ontario (Community and Social Services)* 2006 HRTO 17 (CanLII) at [81].

adult is treated more favourable and that could not be justified or one of the exceptions did not apply, then the disadvantaged adult could bring an action for age discrimination relying on the way in which the child or young person has been relied upon. For example, if a train company introducing a practice of escorting unaccompanied wheelchair users to their seat for persons under 18, but not unaccompanied wheelchair users over 18 who would face similar practical difficulties, so that children and young people were treated more favourably, that would give rise to *prima facie* direct age discrimination. The answer to that problem would be to ensure that all unaccompanied wheelchair users were provided with assistance regardless of age. It follows that protecting children and young people might have “unintended consequence” of enhancing protection for adults in comparable situations. However, we do not consider that there are any *negative* unintended consequences.

D3 *Debate in 2012*

187. The consultation process which preceded the prohibition on age discrimination in goods, facilities and service in GB was concluded in 2012. The Government Equalities Office addressed the reason for excluding people under 18 in its Impact Assessment of the new law. Its analysis is brief and appears to simply be that older people have needs which are more pressing and they are economically valuable.

188. The relevant section is as follows at p.7 and p.8 -

<p>... The ONS reports that between 1971 and 2009 the proportion of the UK population aged under 16 years decreased from 25.5 per cent to 18.7 per cent, while the proportion aged 75 and over increased from 4.7 per cent to 7.8 per cent. It is projected that the number of UK residents aged 65 and over will be larger than the number aged under 16 years by 2018. Clearly the UK population is ageing. This increasingly important section of the ageing. Selling products and services to older people is therefore a major opportunity. ...</p>
--

There is therefore a strong rationale for intervention to put the approach for age discrimination outside work on a similar footing to discrimination in the workplace. That is what informed the Equality Act provision to make it unlawful to discriminate against adults aged 18 and over by those providing services and public functions.

189. This conclusion is obviously only partly supported by its premise. The premise does not lead to the conclusion that under 18s do not need rights only that they are a diminishing number of persons. Yet equality and human rights are universal and do not depend on the numbers of person who have need of them.

190. Thus this approach is fundamentally at odds with the human rights approach outlined above at [40] to [51]. The economic strength of a particular demographic can never be the basis for protecting them with preferential treatment. It is also at odds with the conceptual basis of equality and the importance of human dignity.

191. In short, our conclusion is that the Government at Westminster has not identified any legally compelling basis for excluding children and young people from the prohibition on age discrimination in goods, facilities and services as well as the exercise of public functions outlined in the EA 2010.

D4 Debate in Northern Ireland

192. As explained at [6] above, on 11 March 2013 a debate took place in the Northern Ireland Assembly at which numerous speakers expressed the view that under 18's should be excluded from the proposed legislation. In this section, we will address the legitimacy of the concerns expressed there.

(a) Other jurisdictions

193. One argument deployed in order to argue for an exclusion of children and young people was that only Australia had legislated so as to protect this group. However, as explored in section E below, this is incorrect; other jurisdictions protect children and young people for example, Canada and Belgium.

(b) Extent of exceptions

194. Another argument deployed in order to argue for an exclusion of children and young people was that extensive exceptions would be required which would have the effect of weakening the legislation so that it was practically meaningless and unworkable. We wholeheartedly disagree with that conclusion for three reasons.

195. First of all, discrimination legislation often contains exceptions, the EA 2010 being a good example, and this has not rendered the legislation unworkable.

196. Secondly, carefully defined exceptions are by their nature exceptional and we anticipate that there would still be many important areas where prohibiting children and young people would make a real difference. At section F1 to this Opinion we have set out a non-exhaustive list of scenarios where we consider that children and young people would benefit if the prohibition on age discrimination were extended to cover them.

197. Thirdly, a corollary to this argument is that it would be preferable to exclude children and young people from the Proposed Legislation but then legislate specifically to protect these groups if protection is required. Our view is that this alternative approach would be inconsistent with the principle of equality discussed above at [40] – [51] but further that it would not address adequately the myriad of ways in which children and young people are discriminated

against in respect of goods, facilities and services. It is simply not realistic or practical to imagine that individual pieces of legislation could be constructed to address all instances of discrimination. This point is illustrated by section F1 where we have set out a list of situations in which we believe that children and young people would benefit were they to be included in the Proposed Legislation. The burden on government of formulating legislation to address each of these scenarios would be enormous.

