

‘Promoting equality of opportunity’

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**Response to
OFMDFM’s consultation paper on
prohibiting age discrimination in
employment and training
legislation for Northern Ireland**

by Children in Northern Ireland

February 2004

1. Background

- 1.1 Children in Northern Ireland (CiNI) is the representative organisation for the voluntary childcare sector in Northern Ireland, providing leadership and support to its members and working to enhance the lives of all its children.
- 1.2 CiNI consulted with its members in the preparation of this response and it represents the views of a sector, which considers that its needs in relation to anti-discrimination provisions have to date been largely ignored.
- 1.3 CiNI recommends that for age discrimination legislation in Northern Ireland to be effective and to seriously tackle the discrimination on the grounds of age experienced in everyday life in Northern Ireland, there should in future be a much greater appreciation of the issues not just affecting older people, but also those affecting children and younger people.
- 1.4 CiNI wishes to emphasise that it fully supports strong anti-discrimination laws to provide redress for older citizens in relation to pensions, retirement and a raft of other issues. In many instances the issues facing younger people and children in relation to employment are substantially different, but equally require attention. It thus trusts, as a result of this response, that future proposals on legislation will reflect a more comprehensive understanding of the breadth of age-related discrimination.

2. Introduction

- 2.1 Children in Northern Ireland welcomes many of the developments in recent years to secure a greater recognition of the rights of children and young people, in particular through the proposed Bill of Rights, the appointment of the office of Commissioner for Children and Young People and the development of a Strategy for Children and Young People.
- 2.2 It welcomes the inclusion of age – specifically including children and young people - as an equality ground under the mainstreaming requirements on public bodies (s75 of the Northern Ireland Act 1998). However CiNI is concerned that as yet there are no provisions for children and young people to enjoy the same protection against discrimination that is provided on the grounds of religious belief, political opinion, sex, marital status, disability, race and sexual orientation.
- 2.3 In welcoming the proposals to introduce anti-discrimination law on the grounds of age in Northern Ireland, in accordance with the EU Employment Framework Directive, CiNI is gravely concerned that the process of implementation through Regulations will restrict protection against discrimination to employment and training. A major source of unfair treatment for children and young people is in relation to how they are provided with goods, facilities and services – ranging through education, health, social services, the provision of goods and how they are treated through, for example, the criminal justice system.
- 2.4 It is of considerable concern to CiNI that fundamental rights of protection for children and young people are frequently used as a reason for not providing the basic rights of non-discrimination afforded to all citizens, that should equally apply to children and young people. Indeed the consultation document cites instances where the proposals are to treat children and young people differently because of age in a manner that the sector believes is totally unacceptable.
- 2.5 CiNI believes that a Single Equality Act in Northern Ireland must ensure that all the various grounds of equality accord the same level and breadth of protection for its citizens. So, just as people of different religious belief, political opinion, sex, marital status, disability and race enjoy protection against discrimination in how goods and services are provided, similar protection must be available to people of different age. This is particularly important for children and young people who are not in employment but who are treated less fairly than other citizens simply because of their age.
- 2.6 This response will now specifically address those issues raised in the consultation report of relevance to children and young people, but it should be remembered that these comments must be seen in light of the necessity, as an issue of priority, to implement effective

comprehensive provisions outlawing discrimination against children and young people in the provision of goods and services.

3. Coverage

- 3.1 In addition to the concerns already raised in section 2 about not extending legal protection against discrimination to the provision of goods and services, CiNI is specifically concerned with some of the other proposed exclusions in relation to employment and training.
- 3.2 Whilst the proposals specify that protection against discrimination on the grounds of age will apply to employers, providers of vocational training, and providers of most degrees and many Higher and Further Education institution qualifications, it is explicitly proposed that there will be no protection against age discrimination in the services provided by schools.
- 3.3 Differential treatment on the ground of age at school can place individual children at significant disadvantage, and CiNI fails to understand how such an exclusion can be justified. It already notes that the failure to designate schools under s75 of the Northern Ireland Act 1998 has denied children and young people, and those representing their interests, a consultative role in the development and review of their policies. It therefore argues that such arbitrary exemptions which could result in highly ineffective legislation in an area that has a major impact on children's experiences should be lifted and the legislation extended.
- 3.4 CiNI also is concerned at the proposed absolute exclusion of children and young people (or indeed anyone of any age) from protection in relation to unpaid voluntary work. CiNI fully understands and accepts that some of the provisions of implementing highly transparent processes of appointment / promotion etc can incur costs which are prohibitive to voluntary sector groups. It also acknowledges, however, that the voluntary sector wishes to ensure the highest standards of fairness and protection to all who work for it. Against this background it is important that as the issue of voluntary workers, and the extent to which they will be protected by anti-discrimination law, is debated more broadly in the proposals for a Single Equality Act, that age should be included with whatever protection is accorded.

