

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

**August 2015**

## **Introduction**

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

## **Background and NICCY'S engagement to date**

NICCY has been actively involved in advising on the development of the proposals to extend Age Discrimination Legislation (Age Goods, Facilities and Services) (Age GFS legislation) for a number of years. NICCY has given advice to Ministers, OFMDFM officials and the OFDMDM Committee and worked in partnership with the Equality Commission for Northern Ireland (ECNI) and the Older Persons Commissioner for Northern Ireland (OPONI), as well as civic society and children and young people in aiming to ensure that the extension of the Age GFS legislation applies to all age groups.

NICCY has consistently expressed its serious concerns regarding the proposed

application of the Age GFS legislation only to those aged 16 and over. This will mean that solely on the basis of age, under 16s will not be able to access protection from discrimination in accessing goods, facilities and services which will be afforded to those over 16.

Given the Commissioner's remit, NICCY is concerned with the relevant proposals for all young people aged under 21 years.

The Age GFS legislation will provide protection against discrimination in accessing goods, facilities and services and will also extend to charities, premises, education, public functions, and private clubs and associations. It is the Government's clearly stated intention that this legislation will not apply to children and young people under the age of 16. Children and young people already enjoy protection from discrimination on the basis of their age in employment and vocational training<sup>1</sup> and on the grounds of sex, sexual orientation, religion and political opinion, race and disability when accessing good, facilities and services in Northern Ireland. NICCY and the ECNI have carried out some work jointly to advise the Government of the need to include all children and young people within the scope of this legislation. Part of this joint working has involved commissioning an Expert Paper<sup>2</sup> and Executive Summary<sup>3</sup> by Robin Allen QC and Dee Masters BL<sup>4</sup> and using these to develop a Policy Paper<sup>5</sup> and Executive Summary<sup>6</sup> which has informed extensive work with Government over a considerable period of time. We have also produced a Children and Young Person's Report<sup>7</sup> and collated numerous case examples of the types of discrimination children face when accessing goods, facilities and services in Northern

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

<sup>2</sup> 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 and Dee Masters BL, commissioned by NICCY and the ECNI, April 2013

<sup>3</sup> Strengthening Protection for all Ages. Protecting children and young people against unlawful age discrimination in the provision of goods and services. Expert Paper (Summary), Robin Allen QC and Dee Masters BL, commissioned by NICCY and the ECNI, April 2013

<sup>4</sup> Cloisters, London.

<sup>5</sup> Proposals for reform. Strengthening Protection for all Ages. Protecting children and young people against unlawful age discrimination in the provision of goods and services, NICCY and the ECNI, June 2013.

<sup>6</sup> Proposals for reform. Strengthening Protection for all Ages. Protecting children and young people against unlawful age discrimination in the provision of goods and services. Summary Report, NICCY and the ECNI, June 2013.

<sup>7</sup> Don't Exclude Us! Strengthening Protection for Children and Young People when Accessing Goods, Facilities and Services Children and Young People's Version, NICCY and the ECNI, October 2013.

Ireland (all attached). NICCY has ensured that all of this compelling evidence, which clearly highlights the need to include children and young people of all ages within the scope of the Age GFS legislation, has been shared with the Government. Article 7 of NICCY's founding legislation, 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003), details the duties of the Commissioner. Article 7(4) of this legislation outlines the statutory duty the Commissioner is under to provide advice to Government on matters concerning the rights or best interests of children and young persons. Despite NICCY's statutory remit and numerous references in the consultation document to the use of evidence in taking forward the Age GFS proposals, we do not believe that any of the evidence provided by NICCY and ECNI has been taken cognisance of in progressing proposals for future Age GFS legislation. **We again advise OFMDFM in progressing with future Age GFS legislation in Northern Ireland, to ensure that the attached evidence fully informs its development, specifically with regard to the application of the legislation to under 16s.**

### **Proposed legislation must comply with children's and human rights standards**

As highlighted above, the UNCRC must serve as the underpinning framework for all decisions concerning children's lives. The Convention is an international human rights treaty which provides children and young people with a comprehensive set of rights and places obligations on governments to ensure these are realised. NICCY has consistently detailed its concerns to Government with regard to the proposal to exclude under 16s from future Age GFS legislation and has emphasised the need to ensure that any new legislation conforms to international human rights standards, including the UNCRC and the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998. Of particular relevance is Article 2 of the UNCRC, the right of the child to protection from discrimination on any basis and Article 14 of the ECHR, the right to protection from discrimination in the enjoyment of all of the other Convention rights.<sup>8</sup> Neither of these Conventions place an age range on protection from discrimination as both the UNCRC and the ECHR, as incorporated, apply to everyone, regardless of their age. The protection from discrimination under Article 14 covers, 'other status' which explicitly includes protection from discrimination on the basis of age.<sup>9</sup> NICCY does not believe that

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<sup>8</sup> Article 14 of the ECHR prohibits discrimination with respect to rights under the Convention, i.e. an applicant must prove discrimination in the enjoyment of a specific right that is guaranteed elsewhere in the Convention.

<sup>9</sup> *BB v UK* (2004)

the exclusion of children and young people under the age of 16 from Age GFS legislation and the protections contained therein has the best interests of the child as a primary consideration as provided for in Article 3 of the UNCRC.

In its most recent examination of the UK Government's compliance with its obligations under the UNCRC in 2008, the Committee on the Rights of the Child addressed the issue of discrimination faced by children and young people. It also expressed its concern at the general climate of intolerance and negative public attitudes towards children, including in the media, highlighting that this may be often the underlying cause of further infringements of their rights.<sup>10</sup> The Committee made a recommendation that the Government ensure full protection against discrimination on any grounds, including by taking,

*"...urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including in the media"*<sup>11</sup>

The Committee also recommended that the Government take,

*"...all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively, including with disciplinary, administrative or – if necessary – penal sanctions."*<sup>12</sup>

It is NICCY's view that the proposed exclusion of children and young people from the scope of future Age GFS legislation is in breach of the Government's obligations under both the UNCRC and the ECHR, as incorporated. In the recent Report of the UK Children's Commissioners to the UN Committee on the Rights of the Child for the Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland the Commissioners made the following joint recommendation,

***"The State Party and devolved governments should provide equal legislative protection for children against age discrimination and remove all exemptions relating to children under their equality legislation, unless these can be objectively***

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<sup>10</sup> Concluding Observations on the United Kingdom of Great Britain and Northern Ireland. CRC/C/GBR/CO/4. Para. 24.

<sup>11</sup> *Ibid*, Para. 25(a).

<sup>12</sup> *Ibid*, Para. 25(c).

*justified.*<sup>13</sup>

NICCY welcomes the intention of this consultation on proposals for the introduction of Age GFS legislation as stated in the Ministerial Foreword<sup>14</sup> as the elimination of inequalities and creation of a fair society for everyone. It also states that these proposals should ensure that, “...everyone has the opportunity to realise their full potential and that people are treated fairly regardless of their age.” While we are entirely supportive of the need to create a fair and equal society where all children can develop to their maximum potential in line with Article 6 of the UNCRC, NICCY does not believe, due to the exclusion of under 16s from the scope of the legislation, this aim can be achieved.

### **Programme for Government commitment was not age based**

NICCY welcomes the Northern Ireland Executive’s commitment in the Programme for Government 2011-2015<sup>15</sup> to extend age discrimination legislation to the provision of goods, facilities and services.<sup>16</sup> The Programme for Government commitment does not state that the Age GFS legislation should only be extended to certain age groups. It is extremely disappointing that the Government is proposing to exclude under 16s from the scope of this legislation. In its Policy Paper<sup>17</sup> NICCY clearly recommends that children and young people of all ages should have protection against unlawful discrimination and harassment on the grounds of age when accessing goods, facilities and services. NICCY believes that it has provided an abundance of evidence to Government that children and young people do suffer unjustifiable discrimination on grounds of age. **NICCY is strongly opposed to the blanket exclusion of under 16s from statutory protection against age discrimination in accessing goods, facilities and services.** We firmly believe that everyone, regardless of their age, has the right to be treated fairly and have the opportunity to fulfil their potential, as provided for in Article 6 of the UNCRC. Children and young people should not receive an inferior service simply on the basis of their age and have the right to be treated with dignity and respect when accessing goods, facilities and services. The exclusion of under 16s from the scope of future Age GFS legislation will mean that where a child under 16 is treated in an inferior way to adults in accessing

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<sup>13</sup> 1<sup>st</sup> July 2015

<sup>14</sup> Pg 5, Proposals to extend Age Discrimination Legislation (Age Goods, Facilities and Services) – consultation document, OFMDFM, July 2015.