(d) Unintended consequences

198. A further argument deployed during the debate is that if the Proposed Legislation covered children and young people it would have the unintended consequence of removing age-based serviced. This point was also debated at Westminster – see [184] – [185] above. However, as explained earlier in this Opinion, we do not accept that it is correct. The prohibition on age discrimination would not be a blanket ban; there would be exceptions. Age-specific services which addressed the specific needs of certain groups, for example, immunisation programmes or youth centres, would still be able to continue under the positive action exception outlined at [116] – [117] above. Further examples are set out at Section F2. However, arbitrary age-specific services which served no social purpose would be prohibited on the grounds that they would be discriminatory whereas important age-specific services would certainly be allowed to continue. Finally because we proposed that age discrimination could in limited circumstances be justified, the legislation would force service providers to have a good rationale for their acts.

(e) Relationships between children/young people and their parents

199. It was argued that if children and young people were protected by the

Proposed Legislation then parents might become subject to litigation by disgruntled offspring who had been refused requests. This would absolutely not be in the case. The Proposed Legislation would only apply to “service providers” and not parents acting in their personal and private capacities.

(f) Parental consent

200. It was also suggested that if children and young people were protected under the Proposed Legislation then the requirement for parental consent might be undermined when it came to accessing certain services, for example, medical care. We do not consider that this is a legitimate concern. On the face of it, it would be less favourable treatment because of age for a service provider to limit access to their services to children/young people unless parental consent was given because no such rule would be applied to older age groups. However, the service provider would be able to justify the rule that parental consent was required in circumstances where this was a necessary safeguard – see [118] and following above. Accordingly, a school nurse would not be stopped from seeking parental consent before administering a vaccination. These are classically protective obligations.

(g) Children-go-free holidays

201. A concern was expressed that children-go-free holidays would not be permitted if the Proposed Legislation protected the under 18's. We have already addressed the extent to which concessionary services should form the basis of an exception to the prohibition on age discrimination in goods, facilities and services at [169] – [171] above. As explained there, we accept that age can be a proxy for financial disadvantage. Further, we accept that families with young people can suffer financially due to the financial burdens of childcare and childrearing. Accordingly, we recognise that permitting exceptions to the principle of equal treatment in order to alleviate that financial disadvantage is socially useful in that

it enhances the protection of the vulnerable. We advocate a tailored exception such as the one used in Canada whereby children and young people could benefit from concessions. It follows that children-go-free holidays would still be allowed to continue.

(h) Age verification

202. It was also said that if children and young people were protected under the Proposed Legislation then service providers would be subject to litigation if they refused to sell goods to a child because those items can legally only be sold to those over 18. This is incorrect because the Proposed Legislation would have to include an exception which allowed service providers to verify the age of children and young people and then refuse to serve them goods which are age limited such as alcohol or cigarettes. This is addressed at [172] above.

(i) Children and access to shops

203. It has been said that including children and young people within the remit of the Proposed Legislation should be resisted because it would mean that shop keepers would not be able to restrict the access which children have to shops e.g. forcing school children to leave bags outside shops and preventing more than two children in a shop at anyone time.

204. First of all, we note that there is anecdotal evidence that these practices are common.⁷⁸ To the extent that these practices are rooted in stereotypical or ill-informed views that children are inherently dishonest or prone to criminality then they would be unlawful if the Proposed Legislation covered children and young people.

205. Secondly, our view is that in such a scenario, it is quite right that such

⁷⁸ See fn. 10.

conduct would be unlawful. It is contrary to the principle of equality that children and young people should be treated differently because of negative stereotypes. Indeed, we strongly consider that it is because of these negative stereotypes and the practices outlined above that the Proposed Legislation should protect children and young people.

206. Thirdly, that is not to say that it would be unlawful for all shopkeepers to limit the way in which children/young people access their shops. If there was compelling and objective evidence that certain age groups typically did engage in criminal behaviour in certain stores, and that limiting their access as suggested above would reduce that behaviour, then the shopkeeper would probably be able to show that his rules were capable of justification and so would not be unlawful under the general justification defence outlined at [118] and following above. Otherwise, if a shop keeper was generally only able to service a limited number of customers, that limit should apply to customers of all ages.

(j) Burden on service providers

207. It has also been suggested that including children and young people within the remit of the Proposed Legislation, *“would lead to many problems for service providers as they would be forced to move to a position of standardisation across all services and all age groups or withdraw totally from providing the service”*. It is certainly correct that the Proposed Legislation would have an impact on service providers if children and young people were included in their remit as they would be required to ensure that the services which they provided were non-discriminatory. As discrimination against children and young people appears to be deeply embedded across Northern Ireland (and GB), this would inevitably cause some disruption.⁷⁹ However, this is not a sufficient reason to continue with the status quo where the consequence is the continuation of discrimination. The

⁷⁹ See fn. 10.

principle of equal treatment is a fundamental one – see [40]-[51] above. Arguments concerning difficulty or disruption do not override considerations of equality.