4. Exceptions

- 4.1 CiNI notes the provisions to permit practices within the proposed legislation that otherwise would amount to direct discrimination, where they are objectively justified by reference to specific aims which are appropriate and necessary.
- 4.2 CiNI welcomes the suggestion that any such provisions be indeed exceptional, and should only be seen as possible grounds for moving away from strictly competence-based employment decisions in the most exceptional of circumstances.

Health, Welfare and Safety

- 4.3 One of the potential grounds for justifying differential treatment in exceptional circumstances is health, welfare and safety. An example provided is the protection of younger workers as already recognised in other legislation. CiNI accepts this as a potential ground for justification where the standard of protection accorded to children and young people will be higher than that which would be guaranteed under the proposed anti-discrimination legislation.
- 4.4 However, CiNI is concerned that the consultation document provides evidence of an intention to use other legislation as an excuse for treating young people less fairly, rather than providing them with enhanced protection. Whilst CiNI would welcome proposals to extend coverage of the National Minimum Wage to 16-17 years, as is the case with all other workers, it is concerned that the consultation document seeks to justify differential rates of minimum wage for different age groups.
- 4.5 There is no justification whatsoever for differential rates of pay for those under 22 (or indeed under 18). As in all employment matters, pay should be based on competence and not age-determined prejudice. The consultation document attempts to justify this practice by stating that the EU Directive 'envisages that different pay rates might be set for young people in order to promote their vocational integration – the goal of helping younger workers to find jobs in competition with older workers is consistent with the Directive'.
- 4.6 CiNI believes that a policy of paying young people less than older people for the same work, broadly similar work or work of equal value is clear evidence of age discrimination and cannot be justified by the apparent argument that it is a form of positive discrimination in favour of young people, and therefore discrimination against older people. The differential rates of pay in the National Minimum Wage is perhaps the most overt example of age discrimination against younger people, made worse since it was introduced recently in the context of a society with a deeper understanding of the requirements of fairness and equality.

4.7 CiNI accepts, however, that legislation in relation to the number of hours which can be worked by children and young people – such as the 1998 Working Time Regulations - is in place to strengthen the health and safety of young people at work, and should be capable of being justified under the age discrimination provisions. It should be noted that the sector accepts the principle of such legislation because it does not treat children less favourably but rather genuinely seeks to assure a higher level of protection for them. However, all such legislation should be capable of being challenged to ensure that its application is necessary for a legitimate aim. For example the Employment of Children Regulations 1996 (made under the Children (NI) Order 1995) should be revisited to ensure that its provisions in relation to working hours are justifiable. (The current requirement is that children and young people can only work two hours on a Sunday and are not allowed to work after 7.00pm on a school day).

4.8 CiNI is also concerned that it seems that age discrimination legislation will be considered subordinate to other legislation which ‘necessarily continues to specify age limits’. The example is provided of a road haulage contractor whose lower age limit for employing lorry drivers is linked to the age limits for obtaining a large goods vehicle licence. CiNI considers that it is essential that all such legislation is tested against the standard of age discrimination, not least because the assessment of justifiable and necessary age limits can change significantly over time.

Facilitation of employment planning

4.9 CiNI does not have specific comments to make on this exemption beyond stating that again it should only be used in exceptional circumstances that need to be more clearly specified than in the consultation document

Particular training requirements of the post

4.10 Again the possible justification of age discrimination so that the employer may have a reasonable return on their investment during the period of post appointment training needs to be tightly defined to ensure such differential treatment on age is strictly necessary.

Encouraging and rewarding loyalty

4.11 CiNI is very concerned that real constraints should be placed on any mechanism to allow differential age treatment for employees in relation to rewarding loyalty. Whilst it accepts that incremental pay structures and enhanced service-related benefits have a role in rewarding and retaining employees, the more excessive these become, the more they amount to unjustifiable adverse treatment of younger employees. Again any scope for justification in this context must be tightly prescribed.