<sup>15</sup> Extended to 2016.

<sup>16</sup> Priority 2, Pg 40, Northern Ireland Executive’s Programme for Government 2011 – 2015.

<sup>17</sup> *Op cit.* 5.

goods, facilities and services they will have no right to challenge this treatment. Equally, where a service provider does treat under 16s less favourably because of their age, there will be no requirement on service providers to explain or justify their actions, which they will be required to do in the case of over 16s.

### **No rationale provided for the proposed exclusion of under 16s**

The Government's rationale for the exclusion of under 16s from further age GFS legislation is extremely unclear. While the consultation document is unequivocal that it is not proposed to include under 16s within the scope of the legislation, there is no explanation given for this decision. This presents significant challenges to NICCY in attempting to address the reasons why it is proposed that children under 16 should not be protected in future Age GFS legislation. NICCY does not believe that there is any legal or practical reason for this exclusion.

The consultation document states that in the formulation of exceptions to the legislation, OFMDFM wants to make sure that they have, "...a clear and robust policy position and rationale for any exceptions to age discrimination legislation..."<sup>18</sup> NICCY agrees that all exceptions to the legislation should have a firm and robust policy basis and a clear rationale, however no rationale or policy position has been put forward in the consultation document regarding the proposed blanket exclusion of under 16s. **NICCY recommends that OFMDFM urgently publishes its rationale for the exclusion of under 16s from the legislation to allow a transparent and informed debate to take place** regarding why the Government proposes not to protect under 16s from age discrimination in accessing goods, facilities and services.

In the course of our engagement with Government on the need for the inclusion of under 16s in future Age GFS legislation it has been suggested one of the reasons for the exclusion of under 16s from the scope of the legislation is a fear of undermining parental rights. It is NICCY's view that this fear is unfounded. It is our experience that parents are supportive of their children being protected from age discrimination in accessing goods, facilities and services, particularly where this protection should ensure equal access to vital services in areas such as health, including mental health and education.

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<sup>18</sup>Op cit. 14, Pg 7.

## Failure to take account of compelling evidence in taking forward proposals

It is also our firm view that The Expert Paper<sup>19</sup> commissioned by NICCY and the ECNI comprehensively and conclusively addresses all possible concerns regarding the inclusion of children of all ages in future Age GFS legislation.

The Expert Paper contains a full legal opinion on whether the Age GFS legislation should apply to children and young people. It highlights the fact that in countries including Australia, Canada and Belgium Age GFS legislation applies to everyone regardless of age.<sup>20</sup> It also addresses issues including unintended consequences,<sup>21</sup> exceptions,<sup>22</sup> objective justification,<sup>23</sup> positive action measures,<sup>24</sup> compliance with other legal requirements,<sup>25</sup> the impact on parental rights,<sup>26</sup> age verification<sup>27</sup> and concessions.<sup>28</sup> It concludes that it is not appropriate for the Northern Ireland Executive to propose, or for the Assembly to adopt, legislation that excludes persons under 18 generally from protection from age discrimination in goods, facilities and services.<sup>29</sup> It highlights that excluding children from the scope of legislation prohibiting discrimination in goods, facilities and services would be a breach of the general principle of equal treatment and would itself amount to discrimination.<sup>30</sup>

It is the view of the authors<sup>31</sup> of the Expert Paper, both experts in discrimination and equality law, that anti-discrimination legislation should itself be as free of discrimination as possible. They go on to highlight the fact that Northern Ireland has already agreed to respect the principle of equal treatment in certain fields through its obligations under the UNCRC, the ECHR, the European Social Charter, the European Charter of Fundamental

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<sup>19</sup> *Op cit.* 2

<sup>20</sup> *Ibid*, Pgs 75 and 76.

<sup>21</sup> *Ibid*, Pg 77.

<sup>22</sup> *Ibid*, Pgs 50-69 and 76.

<sup>23</sup> *Ibid*, Pgs 52-60.

<sup>24</sup> *Ibid*, Pg 51.

<sup>25</sup> *Ibid*, Pg 61.

<sup>26</sup> *Ibid*, Pgs 77 and 78.

<sup>27</sup> *Ibid*, Pg 79.

<sup>28</sup> *Ibid*, Pgs 68 and 79.

<sup>29</sup> *Ibid*, Pgs 7 and 104.

<sup>30</sup> *Ibid*, Pgs 6 and 7.

<sup>31</sup> Robin Allen QC and Dee Masters BL, Cloisters, London.



Rights and through its membership of the EU. It states that human rights, including the principle of equality, are universal and no age limits are placed on the application of that principle in any of the above legal instruments. It also states that 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.<sup>32</sup>

The Expert Paper emphasizes the incompatibility of the current proposals to exclude children from future Age GFS legislation with the statutory duty on public authorities to promote equality of opportunity between persons of different ages under section 75 of the Northern Ireland Act 1998. It is the authors view that 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.<sup>33</sup>

It also points out that the inclusion of children of all ages in future Age GFS legislation would be consistent with European consumer protection law which recognises that there should be enhanced levels of protection for vulnerable consumers. It indicates that to exclude children from legislative protection from discrimination in the provision of goods, facilities and services is inconsistent with this approach and uses the fact that children and young people have special needs as a reason to deny them protection from discrimination.<sup>34</sup>

In addition, it points out the unjustifiable and absurd inconsistencies of treatment where young people of different ages may receive the same discriminatory treatment. However, young people under 16 would be unable to take a claim, an option which would only be open to their older peers who would be covered by the legislation.<sup>35</sup>

The authors of the Expert Paper go on to state that they have analysed the debate in the Northern Ireland Assembly regarding the Age GFS legislation and they conclude that the arguments advanced for excluding children and young people do not withstand detailed

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<sup>32</sup> *Op cit.* 2, Pg 7.

<sup>33</sup> *Ibid*, Pgs. 7 and 8.

<sup>34</sup> *Ibid*, Pg 8.

<sup>35</sup> *Ibid*.



scrutiny, when considered against human rights norms and the steps effectively taken in other countries.<sup>36</sup>

We note that the consultation document states that the proposals for future Age GFS legislation are based on the available information and evidence.<sup>37</sup> NICCY does not believe, despite its statutory advice giving remit,<sup>38</sup> that any of the comprehensive evidence it has provided has been taken into account in developing the current proposals regarding under 16s. While we note that OFMDFM's views may change after analysis of the views expressed through consultation and additional information and evidence<sup>39</sup> we are not confident that there is a willingness to change the proposals to include under 16s.

### **Significant evidence that children and young people experience age discrimination**

There are a wide range of areas in which people experience negative barriers because of their age, including experiencing less respect and consideration because of their age in accessing GFS. NICCY has clearly presented that this is the case with regard to children and young people. Children and young people consistently raise the issue of intolerance and the negative treatment which they receive in society by adults just because they are young. In a recent survey of 752 children,<sup>40</sup> 61% of respondents reported that they had experiences of being asked to “move on” by a range of adults in their community, particularly the PSNI, local business employees and local residents, with 13% experiencing it all the time. Young people reported that often they were asked to ‘move on’ while socialising in their area, e.g., playing football, in food outlets, in the park and in shopping centres.

In a 2010 survey of 16 year olds, 83% of respondents thought that young people are judged negatively just because they are young. 86% reported that they had been treated with disrespect because they were a young person. 58% had been told to leave their school bag outside a shop because they were a young person, with 26% excluded from a shop or shopping centre because they were young. 66% had been treated as suspicious by staff in a shop because they were a young person. 56% had experienced standing with

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<sup>36</sup> *Ibid*, Pg 14.

<sup>37</sup> *Op cit.* 14, Pg 8.

<sup>38</sup> Article 7(4), The Commissioner for Children and Young People (Northern Ireland) Order (2003).

<sup>39</sup> *Op cit.* 14, Pg 8.