208. Moreover, the Proposed Legislation would not be introduced immediately, there would inevitably be a period of time during which service providers would be aware that their practices would need to change and there would be time to do so.

209. Finally, we are not aware of any evidence, let alone credible evidence, which suggests that requiring service providers to treat all consumers equally, subject to the exceptions and defences outlined above, would leave to a wholesale withdrawal of a service.

(k) Differing needs as between children and young people

210. It was rightly pointed out during the debate on 11 March 2013 that children and young people are not a homogenous group and the needs of a baby are different to that of a teenager. Inevitably, this means that the needs of children and young people are different on that journey from birth to adulthood. This observation does not undermine the contention that children and young people should be protected under the Proposed Legislation. The over 18's are not a homogenous group either. The needs of an 18 year old are radically different to that of a 75 year old and yet it would be absurd to argue that adults should not be protected for this very same reason. A prohibition on age discrimination in goods, facilities and services for all ages will not stop age-appropriate rules or practices, for example, free chlamydia testing for 16 to 18 years old only, free mammograms for the over 50's only or apprenticeship schemes limited to certain age groups. Further examples are provided at Section F7.

211. It follows that we are not aware of any legally sound reasons for introducing limited legislation in Northern Ireland which excludes persons under 18 from its protection.

E The prohibition of age discrimination in relation to the provision of goods facilities and services in other jurisdictions

E1 Overview

212. In this Part of our Opinion we will examine jurisdictions where the state has elected to prohibit age discrimination beyond the employment context regardless of age, in Australia, Canada (with a specific emphasis on the province of Ontario) and Belgium.

213. Each of these countries legal systems demonstrate that children and young people can be protected against age discrimination in this field, and that suitable exceptions can be formulated without encountering drafting difficulties or creating any undesirable and unintended consequences.

214. Our analysis of how the law works in these jurisdictions also identifies a wide range of scenarios where a prohibition on age discrimination makes a real difference for children and young people.

E2 Canada

215. Equality provisions in Canadian law operate on a federal and provincial level in each of the nine provinces. Federal jurisdiction covers areas including criminal law, immigration, trade, and defence, while provincial jurisdiction extends to areas such as education, healthcare, and property law⁸⁰.

(a) Canadian Charter of Rights and Freedoms

⁸⁰ <http://www.justice.gc.ca/eng/dept-min/pub/just/05.html>

216. The Canadian Charter of Rights and Freedoms (“CCRF”) forms part of the Canadian constitution, as enacted in the Canada Act 1982.⁸¹ It operates on a federal level and is the constitutional bedrock of other Canadian equality legislation. The CCRF is set out at Appendix D.

217. Section 15 of the CCRF provides the equality clause in the following terms -

Equality Rights

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

218. It will be seen that there is no limitation on “age” as a prohibited ground of discrimination; this is also established by cases that have brought under the CCRF in which age discrimination against under-18s has been found to be unlawful.⁸²

219. Where section 15 is engaged, the federal or provincial government may have a defence under section 1 of the CCRF which allows governments to impose limits on the rights guaranteed within the CCRF provided that those limits are “reasonable” and “can be demonstrably justified in a free and democratic society”.

220. The leading case on the meaning of section 1 is *R v Oakes* [1986] 1 SCR 103.⁸³

⁸¹ <http://www.legislation.gov.uk/ukpga/1982/11/schedule/B>

⁸² See [221] below.

⁸³ <http://canlii.ca/t/1ftv6>

The following passage at pp.105-106 explains the position -

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective - the more severe the deleterious effects of a measure, the more important the objective must be.

221. Examples of cases in which section 15 has been litigated are:

- a. *Schafer v Canada (Attorney General)* [1997] 35 OR (3d) 1⁸⁴ where the Court of Appeal for Ontario found that a provincial government benefit to support children adopted over the age of 6 months discriminated against younger babies on the grounds of age, in violation of section 15.
- b. *S. (J.) v. Nunavut (Minister of Health and Social Services)* 2006 NUCJ 20⁸⁵ where the Nunavut Court of Justice granted an order that declaring that s.6 of the Child and Family Services Act (Nunavut) 1997 violated s.15 of the CCRF because it provided a lower level of care to children in the state

⁸⁴ <http://canlii.ca/t/6hf0>

⁸⁵ <http://canlii.ca/t/1pxm6>

care system aged 16 and 17 than those aged under 16.