The need for a reasonable period of employment before retirement

- 4.12 CiNI does not have specific comments to make in relation to this potential justification for differential treatment on the grounds of age.

Financial Planning

- 4.13 The consultation document states that access to vocational training may be influenced by the level of financial resources available and the targeting of resources on particular groups to facilitate entry into the labour market. CiNI considers that this justification allows provision for a range of positive action measures to encourage the integration of age groups underrepresented in the workforce into the labour market, and therefore is an important exception that should be introduced. It would wish to ensure, however, that training schemes and vocational placement programmes which allow trainees to be paid at differential rates should persist only as long as this can be clearly justified by work competence or output, and should not be based on age difference or persist beyond the actual period of training.

5. Other issues

Age-based recruitment

5.1 CiNI believes that with the limited exceptions specified recruitment should be solely based on competence and not age. In relation to graduate training schemes CiNI believes these should only be used if the job requirements specify necessary skills which are only likely to be available through a degree programme. In any event such schemes should not contain age limits and should be open to graduates of all ages.

Employment-related insurance

5.2 Motor insurance frequently discriminates against younger people and inhibits them from seeking certain types of employment (eg HGV driving). CiNI believes that insurance companies should be required to demonstrate that any such raised premiums can be justified on actuarial grounds, and that employers should not be able to justify failure to appoint on grounds of higher premiums unless these are at a level that would be genuinely prohibitive to the employer.

Harassment

5.3 CiNI believes that the strongest concepts of protection should be incorporated in the definitions of discrimination, indirect discrimination, victimisation, harassment, positive action, genuine occupational requirements, positive action, discrimination after employment. It believes that the Single Equality Act should be used to harmonise these definitions upwards to a common level, and that age discrimination provisions should meet these standards. It notes the specific relevance of harassment in this context. Many examples of harassment brought under other equality legislation have demonstrated specific targeting of young people in the workplace. Indeed there are also numerous examples of harassment – unconnected with religious belief, gender etc - simply because an employee is a young person in a specific worksite – initiation ceremonies being a specific example. The proposed legislation needs to raise the profile of this issue for a particularly vulnerable group.

Compensation awards

5.4 CiNI welcomes a number of the proposed changes to redundancy legislation and awards. First it believes strongly that exceptions to those who can bring unfair dismissal awards should not be based on age: everyone in employment should be capable of bringing unfair dismissal complaints which should not be subject to qualifying periods of service. Any other approach is directly and unjustifiably discriminatory on the grounds of age. CiNI agrees that the calculation of compensation and redundancy awards should not accord variable factors linked to different age groups, and that the exclusion of work below age 18 in calculating redundancy payments should also be removed. These are all

examples of direct age discrimination which have unjustifiably been part of the system for too long. However the cap of 20 years service that currently exists is equally unfair and should be replaced by a calculation involving actual years worked.

6. Conclusions

- 6.1 CiNI welcomes the proposals to implement age discrimination legislation in Northern Ireland. It has a number of explicit concerns, however.
- 6.2 A major source of discrimination for children and young people relates to how they access and how they are provided with goods, services and facilities. These issues must be progressed as a matter of priority with the Single Equality Bill.
- 6.3 The exclusion of schools from the coverage of the proposed legislation in relation to training will also significantly impair the ability of children to tackle unfair treatment in vocational, educational and training provision and should be removed.
- 6.4 Whilst CiNI accepts the general proposition that there may be circumstances where differential treatment on the grounds of age can be justified, it is concerned to ensure that any permitted exceptions should be extremely rare and always capable of being tested on their genuine necessity at law.
- 6.5 Many laws in society are inherently age-discriminatory – as has been recognised in these proposals by the recommended changes to the system for making redundancy and compensation awards. CiNI sees absolutely no justification for the retention of differential minimum wage levels depending on age, and believes that all other legislation prescribing differential treatment at different age levels should be reviewed (as presumably should already be happening under s75) to ensure that it can be justified.
- 6.6 CiNI welcomes the opportunity to respond on this key development to improving the rights of children and young people. It trusts that its concerns will be addressed to ensure that children and young people are treated fairly as citizens, and would be pleased to provide further specific comments if this would be helpful.