<sup>40</sup> Children's rights survey to inform young person's report to the Committee on the Rights of the Child, January 2015, Children's Law Centre and Save the Children.

friends on the street and being told to move on. 77% of respondents felt that the media portrays young people mostly negatively.<sup>41</sup> In addition, research highlights discrimination and negative stereotyping of children and young people by the media, with comparable behaviour by adults not similarly represented. Children and young people also highlight the serious impact negative labelling and negative media representations have on the treatment they receive, particularly from the police and paramilitaries.<sup>42</sup>

The consultation document states that age discrimination legislation will help to challenge negative stereotypes and prejudice and send a strong signal that discriminating unjustifiably on grounds of age is unacceptable.<sup>43</sup> It is evident from the experience of young people in society, as presented above, that children and young people of all ages need the protections in the Age GFS legislation. **By not including under 16s in the legislation, NICCY believes that this reinforces negative stereotypes relating to this group and sends a message to society that under 16s are less worthy of protection and that discriminating against under 16s unjustifiably on grounds of their age is acceptable.** This approach is not compliant with children's rights standards and will further exacerbate the marginalisation and negative treatment of young people. NICCY firmly recommends that this is urgently addressed by OFMDFM by the full inclusion of children and young people of all ages within the scope of the legislation.

### **Political decision has already been taken on the scope of the legislation despite overwhelming support for the inclusion of all ages in the legislation**

With regard to the proposed scope of the legislation, the consultation document states that it is proposed to extend protection from discrimination on grounds of age in the provision of goods, facilities and services, charities, premises, education, the exercise of public functions and private clubs and associations to everyone aged 16 and over.<sup>44</sup> It goes on to say that,

*“This would mean that treating a person aged under 16 years old less favourably or more favourably than another person would not be regarded as discrimination, whatever the*

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<sup>41</sup> ‘Young Life and Times Survey 2010’ ARK.

<sup>42</sup> ‘Behind the Headlines’ Media Representation of Children and Young People in Northern Ireland , Summary of Research Findings, Queen’s University Belfast, Gordon, McAlister, Scraton and Include Youth, April 2015.

<sup>43</sup> *Op cit.* 14, Pg 21.

<sup>44</sup> *Ibid*, Pg 23.

*other person's age.*<sup>45</sup>

It states that OFMDFM recognises that there will be concerns and disappointment that those aged under 16 are not included at this stage. It continues,

*"This consultation is a first step to ensure that legislation is brought forward as soon as possible to protect people over the age of 16 from unfair and unjustifiable age discrimination."*<sup>46</sup>

It appears from this section that the decision about the scope of the legislation has already been taken. The implication from the above is that the issue of the inclusion of under 16s in the legislation is such that to continue discussions about this would be so detrimental to the progression of the legislation that it would prevent it being brought forward at all. Comments made by Junior Minister Mc Cann in evidence to the OFMDFM Committee appear to confirm this. She said,

*"I would have much preferred to have been able to say that we were dealing with legislation that excluded nobody. Having said that, I hope that this will be a first step. I **believe that any research that was done was in favour of including everybody.** In my opinion, to discriminate against a particular group is not a good way to go forward with anti-discrimination legislation. **Unfortunately, we did not get the political consensus.**"*<sup>47</sup>  
(Our emphasis).

She also stated,

*"...what we are trying to do is bring legislation forward... I am very keen to move it forward so that it will include all young people... I am keen that those young people have the same protections as everybody else, because they are entitled to it. There is a human right, in my opinion, for that... We could not get the political consensus for anything beyond 16 plus"*

She continued,

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Committee for the Office of the First Minister and deputy First Minister Official Report (Hansard) Age Discrimination Legislation: OFMDFM Junior Ministers and Officials, 15<sup>th</sup> April 2015.

*“The scope of the legislation now has political consensus, albeit that it would have been preferable for it to be different, but it is where it is... It is very important to remember that at no time did any of the older people's sectors want to see the exclusion of anybody. I just want to clarify that point. They, too, wanted this to include everybody. **Nobody said that they wanted a certain age group to be excluded**, and I think it is important to put that on the record.” (Our emphasis)*

The then Junior Minister Bell also said,

*“There is no bar to further legislation in this area, and that needs to be comprehensively looked at. However, with the level of agreement we have, the necessary drafting has been thought through on what we can do and what it is possible to do within this mandate. In that context, I think this Bill is the best that we can deliver. It was on that basis of **political consensus** that we brought it forward.”<sup>48</sup> (Our emphasis)*

NICCY has also been informed by OFMDFM officials<sup>49</sup> that the decision regarding the scope of the legislation and the exclusion of under 16s has been taken and is a political decision. This is despite research which shows overwhelming support for the inclusion of people of all ages in future Age GFS legislation. A survey carried out by Age NI and Age Sector Platform found that 90% of people aged 65 and over agree or strongly agree that the legislation should extend to people of all ages. This figure was higher among the general population with 92% agreeing/strongly agreeing that the legislation should extend to people of all ages.<sup>50</sup> Research has also shown significant political support for the legislation, with 87% of MLAs agreeing that it must be a priority for this current NI Executive to deliver legislation outlawing age discrimination.<sup>51</sup>

There is no indication from the consultation document that the inclusion of under 16s in the scope of the legislation is an area where there is any potential for change. NICCY therefore has a number of very serious concerns about how genuine this consultation

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<sup>48</sup> *Ibid.*

<sup>49</sup> Meeting with Age Sector organizations and OFMDFM, Castlebuildings, 20<sup>th</sup> April 2015, Age GFS Consultation event, City Hotel, Derry, OFMDFM, 28<sup>th</sup> July 2015, Age GFS Consultation event, Grosvenor Hall, Belfast, OFMDFM, 18<sup>th</sup> August 2015.

<sup>50</sup> Millward Brown Research, commissioned by Age NI and Age Sector Platform, 29 May 2014

<sup>51</sup> MLA research panel, December 2013, compiled by Stratagem and ComRes. (MLA Research Panel, Dec 13, compiled by Stratagem and ComRes). ComRes surveyed 40 MLAs between 29 October – 25 November 2013 by self-completion postal questionnaire and online. Data is weighted by party group and region).

exercise is and believes that there is significant evidence to indicate that the outcome of the consultation has been pre-determined from the outset.

### **Failure to include a clear question on whether under 16s should be included in the legislation**

In response to a question by OFMDFM Committee member Megan Fearon, MLA, about whether the consultation document would contain questions around children and young people and consultation with the children's sector, Minister Mc Cann stated,

*"I have no difficulty with that; any question can go into the consultation."<sup>52</sup>*

NICCY had therefore expected a question to be included in the consultation document on whether under 16s should be included in the legislation in order to gauge the level of support for the inclusion of people of all ages in future Age GFS legislation. The question relating to the proposed age scope of the legislation is disappointing in that it is not clear whether OFMDFM is seeking views on the inclusion of under 16s. The question reads,

*"How strongly do you agree or disagree with our current proposal to extend protection against age discrimination to those aged 16 or over? Please provide any further views that you may have on our proposal."<sup>53</sup>*

We do not believe that asking whether consultees agree or disagree with OFMDFM's proposal is indeed a question relating to children and young people, as Minister Mc Cann indicated would be included in the consultation. Despite the assurance given to the OFMDFM Committee by the Minister about the consultation document containing questions around children and young people, none of the 33 questions in the consultation document specifically relate to the exclusion of under 16s from the scope of the legislation. In addition, the request to provide *further* views on the proposals implies that the information that has already been provided to OFMDFM and the views expressed on this issue to date should not be reiterated. This is despite compelling evidence provided by NICCY and others to OFMDFM on the need for under 16s to be included in the legislation

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<sup>52</sup> *Op cit.* 47.

