

OFMDFM Consultation on

**Promoting Equality of Opportunity
Consultation on the draft
Employment Equality (Age)
Regulations (Northern Ireland)
2006**

**Response from
Children in Northern Ireland (CiNI)**

November 2005

Introduction

Children in Northern Ireland (CiNI) is the regional umbrella body for the voluntary child care sector in Northern Ireland.

CiNI represents the interests of its 90 member organisations, providing policy, information, training and support services to members in their work with children and young people.

We responded to OFMDFM's previous consultation on 'Promoting Equality of Opportunity: Prohibiting Age Discrimination in Employment and Training Legislation for Northern Ireland (2003). In our response we urged OFMDFM to ensure that subsequent age discrimination legislation would adopt and reflect a comprehensive understanding of age-related discrimination, thereby acknowledging the need for strong anti-discrimination legislation to provide protection and redress for both younger and older citizens on whom age discrimination impacts most significantly. We urged OFMDFM to ensure that any justification for age discrimination or exceptions to age discrimination legislation would be extremely rare and always capable of being tested on their genuine necessity at law.

We are extremely concerned that the subsequent Draft Employment Equality (Age) Regulations (Northern Ireland) 2006 which are the subject of the current consultation fail to reflect a holistic understanding of the concept of age discrimination in Northern Ireland. We are particularly concerned that rather than ensuring that age discrimination is only permitted in exceptionally rare and carefully defined circumstances, the draft Regulations provide more scope for justification of age discrimination.

CiNI would like to endorse the response of our member organisation the Children's Law Centre and we have sought to reiterate the key messages delivered by CLC in this response.

General Comments

There are a number of general comments which we raised in our response to the previous consultation which have not been addressed by OFMDFM, and hence we wish to reiterate these comments.

While we welcome the introduction of anti-discrimination legislation 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. However we do note that extension of protection against age discrimination to the provision of goods and services is being considered in the context of the development of a Single Equality Bill for Northern Ireland.

CiNI notes that there continues to be no protection for children and young people in the services provided by schools. Differential treatment on the ground of age at school can place individual children at significant disadvantage and we continue to believe that such an exclusion cannot be justified. Added to this is the continuing failure to designate schools under Section 75 of the Northern Ireland Act 1998 which denies children and young people and those representing their interests, a consultative role in the development and review of policies. We continue to advocate that this failure to protect children and young people from age discrimination is effectively addressed through the extension of the Age Regulations to services provided by schools.

CiNI would urge OFMDFM to give due consideration to these concerns and would ask that urgency is accorded to the development and implementation of a Single Equality Act for Northern Ireland. CiNI would again reiterate its firm view 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.

International Standards

CiNI would highlight that in the process of development of the Age Regulations OFMDFM must defer to international human rights standards, and for children and young people, specifically those provided in the United Nations Convention on the Rights of the Child (UNCRC).

The UK Government has an obligation to ensure that all children and young people have their rights promoted and upheld. In ratifying the UNCRC the Government has committed to compliance with a set of non-negotiable and legally binding minimum standards and obligations in respect of all aspects of children's lives and also to the implementation of the terms of the Convention by ensuring that United Kingdom law, policy and practice relating to children is in conformity with UNCRC standards. The UK Parliamentary Joint Committee on Human Rights in its recent report on the UNCRC described the obligations the UNCRC places on government as follows;

"It should function as a set of child- centred considerations to be used by all departments of government when evaluating legislation and policy making"

One of the principles of the UNCRC is Article 2 – the right to non-discrimination. This article places an obligation on government to ensure that all children and young people are protected from all types of discrimination. Article 2 states that,

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

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities,

expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

In addition, the UNCRC Committee's General Comment No 5 states that in order to ensure that the provisions of the UNCRC are being fully implemented in law, policy and practice there is a need for a process of continuous child impact assessment and child impact evaluation (CRC/GC/2003/5 para.45). In this context, this involves carrying out a child impact assessment on the Age Regulations to ensure that they in no way contravene any of the provisions of the UNCRC and that the UNCRC is a fundamental, underpinning component of the Age Regulations.

The UNCRC Committee's concluding observations (2002) also place an obligation on the Government to,

“...adopt the best interests of the child as a paramount consideration in all legislation and policy affecting children throughout its territory...” (CRC/C/15/Add.188 para 26)

With a view to meeting these minimum standards for children CiNI would urge OFMDFM to ensure that the final Age Regulations are compliant with the UNCRC principles of non-discrimination and best interests and that account is also taken of the views of the child in compliance with Article 12.