(b) Canadian Human Rights Act

222. The Canadian Human Rights Act 1978 (“CHR”)⁸⁶ also operates at a federal level and prohibits discrimination in employment and the provision of goods and services. The CHR is set out at Appendix E.

223. The prohibition on discrimination in the provision of goods and services stipulates that -

Discriminatory Practices

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
 - (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

224. The prohibited grounds of discrimination includes “age” and the relevant section reads -

Prohibited grounds of discrimination

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

225. There is no limitation within the CHR on the definition of “age”.

⁸⁶ <http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html>

226. The CHR also provides a defence whereby a measure or practice which is *prima facie* discriminatory may be lawful if there is a *bona fide* justification for it as follows -

Exceptions

15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

...

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

227. The test for *bona fide* justification under s.15(1)(g) was explained in the judgment of Supreme Court of British Columbia⁸⁷ in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 RCS 3 although in that case the focus was on the identically worded s.15(1)(a).

228. In essence, there is a three stage test as follows -

- a. whether the measure is for a purpose rationally connected to the objective (e.g. performance of the job in employment cases);
- b. whether it was adopted in the honest and good faith belief that it was necessary to fulfill that legitimate purpose; and
- c. whether the measure is reasonably necessary for the accomplishment of

⁸⁷ It should be noted that although the CHR applies to the federally regulated sphere, case law on the application of equality provisions in provincial human rights codes and statutes informs the interpretation of its equality provisions.

that legitimate purpose.

229. There is also a provision with the CHR which allows organisations to treat people more favourably because of age where there is a need for positive action. The relevant provision is s.16 which states as follows:

- (1) It is not a discriminatory practice for a person to adopt to carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.
- (2) The Canadian Human Rights Commission, may
 - (a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and
 - (b) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in achievement of the objectives the program, plan or arrangement was designed to achieve.
- (3) ...

230. In addition, the Canadian Human Rights Commission is empowered to issue guidelines setting out exceptions to the principle of equal treatment because of age under s.15 (1) of the CHR. These are worth considering a little greater detail.

231. Age Guidelines 1978, SI/78/165⁸⁸ were issued pursuant to that provision and these make it plain that discounts for younger and older age groups do not amount to discrimination. One relevant section states -

3. Where adverse differentiation in relation to any individual in the provision of goods, services, facilities or accommodation customarily available to the general public is based only on a reduction or absence of rates, fares or charges with respect to children, youths or senior citizens, such adverse differentiation is reasonable and is not, in the opinion of the Commission, a discriminatory practice within the meaning of section 5 of the Act.

232. This provision is particularly interesting. We assume that the rationale for allowing this exception is recognition that children, young people and senior citizens may require additional protection in the form of certain concessions because they are vulnerable financially.⁸⁹ It is clearly consistent with our own analysis set out above.

(c) Ontario

233. The Ontario Human Rights Code 1990 ("OHRC")⁹⁰, which was first codified in 1962, sets out the equal treatment provisions applicable in Canada's largest provincial legal system. It prevents age discrimination in goods, facilities and services. A full copy of the OHRC appears at Appendix F.

234. It is particularly interesting because the protection against discrimination on the grounds of age is limited to people who are 18 or over⁹¹ and this has become controversial as we shall explain because it creates an anomalous contrast with Federal law.

⁸⁸ <http://laws-lois.justice.gc.ca/eng/regulations/SI-78-165/index.html>

⁸⁹ Of course, not all children and senior citizens are economically disadvantaged. However, we can see in principle that age might be a good proxy for economic disadvantage in these circumstances.

⁹⁰ http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm#

⁹¹ See s.10 (1). There is a limited exception for 16 and 17 year olds in respect of accommodation where there is parental support.

235. Thus the effect of this legislation is that, if somebody aged under 18 in Ontario is discriminated against on grounds of age in accessing a service which is subject to federal jurisdiction (for example, at the post office) he or she has recourse to law whereas if the service comes under the provincial jurisdiction (for example, visiting the doctor) there is no legal remedy.

236. This anomaly has been challenged through the court system. In *Arzem v Ontario (Community and Social Services)* (“*Arzem*”) 2006 HRTO 17⁹² a case was brought on behalf of a group of children with development disorders such as Autism because their access to certain healthcare services terminated at the age of 6.