<sup>53</sup> *Op cit.* 14, Pg. 24.

and the above acknowledgement by Minister Mc Cann that all of the evidence and research is supportive of the inclusion of all age groups. In addition, the draft EQIA acknowledges that age discrimination is largely experienced by older and younger people.<sup>54</sup> It appears that these are the two groups who require the protections the most, despite the proposed exclusion of under 16s from the legislation. NICCY is unaware of evidence being sought about the need for the majority of the population, i.e. working age adults, to have Age GFS protections, yet they will be included in the legislation. **NICCY therefore questions the evidential basis for the proposed exclusion of under 16s from future Age GFS legislation.**

### **The exclusion of under 16s from the legislation may result in further cuts to vital children's services**

NICCY has grave concerns about what the proposed exclusion of under 16s from Age GFS legislative protections will mean for children and young people's services. Northern Ireland has undergone a period of five years of sustained Government cuts to public services. In the Northern Ireland Executive's consultation on its draft Budget for 2015/2016 which proposes the most severe cuts to public services to date it states that,

*"Due to the economic context, we are dealing with a draft Budget scenario that once again represents a real terms decline in public spending."<sup>55</sup>*

A report by Oxfam<sup>56</sup> found that over the course of five years, £4 billion in cuts will have been delivered in Northern Ireland. The report stated that austerity measures, which are hitting women and young people particularly hard, are making Northern Ireland even more of an unequal society and the UK Government's proposed welfare reforms will particularly disadvantage already vulnerable sectors of our community, such as those with disabilities and mental illness. It is extremely likely that public service budget cuts, welfare reform and sustained and intensified austerity measures will disproportionately negatively impact on vulnerable children including children with disabilities and mental health needs resulting in more children in poverty facing the multiple disadvantages that accompany socio-economic deprivation.

<sup>54</sup> *Ibid*, Paras 3.5 and 3.9, Draft Equality Impact Assessment, Annex A.

<sup>55</sup> Draft Budget 2015-16, Northern Ireland Executive, December 2014, Para 6.7.

<sup>56</sup> A Cautionary Tale: The true cost of austerity and inequality in Europe, 14<sup>th</sup> January 2014.

NICCY is already extremely concerned about the impact that budget cuts will have on children and young people's services, such as youth services, early intervention and prevention, education services and child and adolescent mental health services. Research by NICVA has found that children and young people are the group hardest hit by funding cuts.<sup>57</sup> **In a time of extreme pressures on very limited government resources, NICCY is concerned that the failure to protect under 16s from age discrimination in accessing GFS will mean that funding for children's services will be disproportionately impacted upon.** It is obvious that where legislative protections from age discrimination in accessing services exist for one group, including health and education services, this group will be protected from less favourable treatment in accessing these services. Where one group, i.e. under 16s, are not protected from age discrimination in accessing services, treating them less favourably will not be regarded as discrimination. NICCY is extremely concerned that when decisions are made regarding the allocation of extremely limited funding for services, children's services will be disproportionately cut as they are the only group not protected. This is potentially one of the most serious issues with regard to the proposed exclusion of under 16s from the scope of the Age GFS legislation and comes at a time of already devastating cuts to education and youth services and chronically underfunded child and adolescent mental health services.

### **Accelerated Passage will not allow for adequate scrutiny of the legislation**

NICCY is aware that it is proposed, following the consultation deadline, to progress the Age GFS legislation using the Accelerated Passage procedure. The passage of legislation in the Northern Ireland Assembly involves a number of stages, one of which is the Committee stage. This involves detailed consideration of a Bill. The Committee usually takes evidence from interested bodies, including the relevant Government Department, NGO's, Independent Human Rights Institutions and individuals. Committee members will scrutinise each clause and schedule of a Bill and discuss possible amendments to it. Committees have no power to amend a Bill but they prepare a report for the Assembly, including any proposals for amendments to the Bill. The Committees of the Northern Ireland Assembly have been set up to, "...advise and assist each Northern Ireland minister in the formulation of policy with respect to matters within his/her responsibilities as a minister".<sup>58</sup>

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<sup>57</sup> <http://www.nicva.org/article/cutswatchni-results-are-coming>

<sup>58</sup> Section 29(1)(a) Northern Ireland Act (1998).



Under the Accelerated Passage procedure, a Bill can pass all stages in as little as ten days. While the Accelerated Passage Procedure requires cross-community support, this process skips the Committee Stage. This stage in the passage of a Bill is vital in highlighting potential flaws, debating the policy rationale behind a Bill, testing the strengths and weaknesses of proposed clauses and suggesting a way forward which will make the Bill, when it is passed, a robust and fully considered Act of the Northern Ireland Assembly. It is extremely concerning that the Age GFS legislation will not be considered by the OFMDFM Committee when progressing through the Assembly. **NICCY believes that the use of the Accelerated Passage procedure with regard to the Age GFS legislation and the consequent removal of the vital role of the Committee have the potential to result in flawed and untested law.**

### **Strategic context and NICCY's powers and duties**

With regard to the strategic context within which OFMDFM believes the Age GFS legislative proposals will sit, we note reference is made to the Ten Year Strategy for Children and Young People as one of the key strategies which aim to improve their lives.<sup>59</sup> NICCY is aware and involved in the ongoing work to develop a new Children's Strategy for Northern Ireland, however the current Children's Strategy has effectively not been in operation since April 2011 when the last Action Plan ended. NICCY would therefore question the prominence afforded in the consultation document to the Children's Strategy as a key strategy to improve children's lives. We also note reference in this section to the Commissioner for Older People, the ECNI and NICCY.<sup>60</sup> We note that in providing an explanation of the Commissioner for Older People, specific reference is made to its promotional, advisory, educational and general investigatory duties and powers. This is in contrast to the section on NICCY where there is no reference to the powers or duties of NICCY, despite NICCY having similar yet more extensive powers which also include assisting with complaints to relevant authorities and bringing, intervening or assisting in legal proceedings.<sup>61</sup> NICCY recommends that its role as a statutory body charged with protecting the rights and best interests of children and young people, including its statutory duty to give advice to Government on matters concerning the rights or best interests of children and young persons, should be adequately reflected in the

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<sup>59</sup> *Op cit.* 14, Pg 16.

<sup>60</sup> *Ibid*, Pg 17.

<sup>61</sup> Articles 7 and 8-15, The Commissioner for Children and Young People (Northern Ireland) Order (2003).

consultation document.

The consultation document states that OFMDFM has ‘taken account’ of research reports into age discrimination outside the employment and training sphere where appropriate.<sup>62</sup> However, in presenting some examples of unfair age based practices identified in research, all of the examples relate to older people.<sup>63</sup> The only reference to NICCY’s submissions to OFMDFM refers to the strong support contained therein for the extension of age discrimination legislation outside the employment context.<sup>64</sup> While this is one element of NICCY’s submissions to OFMDFM, NICCY’s main concern is the proposal to exclude under 16s from the scope of the legislation. This has not been highlighted in referring to NICCY’s submissions to the Department. As stated above, NICCY has provided OFMDFM with numerous case examples of areas where children and young people face discrimination in accessing goods, facilities and services. It is extremely disappointing that these case examples have not been included in the consultation document.

### **EU Commission Directive on the provision of goods and services**

We note the reference in the consultation document to the Employment Equality (Age) Regulations (Northern Ireland) 2006 which make discrimination unlawful on grounds of age in employment, occupation, vocational training and further and higher education. The consultation document states that these Regulations implemented the age strand of the European Framework Directive 2000/78/EC.<sup>65</sup> NICCY wishes to again refer OFMDFM to the draft EU Commission Directive on the provision of goods and services 2008/0140<sup>66</sup> which proposes to ban discrimination on a number of grounds including age. We are aware that discussions are ongoing regarding the Directive and there is no agreed date for adoption. However, the draft Directive illustrates the intention of the EU Commission to protect children and young people of all ages when accessing goods, facilities and services. If this Directive is adopted the UK Government and its devolved administrations will be required to extend their legal frameworks to extend Age GFS protections to children and young people within 2 years of adoption. It is NICCY’s firm view that as OFMDFM is

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<sup>62</sup> *Op cit.* 14, Pg 19.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid*, Pg 21.

<sup>65</sup> *Ibid*, Pg 13.

<sup>66</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2008/0140.

aware of this Directive and the implications its adoption will have on Northern Ireland's Age GFS legal framework, legislation which covers all age groups should be introduced now.

## General approach

NICCY is supportive of the proposed areas which will come within the scope of the legislation, the types of discrimination which will be prohibited, as well as the proposal to permit discrimination that does not come within a specific exception or positive action through objective justification. One area which does cause NICCY concern is the proposal to allow direct discrimination to be objectively justified without any proposed limitations on this. NICCY and the ECNI had recommended in their joint Policy paper<sup>67</sup> that direct discrimination should only be objectively justified where a social policy objective is being pursued. We also recommended that the measures adopted to achieve that social policy objective must be proportionate. NICCY wishes to see the proposed test for justification in respect of direct age discrimination being limited in this manner.