Consultation

CiNI is concerned that the responses to the previous consultation on 'Prohibiting Age Discrimination in Employment and Training Legislation for Northern Ireland' have largely been ignored. We note that in a number of instances, where the majority of respondents to the previous consultation favoured a particular approach, this has subsequently been ignored by OFMDFM in favour of either OFMDFM's own conclusions or the GB policy line. This calls into question the very purpose of consultation and leads us to question the value which OFMDFM accords to the consultation process. CiNI believes that this approach to the interpretation of consultation responses is in fact in contravention of the purpose of consultation as set out in Section 75 of the Northern Ireland. CiNI would refer OFMDFM to the Equality Commission for Northern Ireland's Guidance for Implementing Section 75 of the Northern Ireland Act 1998 which states at 2.19 that '*consultation enables an assessment of the views of those who are affected by policy decisions*'. Furthermore Schedule 9 states that '*a public authority must engage in consultation about the likely impact (on the promotion of equality of opportunity) of its existing and proposed policies, and in making decisions about such policies, it must take the consultation into account*' (Paragraphs 4 (2) (b)). We do not believe that in ignoring the majority of respondents or favouring the GB policy line that OFMDFM has properly taken into account responses to consultation.

We would request information on the system which OFMDFM uses to analyse responses to consultation process including the degree of weight which will be attributed to both individual and organisation responses. It would suggest that the particular circumstances of Northern Ireland and in particular the views of those who will be directly affected by this legislation are subsidiary to the GB policy line. This is a vital element to drawing conclusions from responses and progressing with identified areas for

immediate action. For this reason, we would appreciate information both on the system itself and on its operation for the purposes of analysis.

Furthermore, CiNI would also request information on how OFMDFM have or how it intends to consult directly with children and young people as one of the groups likely to be impacted upon most by the implementation of the Age Regulation. This form of consultation is essential both in ensuring OFMDFM's compliance with Section 75 and also in ensuring OFMDFM's compliance with Article 12 of the United Nations Convention on the Rights of the Child which provides for respect for the views of the child.

Objective Justification and Direct Discrimination

CiNI is gravely concerned by the proposal to enhance the scope for justification of direct age discrimination. We do not believe that this can be legitimately justified given the much narrower scope provided by other strands of discrimination legislation.

We are concerned that despite 67% of respondents to the previous consultation stating that they did not believe that the list of legitimate aims justifying differences of treatment in exceptional circumstances should be expanded, this list has been set aside in favour of an unrestricted open ended approach providing employers or providers of vocational training with unfettered freedom to demonstrate that age-related practices can be justified by reference to legitimate aims. We believe that rather than ensuring that the scope for justifying direct age discrimination is 'strictly limited' (para 4.5) this will make it increasingly difficult to strictly limit justification for direct age discrimination. We believe that this approach seriously undermines the draft Age Regulations as a whole and the protection they offer to children and young people.

CiNI would advocate strongly that the provisions on direct discrimination are brought into line with other strands of discrimination legislation.

CiNI would also highlight its concerns in relation to the requirement that in order to justify direct discrimination an employer or provider of vocational training must not only show that they have a legitimate aim, but also that the discrimination is 'proportionate'. We believe that this standard falls short of that which is required by the Framework Directive, which uses the term 'appropriate and necessary'. We note that the consultation document states that this test is the same as the Directive's requirement that the means of pursuing the aim are appropriate and necessary. We disagree with this statement and are of the opinion that the Directive's test is a more stringent one, which may require more thorough proof in terms of justification. The European Court of Justice (ECJ) has given guidance on what is required of an employer in order to "justify" the application of a requirement, condition, policy or practice which is discriminatory in effect in the case of gender discrimination. In the case of *Bilka Kaufhaus GmbH -v- Weber Von Hartz* [1989] IRLR 317 ECJ, the ECJ held that in order to justify an indirectly discriminatory pay practice it must be shown that "the means chosen for achieving the employer's objective serve a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end". This test was endorsed by the House of Lords in the case of *R -v- The Secretary of State for Employment ex-parte Equal Opportunities Commission and Another* [1994] IRLR 176. CiNI believes that the language of the Regulations should mirror that of the Directive to ensure that the intention of the Directive is accurately reflected, this is particularly important in the case of legal definitions which will most certainly be debated in the courts.

National minimum wage

CiNI remains gravely concerned at the continuing fundamental breach of the rights of young workers through the discriminatory age bands applied through the National Minimum Wage. The rationale advanced by Government for retaining discriminatory age bands is that “many employers would be unwilling to pay younger employees the same (higher) minimum wage than employees over 21 are getting” and therefore those age bands are justifiable within the terms of the Directive. This does not amount to an objective justification in accordance with the standards of Article 6 of the Framework Directive, but is merely an expression of the widespread discriminatory assumptions about the value of younger workers and the work that they do. If circumstances do arise where an employer is, in the context of the post in question, justified in paying a lower rate to a younger worker then that employer will have an opportunity to argue that the broad objective justification defence applies in the circumstances of the particular case. A blanket exemption applying to all young workers in all cases is neither appropriate nor necessary. It merely retains a statutory rationale for creating a pool of very cheap young labour. This exception will not only disadvantage young workers, but will in fact disadvantage workers at both ends of the age spectrum. On the one hand, we will see the exploitation of young cheap labour which, in turn, will act as a disincentive to the employment of older workers even where on personal merit they are the best candidate for the job.