237. They challenged the definition of “age” in s.10 (1) of the OHRC as incompatible with their right to equal benefit of the law under section 15 of the CHR. The Human Rights Tribunal of Ontario upheld the appeal and concluded that the relevant provisions of the OHRC were invalid. However it must also be noted that the Tribunal lacked the jurisdictional competence to grant a general declaration striking down that part of the legislation.⁹³

238. The findings of the Adjudicator, Patricia DeGuire, were highly critical of the discriminatory effect of the age limitation stating that:

- a. Children as a group are highly vulnerable members of society who are subject to a pre-existing disadvantage;⁹⁴
- b. Excluding children from the protection of anti-discrimination on grounds of age, being the very factor which makes them more vulnerable, “...

⁹² <http://canlii.ca/t/1r78j>

⁹³ *Arzem*, [160] – [172]

⁹⁴ *Ibid*, [42] and [52].

*markedly contributes to the violation of their protected rights”;*⁹⁵

- c. Children are exposed to unfair treatment when they are not protected by governments;⁹⁶
- d. Excluding children from protection in the sphere of goods, facilities and services will undermine their rights and not (as argued by the Government) undermine them -

[69] The Tribunal agrees with Ontario that, historically, age is an appropriate proxy in determined developmentally proper programmes and services for children. However, using chronological age as a proxy to derive a benefit from some goods and services might be superfluous. In fact, using age as a proxy to determine access to some services might be a barrier instead of providing protection for children as a group. One should be mindful always that the Code ought to be interpreted liberally, consistent with its legislative philosophy and objectives. It should be interpreted and applied to enhance rights not to limit or take away rights.

- e. Further, a blanket exclusion can only undermine rather than enhance rights -

[75] For these Complainants, the age restriction does not provide a need or protection; it facilitates the perpetuation of being devalued, which has dire long-term negative effects ...

[76] ... The definition of age in subsection 10(1) of the Code in purpose and effect, withholds that protection from children as a class, which not only demeans these Complainants, but also reinforces or perpetuates the stereotype that they are not equally capable and equally deserving of concern, consideration, and respect.

⁹⁵ Ibid, [59].

⁹⁶ Ibid, [61].

...

[96] The exclusionary definition of age under the Code does not prevent the violation of the essential human dignity interests of children. It does not protect children from discrimination. It prevents them from gaining access to redress, and that imposes a further disadvantage and perpetuates economic, political and social prejudice.⁹⁷

...

[121] One may postulate that the objective of the age definition in the Code is to preserve and provide benefits to children under age 18, or to protect children under age 18 from age discrimination. Further, one might argue that the object to protect adults from discrimination in specific circumstances is appropriately pressing and substantial. And, one may accept that there is a need to protect and provide benefits for children and to protect children from ageism, which are pressing and substantial. However, the blanket exclusion of children is why it fails: the means used was an overkill of the objective to prevent discrimination against adults or children. The means produced a by-product of discrimination against a group, which is one of society's most vulnerable.

239. This judgment is a powerful analysis of the reason why children and young people should be protected under the Proposed Legislation and neatly exposes the fallacy that excluding the under 18's somehow enhances their rights.

E3 Australia

240. The Australian Constitution is principally concerned with the establishment of the federal organs of government and with the distribution of constitutional power between the Commonwealth and State Governments. There is limited reference to individual rights in the Australian Constitution and none of them relate to children.

⁹⁷ Ibid, [75] and [96].

241. However, the law was changed 10 years ago so that persons of all ages are protected from age discrimination at a federal level by the Age Discrimination Act 2004 (CTH) (“ADA”).⁹⁸ A fully copy of the ADA appears at Appendix G.

242. The objects of the Act are set out in s.3 and include the following -

The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and
- (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and
- (c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and
- (d) to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights;...

243. This Act covers education, access to goods, facilities and services, accommodation, access to premises and the administration of Commonwealth laws and programs.

244. Since the introduction of the ADA, 6.6% of all legal complaints have been of age discrimination. The average number of age discrimination complaints made

⁹⁸ Historically, there had been state and territory based protection against unlawful age discrimination.

for the period 2004/5 to 2009/10 is 129 per year. Most complaints relate to employment.⁹⁹ Unfortunately, we are not aware of any statistics concerning the proportionate of these complaints which relate to persons under 18 years of age or the exact number or that relate to goods, facilities or services.