In addition, while we are supportive of the proposed exceptions, we recommend, as in our policy paper,<sup>68</sup> that the exception relating to concessions should be justified rather than a blanket exception. While we agree that there is a need for an exception relating to the home, we believe that it should be limited to prevent harassment and victimization from occurring on grounds of age in the home. We also recommend that a mechanism is introduced into the legislation whereby ad hoc exceptions can be made to the principle of equal treatment as new scenarios are encountered.

## Education

It is proposed that education will come within the scope of the Age GFS legislation. NICCY strongly agrees that Age GFS protections should include education. However, the consultation document states that protections from age discrimination in education should only apply to young people who have attained the upper limit of the compulsory school age under the Education and Libraries (Northern Ireland) Order 1986, as amended. Again, no explanation has been provided regarding OFMDFM's rationale for proposing to exclude under 16s, or indeed 16 year olds who have not attained compulsory school leaving age, who comprise the vast majority of young people in education in Northern Ireland, from

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<sup>67</sup> *Op cit.* 5

<sup>68</sup> *Ibid.*

these protections. Currently in Northern Ireland 276,342 children under 16 are in primary and post primary education, all of whom will not be protected under the proposed Age GFS legislation.<sup>69</sup> 31,759 over 16s are currently in post primary education in Northern Ireland and only those over compulsory school leaving age, i.e. those who have reached the end of June after their 16<sup>th</sup> birthday, will be protected from age discrimination in accessing education.<sup>70</sup>

Children and young people in Northern Ireland already enjoy less equality protection under section 75 of the Northern Ireland Act 1998 than all other members of the nine section 75 categories by virtue of the non-designation of schools. This is an unjustifiable position when one considers that all the further education colleges and Universities in Northern Ireland are designated public bodies. It is extremely disappointing that this differential will be exacerbated by the proposed failure to extend Age GFS protections to children of all ages in education.

This is particularly important when one considers the level of education inequalities experienced by children in schools in Northern Ireland. Education is one of NICCY's priorities, with a particular focus on educational inequalities. Almost 4,000 pupils leave primary school without the basic literacy and numeracy skills they need, a trend which continues until leaving school.<sup>71</sup> The Department of Education has identified groups of children who are at particular risk of underachieving in education, including Traveller children; children from ethnic minorities; children with additional needs and children from disadvantaged backgrounds.<sup>72</sup> Other groups of children who are most likely to under achieve in education include children who are entitled to free schools meals,<sup>73</sup> boys,<sup>74</sup> non-grammar school leavers,<sup>75</sup> children attending controlled or non-denominational schools,<sup>76</sup> working class Protestant boys,<sup>77</sup> looked after children,<sup>78</sup> Traveller pupils,<sup>79</sup> children with a disability<sup>80</sup> and children with Special Educational Needs (SEN).<sup>81</sup>

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<sup>69</sup> Figures received by NICCY from the Department of Education for the 2014/2015 school year, 11 August 2015.

<sup>70</sup> *Ibid.*

<sup>71</sup> Key Stage 2 Results 2010/11.

<sup>72</sup> Appendix 1, Priorities for Youth Consultation Document, Department of Education, consultation closed 10<sup>th</sup> December 2012.

<sup>73</sup> Statistical Bulletin Year 12 and Year 14 Examination Performance at Post-Primary Schools in Northern Ireland 2013-14, Department of Education, 11<sup>th</sup> December 2014.

<sup>74</sup> *Ibid.*

<sup>75</sup> Statistical Bulletin Year 12 and Year 14 Examination Performance at Post-Primary Schools in Northern Ireland 2013-14, Department of Education, 11<sup>th</sup> December 2014.

<sup>76</sup> Northern Ireland School Leavers Survey 2009/10 – Department of Education Northern Ireland

NICCY also has concerns about the education received by other groups of children and young people. These include newcomer children who may have no experience of formal education and language difficulties, children in hospital, including inpatients of Beechcroft Regional Child and Adolescent Mental Health facility, young people in the Juvenile Justice Centre, young people in Lakewood Secure Care Centre, children who cannot attend school due to illness, suspension, expulsion or other reasons and children with complex and significant needs.

It is evident that certain groups of children and young people are not achieving in education in line with their peers. While not all of the educational disparities experienced by those groups of children will be attributable to age discrimination in education, it is clear that children should be protected from all forms of discrimination. Education is a fundamental human right and the level of a child's attainment in education has a huge impact on their lifetime opportunities. **NICCY wishes to see protection from age discrimination in education being extended to children of all ages on an equal basis to those over compulsory school leaving age.**

In addition, NICCY and the ECNI recommended in our joint policy paper<sup>82</sup> that the education and library boards<sup>83</sup> and the Council for Catholic Maintained Schools (CCMS) should also be prohibited from unjustifiably discriminating on the grounds of age when providing services. This reflects similar responsibilities placed on these bodies under other equality legislation in Northern Ireland, for example, under the race equality legislation. In taking forward the education provisions of future Age GFS legislation we recommend that OFMDFM ensure that the CCMS and Education Authority are prohibited from unjustifiably discriminating on the grounds of age when providing education services.

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<sup>77</sup> Northern Ireland Peace Monitoring Report Number 3, P. Nolan, March 2014.

<sup>78</sup> 'Children in Care in Northern Ireland 2012/13 Statistical Bulletin' Department of Health, Social Services and Public Safety, 31<sup>st</sup> July 2013.

<sup>79</sup> Taskforce on Traveller Education – Report of the Taskforce to the Department of Education, R. Mc Veigh, 2011.

<sup>80</sup> [http://www.deni.gov.uk/ministers\\_speech\\_to\\_equality\\_commission\\_conference\\_-\\_121108.pdf](http://www.deni.gov.uk/ministers_speech_to_equality_commission_conference_-_121108.pdf)

<sup>81</sup> Qualifications and Destinations of Northern Ireland School Leavers 2013/13, Department of Education 29<sup>th</sup> May 2014.

<sup>82</sup> *Op cit.* 5

<sup>83</sup> As of 1 April 2015 the Education Authority replaced the five Education and Library Boards and the Staff Commission for Education and Library Boards.

## Health and Social Care

NICCY is very supportive of no specific exceptions being proposed with regard to health and social care. NICCY appreciates the statement in the consultation document that all health and social care services should be included in the scope of any future age discrimination legislation, including all organisations responsible for planning, commissioning and delivering statutory health and social care services, as well as other providers in the private and voluntary sectors, such as private hospitals, dental practices, nursing homes and hospices.<sup>84</sup> NICCY assumes, but would seek assurances from OFMDFM, that children’s residential homes are intended to be included in the scope of the legislation. We believe that such protections are vital for children and young people of all ages.

NICCY welcomes the stated intention in the consultation document with regard to health and social care. It states that OFMDFM wants to,

*“...ensure that high quality, dignified and compassionate health and social care services are provided on the basis of individual need, taking account of an individual’s age where it is appropriate to do so.”<sup>85</sup>*

We believe that this should be the manner in which health and social care services are provided to everyone, regardless of age. For the Government to bring forward legislation that fails to protect under 16s from less favourable treatment in accessing health and social care services clearly implies that this age group are less deserving of protection. The examples in the consultation document which evidence age discrimination in health and social care<sup>86</sup> are all examples which the proposed Age GFS legislation will cover. However, NICCY has provided detailed evidence to OFMDFM regarding the difficulties young people face in accessing age-appropriate health and social care services, including mental health services.<sup>87</sup> None of these examples have been included in the consultation document. They include the continued admission of children into adult psychiatric wards,

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<sup>84</sup> *Op cit.* 14, Pg 63.

<sup>85</sup> *Ibid*, Pg. 57.

<sup>86</sup> *Ibid*, Pg. 61.

<sup>87</sup> *Op cit.* 5, Pgs. 20-26.

the lack of availability of certain services including crisis intervention and drug and alcohol services and tier two CAMHS services for deaf children, inconsistencies in the age at which young people transition into adult services and no forensic inpatient paediatric psychiatric provision in Northern Ireland.