CiNI would again reiterate that the differential National Minimum Wage is one of the most overt examples of age discrimination against young people and cannot be justified by a society purporting to uphold the spirit of equality. We would highlight that the discriminatory nature of the National Minimum Wage whereby children under the age of sixteen are not entitled to a minimum wage and those under 18 and 21 are entitled to lower rates is legalised economic exploitation and contributes directly to child poverty. As in all employment matters pay should be based on competence and not age determined prejudice. Until the National Minimum Wage is equalised for people of all ages Government remains in breach the UNCRC principle of non-discrimination (Article 2). The UN Committee on the Rights of the Child in its 2002 report on the implementation on the UNCRC in UK and NI, recommended that the Government reconsider its policies regarding the national minimum wage for young workers in light of the principle of non-discrimination (CRC, para 55).

Young people have consistently voiced their concerns rejecting lower wages based on age as discriminatory (CLC, 2004 and NICCY, 2004).

Service-related pay and benefits

In relation to service-related pay and benefits we note that the Age Directive does provide that the fixing of conditions of seniority in service for access to certain employment advantages can constitute justified discrimination. However, the Directive does not provide for an outright exemption.

The majority of respondents (68%) supported being able to objectively justify such practices. However the draft Age Regulations have not only went beyond the scope of

the Directive but have also gave preference to the responses of the minority of respondents by providing for one general exemption and two specific exemptions. CiNI believes that in going beyond the scope of the Directive these exemptions are open to legal challenge and we would again highlight our concern that OFMDFM has not complied with their section 75 requirement to properly take into account responses to consultation.

The general exemption which will apply where, 'it reasonably appears to the employer that there will be an advantage to him', in awarding benefits on this basis. This is an unacceptably low threshold of proof for an employer to meet in order to raise a defence. The exemption does not require employers to collate objective evidence of what constitutes, "advantage". It falls short of the standard of objective justification required by Article 6 of the Framework Directive and is again susceptible to legal challenge on grounds of non-compliance.

CiNI would urge that these exemptions are removed as they would provide unjustifiable scope for permitting age discrimination in relation to service related pay and benefits.

Volunteering

We also remain concerned that there is no protection for children and young people and in fact people of any age in relation to unpaid voluntary work. Again we understand and accept that some of the provisions of implementing highly transparent processes in relation to employment would result in prohibitive costs for the voluntary sector, however the voluntary sector is committed to ensuring the highest standards of fairness and protection for all those who work in the sector. CiNI would reiterate that that within the context of the Single Equality Act that the issue of voluntary workers, and the extent to which they will be protected by anti-discrimination law, is debated more broadly and that age could be included with whatever protection is given.

Section 75 Considerations

While we appreciate that Northern Ireland does not have jurisdiction over the National Minimum Wage, we also must point out the high constitutional importance of section 75 in the context of the new settlement in Northern Ireland. There is very obviously a need for OFMDFM to be proactive in meeting its obligations under section 75 in this consultation exercise. We are concerned with the apparent failure of OFMDFM to afford the correct degree of importance and political will to the effective operation of its section 75 duty. The practice of inheriting policies and pieces of legislation as a direct read across from England and Wales without regard for the specific circumstances of Northern Ireland or indeed any meaningful attention shown to section 75 as it operates in Northern Ireland is a matter of grave concern as the duties imposed under section 75 apply whether we are in a climate of direct rule or devolution, or whether Northern Ireland has jurisdiction over a piece of legislation or not. CiNI has real concerns with the limited consideration that has been given to Section 75 considerations in the development of the draft Age Regulations. The consideration given fails to identify and address the adverse impact which the requirement for objective justification and the exemptions will have on the right of children and young people not to be discriminated against on the grounds of age. OFMDFM should, as a matter of urgency, carry out a full and comprehensive Equality Impact Assessment on the Age Regulations in their entirety and where adverse impact is identified, such as in the case of the National Minimum

Wage, it should be acknowledged and the adverse impact that its operation will have on children and young people should be addressed in discharging its section 75 duties. The fact that this has not been the case indicates a failure on behalf of OFMDFM to discharge its statutory duty, attribute the correct degree of importance to section 75 and ensure its effective implementation. We wish to point out that OFMDFM does have jurisdiction over the Age Regulations themselves and in light of the obvious adverse impact on children and young people as a result of the National Minimum Wage, OFMDFM should remove the National Minimum Wage exemption from the Regulations, thus not protecting the primary legislation and abolishing economic exploitation on grounds of age in Northern Ireland.

Conclusion

In responding to this consultation CiNI's primary objective has been to advocate for the highest possible level of protection against age discrimination for children and young people who experience the worst excesses of age discrimination. We trust that in light of our comments and those from across the voluntary and community sector who work with and for those who will be directly affected by this legislation that the appropriate and necessary revisions will be made to the draft Age Regulations. We continue to support the development of robust age discrimination legislation and are committed to engaging with the ongoing process of developing effective legislation for Northern Ireland.