245. The ADA contains a number of exceptions which are referred to as “permanent exemptions”.¹⁰⁰ These are extensive and cover a wide range of scenarios from education¹⁰¹, the provision of accommodation where the service provider is also a resident¹⁰², wills or gifts¹⁰³, positive discrimination¹⁰⁴, charities¹⁰⁵, religious bodies¹⁰⁶, voluntary bodies¹⁰⁷, certain financial services¹⁰⁸, acts done in compliance with other laws¹⁰⁹ including tax laws¹¹⁰, pensions and certain social security benefits¹¹¹, schemes designed to decrease unemployment¹¹², certain health programmes such as mass vaccination schemes¹¹³, provision of health goods and services¹¹⁴, the administration of certain health legislation¹¹⁵, migration and citizenship¹¹⁶. Crucially, we have not identified any evidence that these lengthy and detailed exceptions have rendered the legislation unworkable or meaningless.

⁹⁹ Australian Human Rights Commission, “The Road So Far – the Age Discrimination Act 2004”, 5 December 2011, p.5-6.

¹⁰⁰ All Australian jurisdictions except the Commonwealth also have exemptions on the grounds of age in respect of competitive sports although the exact detail differs as between legislation. See [80-635] in Halsbury’s Laws of Australia in “Equality and Discrimination”.

¹⁰¹ S.26(4) ADA 2004. This exception is discussed in greater detail at [161] – [162] above.

¹⁰² Ibid, s.29(3).

¹⁰³ Ibid, s.30.

¹⁰⁴ Ibid, s.33.

¹⁰⁵ Ibid, s.34.

¹⁰⁶ Ibid, s.35.

¹⁰⁷ Ibid, s.36.

¹⁰⁸ Ibid, s.37.

¹⁰⁹ Ibid, s.38.

¹¹⁰ Ibid, s.40.

¹¹¹ Ibid, s.41.

¹¹² Ibid, s.41A.

¹¹³ Ibid, s.42(1)-(2).

¹¹⁴ Ibid, s.42(3).

¹¹⁵ Ibid, s.42(5).

¹¹⁶ Ibid, s.43.

246. In respect of the positive action exception, the Australian Human Rights Commissioner has identified the following project, aimed at assisting young people and children, as falling within its scope¹¹⁷ -

Youth Connect was a not for profit organization which had been contracted by the Department for Victorian Communities to provide training and job-search assistance to young people between 15 and 24 years of age ... The Commission found that the program provided a genuine benefit to young people, assisted young people in making a transition from school or training or employment and reduced disadvantage experienced by young people between 15 and 24 years of age. As such, the Commission found the proposed schemes were “positive discrimination” ...

247. Interestingly, the ADA also contains a process by which individuals and organisations can seek “temporary exemptions” by applying to the Australian Human Rights Commissioner.¹¹⁸ Generally speaking, temporary exemptions will only be granted where the Australian Human Rights Commissioner is satisfied that the measure is necessary and consistent with the objectives to the ADA.

248. Temporary exemptions to the benefit of children and young people which were granted by the Australian Human Rights Commissioner are as follows¹¹⁹ -

A government Continence Aids Assistance Scheme provided assistance in reducing the costs of continence aids to people between the ages of 16 and 65 years. The aim of the scheme was to assist eligible clients with a permanent disability to overcome disability specific costs that create barriers to seeking and obtaining employment and participating in the community. People over the age of 65 years were able to access the scheme if they could establish that they worked in paid employment of at least eight hours per week. A temporary

¹¹⁷ See fn. 99, p.10.

¹¹⁸ The guidelines used by the Australian Human Rights Commissioner are available at [www.humanrights.gov.au/legal/exemptions/ada exemption/ada exemp info appl.html](http://www.humanrights.gov.au/legal/exemptions/ada%20exemption/ada%20exemp%20info%20appl.html).

¹¹⁹ See fn 99 at p.10.

exemption was sought to enable the scheme to continue while a review of the scheme was conducted.

The Commission found that the scheme would likely constitute unlawful discrimination in the provision of goods or services or in the administration of Commonwealth laws and programs. The Commission also found that the Government had undertaken a national review of community care programs and that the Government required more time to develop an effective longer term strategy for simplifying and streamlining arrangements.

The Commission granted the temporary exemption (and a subsequent 12 month exemption) subject to the condition that the department advise the Commission by certain specified dates of:

- the status of the review and;
- the changes the department proposed to make to the age related restrictions before the expiration of the temporary exemption.

249. In contrast, the following scheme was not granted a temporary exemption because it was disproportionate and inconsistent with the ADA¹²⁰ -

Carnival Australia was a cruise company that applied for a temporary exemption to restrict the ability of people under 21 to take part in its cruises between 1 November and 30 January each year unless they were accompanied by a parent or guardian. Carnival Australia submitted that the policy would enable it to ensure the security, comfort, health and safety of its passengers aboard its ships.