The Committee on the Rights of the Child in 2008 expressed its concern about the continued treatment of children in adult psychiatric wards, the small number of children with mental health problems who have access to the required treatment and care and also highlighted its concern that in Northern Ireland - due to the legacy of the conflict - the situation of children in this respect is particularly concerning. The Committee recommended that additional resources and improved capacities be employed to meet the needs of children with mental health problems throughout the country, with particular attention to those at greater risk, including children deprived of parental care, children affected by conflict, those living in poverty and those in conflict with the law.<sup>88</sup>

Children in Northern Ireland suffer disproportionately high levels of mental ill-health. In a recent survey of 752 young people, 27% stated that they have had a concern about their mental health.<sup>89</sup> Statistics relating to the funding of CAMHS in Northern Ireland are extremely concerning. In Northern Ireland in 2013/14, only £19.4m was allocated to Child and Adolescent Mental Health Services (CAMHS), which equates to 7.8% of the total planned mental health expenditure for that period,<sup>90</sup> despite the fact that children and young people under 18 represent almost a quarter of Northern Ireland's population.

We note that the consultation document states that with regard to health and social care, OFMDFM has taken into account submissions and feedback from the age sector, the Commissioner for Older People NI and the Equality Commission NI.<sup>91</sup> It appears that the evidence provided to OFMDFM by NICCY has not been taken into account in formulating proposals for Age GFS protections in health and social care. We firmly recommend that OFMDFM takes cognisance of the wealth of evidence it has received regarding age discrimination faced by children and young people in accessing health and social care in formulating its proposals for Age GFS legislation.

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<sup>88</sup> *Op cit.* 10, Paras. 56 – 57.

<sup>89</sup> *Op cit.* 40.

<sup>90</sup> Information received by the Children's Law Centre from the Health and Social Care Board, dated 17<sup>th</sup> February 2015.

<sup>91</sup> *Op cit.* 14, Pg. 62.



## Financial Services

With regard to financial services, it is NICCY's view that the proposed exception is too broad as it will continue to allow financial service providers to use a person's age as a criterion in designing financial services products. This will not address the issue of young people being able to access a range of financial services on an equal basis to everyone else, including moped and car insurance for 16 and 17 year olds. While we understand the need to ensure that financial services are in line with Britain as regulation of financial services is carried out on a UK wide basis, we recommend that OFMDFM further considers limiting this exception. The manner in which it is currently proposed will allow this type of age discrimination in accessing financial services to continue.

## Draft Equality Impact Assessment – Annex A

NICCY welcomes the fact that OFMDFM has carried out an EQIA of its proposals to bring forward Age GFS legislation. NICCY has no doubt that the proposed exclusion of under 16s from the scope of the legislation has significant potential for adverse impact on this group, who are protected under the age section 75 category. However, as stated above, NICCY does not believe that there is any appetite to change the proposed scope of the Age GFS legislation, despite the views expressed by consultees and advice given by NICCY to the Department. As detailed above, both NICCY and the OFMDFM Committee have been informed that the scope of the legislation is a political decision. **NICCY therefore has serious concerns about how genuine this consultation exercise is and believes that there is significant evidence to indicate that the outcome of this consultation with regard to the scope of the legislation has been pre-determined from the outset.**

The EQIA outlines the aims of the policy, the overall aim being to,

*“...establish a robust policy position prior to bringing forward draft legislation to protect those aged 16 or over from discrimination on grounds of age in the provision of goods, facilities and services, charities, premises, education, public functions and private clubs*

*and associations.*<sup>92</sup>

It is clear from the above that the extent of the policy is limited to those aged 16 or over. We do not believe that any indication has been given in the consultation document that there is any potential to change the proposed scope of the legislation. This is concerning in that in carrying out an EQIA, there should be a clear willingness to take whatever measures are necessary to mitigate against any adverse impact identified or to bring forward an alternative policy.

The EQIA states that the Age GFS proposals aim to address the major gap in anti-discrimination legislation by providing people with the same legal protection from discrimination in accessing GFS as currently enjoyed by people on other equality grounds and on grounds of age in relation to employment and vocational training.<sup>93</sup> This statement is misleading given that people of all ages are protected from discrimination on other equality grounds and on grounds of age in relation to employment and vocational training. The 'major gap' in anti-discrimination legislation will continue for under 16s if future Age GFS legislation is progressed as proposed, despite under 16s enjoying protections on other equality grounds and in employment and vocational training on grounds of their age. This is an incongruous position which no rationale has been provided for. NICCY believes that the failure to bring forward Age GFS legislation which will include everyone will create a hierarchy of inequalities with under 16s apparently less deserving of protection on grounds of their age than on any other equality ground. If future Age GFS legislation is progressed as proposed, under 16s will be protected from age discrimination in training and employment and protected from discrimination in accessing GFS on grounds of sex, sexual orientation, religion, political opinion, race and disability, but not on grounds of their age. NICCY does not believe that there is any justification for the exclusion of under 16s from the scope of future Age GFS legislation.

In considering available data and research, OFMDFM presents evidence which shows that both older and younger people experience age discrimination and other ageist behaviour. With regard to young people, the EQIA states that,

*"...evidence suggests that children and young people can experience a range of age discrimination and other ageist behaviour including stereotypical negative attitudes,*

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<sup>92</sup> *Ibid*, Pg. 94.

<sup>93</sup> *Ibid*.

*prejudice and intolerance, negative media coverage, harassment, refusal of access to services, poorer services, lack of respect and incorrect accusations of misbehaviour.*<sup>94</sup>

It also states that age discrimination against children and young people appears to be most prevalent in health and social care, criminal justice and general services.<sup>95</sup> In addition, it highlights the extremely high perception of age discrimination among children and young people themselves and refers to the 2010 Young Life and Times Survey which found that 83% of respondents agreed that young people are judged negatively just because they are young. This is in contrast to 43% and 37% of respondents to the 2008 and 2014 Northern Ireland Life and Times Survey (Ark) respectively who felt that older people are treated worse than people in the general population because of their age. NICCY believes that everyone requiring protection from discrimination should have access to such protection. We do not believe that excluding children from the scope of future Age GFS protections, 83% of whom perceive that they are being negatively treated because of their age, is an example of evidence based policy making. It is notable that no evidence has been provided or sought regarding the working age adult population and discrimination yet they will be included in the scope of the legislation.

### **Young person friendly version of the consultation document**

NICCY is supportive of the production of a young person friendly version of the consultation document but would seek clarity on the age group OFMDFM intends for this document to be used to consult with. It is notable that this version of the consultation document is a 'young person friendly version', rather than a children and young people's version. NICCY has concerns OFMDFM may not be able to facilitate consultation with children as part of this process, particularly given the statement in the EQIA that, "...this policy will not directly impact those aged under 16, as this age group is not included in these proposals".<sup>96</sup> NICCY disagrees entirely with this assertion and firmly believes that this policy will significantly directly impact on children and young people under 16 through their proposed exclusion from the legislation. NICCY recommends that OFMDFM urgently revises its understanding of the impact the current proposals will have on children and young people under 16. The proposed exclusion of under 16s from future Age GFS legislation will allow age discrimination suffered by under 16s in accessing goods, facilities

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<sup>94</sup> *Ibid*, Pg. 97.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*, Pg. 99.

and services to continue. It is NICCY's view that under 16s are therefore significantly directly impacted upon by the current policy proposals. It is vital that child accessible documentation is produced and direct consultation is carried out with children of all ages as a matter of priority.

The ECNI's Section 75 Guidance for Public Authorities states that in carrying out consultation that it is vital that public authorities consider the accessibility of the language and the format of information to ensure that there are no barriers to the consultation process. It also states that information should be made available on request in accessible formats and systems should be in place so that information can be made available in accessible formats in a timely fashion. It also recommends that specific consideration is given to how best to communicate information to children and young people.<sup>97</sup> OFMDFM's approved Equality Scheme also commits to considering,

*"...the accessibility and format of every method of consultation we use in order to remove barriers to the consultation process. Specific consideration will be given as to how best to communicate with children and young people"*<sup>98</sup>

### **Consultation period for young person friendly version**

NICCY is supportive of the fourteen week consultation period on its proposals for future Age GFS legislation, particularly given that the consultation is taking place over the summer months. However, we have some concerns about the consultation period for the young person friendly version of the consultation document.

OFMDFM commits under its Equality Scheme to carrying out consultation in accordance with a number of principles including that the consultation period will,

*"...normally last for twelve weeks to allow adequate time for groups to consult amongst themselves as part of the process of forming a view. However, in exceptional circumstances when this timescale is not feasible (for example implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health matters or complying with Court judgements), we may shorten*

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<sup>97</sup> Pg. 38, Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities, Equality Commission for Northern Ireland, April 2010.

<sup>98</sup> Para 3.5, OFMDFM's Equality Scheme, Approved by the ECNI 25<sup>th</sup> September 2013.

*timescales to eight weeks or less before the policy is implemented.”<sup>99</sup>*

NICCY has concerns that the consultation period of 10 weeks on the young person friendly version of the consultation document falls short of this commitment and we do not consider that any ‘exceptional circumstances’ apply that would justify departing from the standard 12 week consultation period. OFMDFM’s Equality Scheme commits to ensuring that where child friendly versions of consultation documents are made available, such consultees will have sufficient additional time to respond.<sup>100</sup> It should also be noted that the consultation period has taken place over the summer months. OFMDFM’s Equality Scheme provides that if a consultation exercise is to take place over a period when consultees are less able to respond, for example, over the summer or Christmas break, it will give consideration to the feasibility of allowing a longer period for the consultation.<sup>101</sup>

### **Content of young person friendly version**

With regard to the content of the young person friendly version of the consultation document, we consider this to be incomplete. While information on the main proposals has been included in the document, there has been no attempt to include information in this version which relates to the EQIA, including the types of discrimination children and young people face on grounds of their age. It would therefore appear that OFMDFM is not seeking the views of young people on the EQIA in its young person friendly version of the consultation document. The ECNI’s Practical Guidance on Equality Impact Assessments is clear that those directly affected by a policy should be consulted with in carrying out an EQIA, whether or not they have a personal interest. Children and young people aged 16 and 17 are directly affected by the proposals through their inclusion and children under 16 are also clearly directly affected by the current policy proposals by virtue of their proposed exclusion from future Age GFS legislation. The ECNI’s Practical Guidance on Equality Impact Assessments states that,

*“An equality impact assessment requires consultation... Consultation should also include those directly affected by the policy to be assessed, whether or not they have a personal interest”<sup>102</sup>*

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<sup>99</sup> *Ibid*, Para.3.8.

<sup>100</sup> *Ibid*, para.3.5.

<sup>101</sup> *Ibid*, para.3.9.

<sup>102</sup> Pg. 34, Practical Guidance on Equality Impact Assessments, Equality Commission for Northern Ireland, February 2005.

**The failure to include information on the EQIA in the young person friendly version of the consultation document is extremely disappointing and not in compliance with OFMDFM Equality Scheme commitments.** NICCY would urge OFMDFM to urgently develop a child accessible version of its EQIA and to carry out direct consultation on this with children and young people in line with its Equality Scheme commitments. Such consultation should last for a minimum of 12 weeks.

### **Requirement to directly consult with children and young people**

OFMDFM's approved Equality Scheme commits to ensuring that all consultations will seek the views of those directly affected by the matter/policy.<sup>103</sup> It is vitally important that children and young people are directly consulted with on the proposals to ensure that OFMDFM is in compliance with its approved Equality Scheme. Both the ECNI's Guidance for Public Authorities<sup>104</sup> and OFMDFM's approved Equality Scheme<sup>105</sup> reinforce the need to take appropriate measures to ensure full participation in any meetings that are held. This should include consideration of the time of day, the appropriateness of the venue, accessibility, how the meeting is to be conducted, the use of appropriate language, whether a signer and/or interpreter is necessary, and whether the provision of childcare and support for other carers is required. OFMDFM also commits to giving specific taking account of existing and developing good practice, including the ECNI's Guidance, *Let's Talk Let's Listen – Guidance for public authorities on consulting and involving children and young people (2008)*.<sup>106</sup> 'Let's Talk, Let's Listen' states that,

*“Children and young people have particular needs concerning information and to take part in consultation and decision-making processes, especially on issues that affect them. It is particularly important that you consider which methods are most appropriate for consulting children and young people. You should also make sure that you provide information which is clear, easy to understand and in an appropriate format, to make sure there are no problems preventing you from consulting children and young people.”*<sup>107</sup>

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<sup>103</sup> *Op cit.* 98, Para 3.3.

<sup>104</sup> Let's Talk, Let's Listen: Guidance for public authorities on consulting and involving children and young people' Equality Commission for Northern Ireland, May 2008, Pg. 39.

<sup>105</sup> *Op cit.* 98, Para 3.9.

<sup>106</sup> *Ibid*, para.3.5.

<sup>107</sup> *Op cit.*104, para 2.26.

NICCY would advise OFMDFM to undertake direct consultation with children and young people in compliance with its statutory equality obligations under section 75 and Article 12 of the UNCRC.

### **Failure to use Section 75 as a policy formulation tool**

It is also of note that in the young person friendly version of the consultation document with regard to the scope of the legislation states that,

*“The new laws will cover everyone aged 16 or over. We know that some people are disappointed that children under 16 have been left out at this stage. In Great Britain and Ireland only those aged 18 or over are covered.”<sup>108</sup>*

It is clear that the young person friendly version of the consultation document is not seeking views around the appropriateness of this approach with regard to the exclusion of under 16s from the scope of the legislation. In addition, we do not believe that simply because in Great Britain and Ireland only over 18s come within the scope of the Age GFS legislation that this justifies the exclusion of one of the most discriminated against groups in society, children and young people under 16. While the information regarding Britain and Ireland is factually correct, the young person friendly version of the consultation document does not state that in countries including Canada, Belgium and Australia, Age GFS protections apply to everyone regardless of age. The implication in the young person friendly document is that because no-one under 18 is protected from age discrimination in accessing GFS in either Britain or Ireland, Northern Ireland should be satisfied with protections from the age of 16. NICCY does not agree that the legislative framework elsewhere should have any bearing on how we legislate in Northern Ireland. Northern Ireland has already gone beyond Britain in the past in a number of areas with regard to equality legislation, notably with regard to section 75 of the Northern Ireland Act 1998, which itself provides statutory equality and good relations protections for all age groups. NICCY believes that the Age GFS legislation presents a further opportunity to lead the way on equality and anti-discrimination legislation in a manner which is compliant with the Government’s obligations under both the UNCRC and the ECHR.

With regard to the consultation process, as stated above, NICCY does not believe that any

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<sup>108</sup> Pg. 3, Ideas to stop discrimination based on a person’s age – young person friendly version, Participation Network and OFMDFM, July 2015.



indication has been given that there is any potential to change the proposed scope of the legislation to include children of all ages. It would therefore appear that the decision on the scope of the legislation has already been made. This is in conflict with the purpose of section 75, which is intended to be used as a policy formulation tool. The Equality Commission's, "*Guidance for Implementing Section 75 of the Northern Ireland Act 1998*"<sup>109</sup> is clear about the stage at which public authorities need to screen policy proposals and carry out EQIA's when required. The Guidance states that,

*"Section 75 is important to policy formulation (new or proposed policies) and policy review (existing policies). It is important that public authorities use the assessment of policies for impact on equality of opportunity, including screening and equality impact assessment, as part of their policy development process, rather than as an afterthought when the policy has been established."*<sup>110</sup>

OFMDFM's approved Equality Scheme also states that,

*"Once a policy is screened and screening has identified that an equality impact assessment is necessary, we will carry out the EQIA in accordance with Equality Commission guidance. The equality impact assessment will be carried out as part of the policy development process, before the policy is implemented."*<sup>111</sup>

Section 75 is therefore not intended to be used when policy decisions have been taken, with no regard having been shown to the obligation to have due regard to the need to promote equality of opportunity.

### **Duty to take into account any EQIA and consultation carried out on a policy**

There is also a clear statutory obligation, under Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998, on all public authorities to take into account any Equality Impact Assessment and consultation carried out in relation to the policy. A firm commitment to this is also included within OFMDFM's approved Equality Scheme.<sup>112</sup> It is therefore essential that OFMDFM fully complies with this commitment and can clearly show how views

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<sup>109</sup> April 2010.

<sup>110</sup> *Op cit.* 97, Pg. 13.