The Commission declined the application for the following reasons:

First, the Commission was not satisfied that unaccompanied under-21's presented a serious risk to the security, comfort, health and safety of passengers.

Secondly, the Commission did not consider the proposed exclusion of all unaccompanied under-21's to be a proportionate measure and considered the effect of the application to be broader than its intended purpose because it affected all persons under the age of 21, regardless of whether they were school leavers, university students or in full-time employment.

Finally, the Commission considered that granting the exemption would be inconsistent with the objects of the Age Discrimination Act.

250. The Australian Human Rights Commission also assists young people across

¹²⁰ Ibid, p.11.

Australia resolve their complaints of discrimination. On their website¹²¹, they provide the following examples as being typical of complaints which they receive

-

Age discrimination – access to premises

Mark is 19 years old. He went to a city nightclub with some friends but was told he couldn't get in because the club was for over 20's. Mark emailed the Commission about this and we contacted the club to discuss its entry policy. The club told us that it only allowed people over 20 onto the premises – but it didn't have any reason for this. As a result of Mark's complaint the club changes its policy to allow anyone over 18 to enter.

Age discrimination – renting a house

Frank and two of his friends wanted to rent a house together when they started uni. They approached three real estate agents – two wanted to charge them more than the advertised rent because they were under 21 and might "cause damage to the property by partying too hard". The third real estate agent said he wouldn't rent them a property because they were young and all male.

251. In addition, we have identified one additional Australian case concerning age discrimination in the provision of goods, facilities and services. In *G v Victoria Legal Aid* (2000) EOC, a court concluded that it was unlawful to refuse to provide a child with legal aid assistance on the grounds of maturity in circumstances where there had been no proper objective assessment of the child's maturity and ability to provide instructions.

E4 Belgium

252. There is federal law in Belgium which prohibits age discrimination in goods, facilities and services.¹²² All ages are protected. Both direct and indirect

¹²¹ www.humanrights.gov.au/complaints_information/young_case_studies.html

¹²² Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (BS 30 V 07), articles 3 and 5. Importantly, it does not cover matters falling within the jurisdiction of Belgium's Communities and Districts.

discrimination on grounds of age can be objectively justified. There are no exceptions to the prohibition on age discrimination in the provision of goods, facilities and services and services other than a positive action exception¹²³ and a provision making it clear that the ban does not preclude other legislation permitting differential treatment because of age¹²⁴. A copy of the law is set out at Appendix H.

253. The positive action exception defines the circumstances in which such action is lawful in a much narrower way than in GB.¹²⁵

254. Specifically, in order for the positive action exemption to apply, the following conditions must be satisfied:

- a. There must be an obvious inequality;
- b. The removal of this inequality must be pursuant to a goal which has been identified as one which should be promoted;
- c. The positive discrimination measure must be of a temporary nature i.e. capable of being removed as soon as the goal is achieved; and
- d. The positive discrimination measure must not needlessly restrict the rights of others.

255. Our view is that the breadth of this exception is probably too restrictive. We prefer the more liberal interpretation used in the EA 2010 and set out at [116] - [117] above.

256. Interestingly, there is a mechanism specified in the legislation whereby the

¹²³ Article 10.

¹²⁴ Article 11.

relevant competent body can be asked to identify whether certain measures would fall into the positive action exception. The identity of the competent body is determined by the subject matter of the measure.

257. The Centre for Equal Opportunities and Opposition to Racism has a supervisory role in relation to discrimination matters in Belgium. It issues reports and recommendations within its mandate and also assists victims of discrimination, including filing judicial actions on their behalf.

258. In 2009, the Centre opened 86 new files concerning alleged cases of age discrimination. Of these only 3% related to complainants aged up to 18 years.¹²⁶

259. We have been unable to identify any significant case law on age discrimination in the context of goods and services and children or young people. However the Centre does provide examples from its own files, although the only relevant example related to a holiday home owner who would not rent his upmarket properties to groups of young people aged under 25. He justified their exclusion on the basis that he had had poor experiences with such groups previously where damage had been caused previously which exceeded the deposit. The Centre's position was that excluding all groups in a blanket fashion was not an appropriate and necessary measure.¹²⁷ This would seem to be a classic case of age discrimination and we cannot see that it should not be protected in the Proposed Legislation in any different or less effective way.

¹²⁶ "Qu'est-ce que la discrimination fondee sur l'age?" available at <http://www.diversite.be>

¹²⁷ Ibid.