<sup>111</sup> *Op cit.* 98, Para 4.17.

<sup>112</sup> *Ibid*, Para 4.2.

expressed through consultation on the current proposals and the EQIA have been taken into account in progressing future Age GFS legislation.

### **Identification of adverse impacts on under 16s and multiple identity under 16s**

In its assessment of impacts the EQIA is unequivocal regarding the adverse impacts the current proposals will have on the enjoyment of equality of opportunity of under 16s by virtue of their exclusion from future Age GFS legislation. It states that,

*“This policy may mean that children and young people aged under 16 may not be able to access the particular age based services that they need, and they may therefore be placed at a disadvantage compared with those aged 16 and over. This may have a particular adverse impact on children and young people aged under 16 who experience other forms of discrimination, or who are considered to be in vulnerable groups, such as young mothers or parents, children who are lesbian, gay or, bisexual, children who are transgender, children who belong to ethnic minority groups, young carers, and looked after children who may not be able to access particular services that they require due to age, such as counselling, extra support in schools, and health and social care services.”<sup>113</sup>*

NICCY submits that the introduction of legislation that allows children and young people under 16 to be placed at such a disadvantage where they cannot legally access the age based services that they need will significantly adversely impact upon their enjoyment of equality of opportunity. We also submit that with regard to the particular adverse impacts that will be suffered by children with multiple identities, children with disabilities should also be included in the above list. NICCY has provided OFMDFM with a number of examples of age discrimination suffered by children and young people. These include access to CAMHS and education support services and we are surprised that children with disabilities has not been identified as one of the groups who will be particularly adversely impacted upon by the exclusion of under 16s from future Age GFS legislation. We do welcome the recognition that other groups of children under 16 will be particularly adversely impacted upon including on grounds of sexual orientation, race, people with dependents and gender. However, it is extremely disappointing that there is no further examination of the particular adverse impacts that will be suffered by under 16s when assessing impact on any of these specific grounds. There has also been no attempt to mitigate against these adverse impacts with regard to multiple identity under 16s despite the identification of the

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<sup>113</sup> *Op cit.* 14, Pg. 99.

adverse impacts. It is fundamental to compliance with the section 75 statutory obligations that where adverse impact is identified OFMDFM should seek other ways to achieve the policy aims which will have a lesser impact on equality of opportunity through alternatives to the policy or mitigation of the adverse impact on enjoyment of equality of opportunity.

### **Failure to mitigate or propose alternative policies to better achieve promotion of equality of opportunity**

The section in the EQIA on, *“Possible measures to mitigate any adverse impact and alternative policies which might better achieve the promotion of equality of opportunity”*<sup>114</sup> makes reference to ongoing work on the Ten Year Strategy for Children and Young People. This appears to be the only suggested mitigating measure relating to the significant adverse impact that will be suffered by children under 16, including multiple identity children, as a result of their exclusion from the legislation. NICCY does not believe that the significant adverse impacts which children under 16 will suffer as a result of their exclusion from the scope of future Age GFS legislation will be in any way mitigated against by ongoing work on a new Children’s Strategy for 2016.

The Ten Year Strategy for Children and Young People will not provide any legislative protection for under 16s from age discrimination in accessing goods, facilities and services. It is NICCY’s firm view that this sole ‘mitigating measure’ for under 16s who will be excluded from the legislation falls far short of what is required under section 75 of the Northern Ireland Act 1998.

### **Failure to take proactive measures to promote equality of opportunity**

It is also extremely disappointing that OFMDFM does not propose to take proactive measures to promote equality of opportunity for members of any of the specific section 75 groups. Section 75 of the Northern Ireland Act 1998 requires more than avoidance of adverse impact, it also requires a proactive approach to be taken by designated public bodies to ensure the promotion of equality of opportunity. The ECNI’s Guidance states that,

*“The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of*

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<sup>114</sup> *Op cit.* 14, Pg 106.

*equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities.”<sup>115</sup>*

Public bodies are not only required to ensure that there is no adverse impact suffered by members of any of the section 75 categories as a result of the proposed policy, but also to have due regard to the need to promote equality of opportunity among members of the nine groups. This means that there is a statutory obligation on OFMDFM to take action to mitigate against adverse impact as well as to proactively promote equality of opportunity in order to comply with section 75. NICCY wishes to remind OFMDFM that once adverse impact is identified through an EQIA, compliance with the statutory obligations under section 75 of the Northern Ireland Act 1998 requires public authorities to mitigate against this adverse impact or introduce alternative policies. As adverse impacts have been identified and neither mitigation of adverse impact on the enjoyment of equality of opportunity or promotion of equality of opportunity are proposed in the current EQIA, NICCY believes that this failure to do so is a breach of OFMDFM’s approved Equality Scheme.

### **Predetermination of consultation and compliance with case law**

Case law in Britain is of particular relevance with regard to the ability of respondents to the consultation to influence the decision regarding the scope of the legislation. As stated throughout this submission, NICCY has been informed that the decision regarding the exclusion of under 16s from future Age GFS legislation has been taken and is a political decision. The EQIA reinforces this and states that under 16s are not included in these proposals<sup>116</sup> and that in considering mitigation OFMDFM is aware of the need to balance the potential adverse impact on under 16s with the likely benefits for older people. It also states that there may be significant adverse impact on older people if OFMDFM does not deliver on its commitment to bring forward age discrimination legislation through the development of these policy proposals.<sup>117</sup> The implication from this statement is the only way to properly mitigate against the adverse impact that under 16s will suffer through their exclusion from the legislation would be to include them in the legislation by extending its

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<sup>115</sup> *Op cit.* 97.

<sup>116</sup> *Op cit.* 14, Pg 99.

<sup>117</sup> *Ibid*, Pg 106.

scope. OFMDFM appears to be suggesting that this is not an option with regard to mitigation as it would prevent the legislation being taken forward, thus creating a significant adverse impact on older people. It therefore appears that if the legislation is to progress the only way in which this will be possible will be as is currently proposed, with under 16s being excluded. NICCY therefore has a number of very serious concerns about how fair this consultation exercise is.

Case law in Britain is clear that consultation must be fair. In the recent Supreme Court case of *Moseley R (ota) v. London Borough of Haringey*<sup>118</sup> the court endorsed the long standing core principles of consultation as the embodiment of fairness, known as the Gunning or Sedley principles, which came from the earlier case of *R v Brent London Borough Council, ex parte Gunning*.<sup>119</sup> **These are that consultation must be at a time when proposals are still at a formative stage; the proposer must give sufficient reasons for its proposal to permit intelligent consideration and response; adequate time must be given for consideration and response and the product of consultation must be conscientiously taken into account in finalising any statutory proposals.** It is NICCY's view that in the current consultation the proposals are not at a formative stage as the decision to exclude under 16s from future Age GFS legislation has been taken, despite the ongoing consultation process. In addition, no rationale or reasons have been provided by OFMDFM for the exclusion of under 16s from future Age GFS legislation, thus preventing consultees from being able to consider and respond to this. We are therefore concerned how OFMDFM will be able to show that the product of consultation was conscientiously taken into account in finalising its statutory proposals.

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

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<sup>118</sup> [2014] UK 56

<sup>119</sup> [1985] 84 LGR 168

## Conclusion

NICCY is extremely disappointed that, despite its ongoing engagement with and detailed and expert advice given to Government on the need to include all children and young people within the scope of future Age GFS legislation, legislative proposals have been taken forward which will exclude under 16s. This approach is not compliant with international children's rights and human rights standards. While we appreciate the need for Age GFS legislation to be introduced to protect some of our most vulnerable citizens before the end of this mandate, NICCY firmly recommends the urgent introduction of Age GFS legislation which affords equal protection from discrimination to everyone, regardless of their age. We recommend that OFMDFM takes into account the views expressed in this and earlier consultation on its proposals, both in light of its statutory equality obligations under section 75 and recent equality case law in Britain. We also recommend that proposals are brought forward for Age GFS legislation which are clearly evidence based and take cognisance of the overwhelming support for children of all ages to be included in the legislation. We would be happy to discuss anything in this submission or provide clarification or further information if required.

## **APPENDIX**

- **Expert Paper**
- **Executive Summary**
- **Policy Paper**
- **Executive Summary**
- **Children and Young Person's Report**
- **Case Studies**