F Practical illustrations of the impact of legislation which protects children and young people against age discrimination in the context of goods, facilities and services

260. In various places in this Opinion we have examined scenarios in which the Proposed Legislation would affect the way in which service providers operate if children and young people were included within the scope of the Proposed Legislation. Similarly, we have identified circumstances where age-based practices would be able to continue because one of the exceptions applied or because of the operation of the general justification defence. In this section, we have set out again these practical examples along with additional scenarios.

F1 Discriminatory practices which would be affected by legislation protecting children and young people

261. Decisions within the NHS, or by service providers delivering services on behalf of the NHS, which take into account age would be subject to scrutiny under the Proposed Legislation as would amount to less favourable treatment because of age which would require objective justification in order to be lawful. For example a decision to prioritise funding for mental health services for adults as opposed to children/young people or only provide mental health services suitable to adults would require certainly require objective justification.¹²⁸ Unless there were compelling reasons for excluding children from appropriate mental health care, the practices outlined above would amount to unlawful discrimination.

262. The exclusion of children from shops and rules limiting the number of children in shops would probably be unlawful in so far as they were based on

¹²⁸ We understand that this is a very real issue. There is evidence which has been identified by the NICCY that only 8% of the mental health budget is spent on child and adolescent mental health services even though one quarter of the population is under 18 years of age. See fn 9.

stereotypical and ill-informed views. See [203] – [206] above.

263. The exclusion of children from shops or premises using Mosquito devices would almost certainly be unlawful on the basis that even if there were a need to exclude children, using a device which might harm children could never be a proportionate means of achieving that aim. Moreover, this type of practice might well amount to harassment, which is another form of discrimination as would the intimidation of children by security staff on shop premises or forcible ejection groups of children from cafes for no other reason than stereotypical views concerning this demographic.

264. Transport providers will have to re-assess their services to ensure that babies and young children are not disadvantaged indirectly on grounds of age. For example, babies and young children often encounter difficulties accessing transport, such as buses and trains, because there is inadequate or insufficient space for buggies and pushchairs. See [113] above.

265. Buildings which can be accessed by members of the public would also need to carefully assess whether there are adequate provisions for babies and young children, for example, suitable buggy/push chair access, family-friendly changing rooms, nappy changing facilities. See [113] above.

266. It would be unlawful age discrimination for the police to treat a child or young person less seriously when reporting a crime simply because of their age or negative stereotypes associated with youth.

267. Similarly, it would be unlawful age discrimination for an emergency services operator to treat a child or young person less seriously when calling for an ambulance simply because of their age or negative stereotypes associated with youth.

268. It would be unlawful age discrimination to restrict the fertility of a disabled child unless the general justification defence could apply in the particular facts of the case.

F2 Discriminatory practices which would be unaffected by legislation protecting children and young people under the scheme set out in this Opinion

269. A program for providing free influenza vaccines to older people, based on evidence showing that older people are at a greater risk of complications as a result of influenza than are people of different ages, would be permitted under the positive action exception.

270. A screening programme at sixth forms colleges for illness which typically affect but are frequently undiagnosed in 16 to 18 years olds would almost certainly be permitted under the positive action exception.

271. Free chlamydia testing for 16 to 18 year olds would still be permissible under the positive action exception.

272. A soft play centre dedicated to the under 2's only because children under this age are generally not strong, tall or co-ordinated enough to safely use the equipment with older children in attendance would still be able to continue under the Proposed Legislation as it would fall within the general justification defence.

273. The provision of a breakfast club at school for pupils from socially disadvantaged backgrounds would be allowed to continue under the positive action provisions or the general justification defence.

274. Age-based criteria for eligibility to educational institutions would still be permitted in so far as they were allowed by statutory provisions. Where no statutory provisions exist, then age-based criteria could still continue provided that the general justification defence applied. See [153] – [159].
275. Services providers would still be permitted to verify the age of people seeking to buy age-restricted products such as alcohol, fireworks and tobacco as there would be an exception within the Proposed Legislation allowing for age verification to lawfully take place. See [172] above.
276. Children-go-free holidays would still be permitted under the concessionary services exception.
277. A requirement to seek parental consent before providing a particular medical treatment or service would still be lawful provided that the parent consent was necessary.
278. Criminal laws relating to the age of consent, sale of alcohol, fireworks and tobacco products would be entirely unaffected as criminal liability would be entirely outside of the remit and impact of the Proposed Legislation.

G Conclusion

279. Our analysis leads to the conclusion that Northern Ireland should not exclude children and young people from the remit of legislation which prohibits age discrimination in goods, facilities and services.