



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to consultation on Proposals to Extend Age Discrimination
Legislation (Age Goods, Facilities and Services).**

Summary

The Northern Ireland Human Rights Commission (the Commission) confines its response to the issues of scope (age), public functions, objective justification and exceptions, and positive action. The Commission will provide clause by clause advice to the Northern Ireland Assembly on the Bill when introduced. The Commission:

- **welcomes the general principle of prohibiting age discrimination in the provision of goods, facilities and services, charities, premises, education, public functions and private clubs and associations. The Commission advises that OFMDFM reflect in the document that the purpose of the proposals are in accord with a number of human rights principles and obligations and that legislation would partially give these principles and obligations domestic effect (para 14).**
- **notes the distinctions made between children and adults in a number of areas of domestic law. It recognises that these distinctions will remain in force through the proposed exception for statutory authority. The Commission further accepts the legitimacy of this approach (para 17).**
- **welcomes in principle the prohibition of age discrimination in goods, facilities and services but is concerned with the gap in the protection of children under the age of 16. Whilst welcoming the proposals generally, the document brings into sharp relief that the overall domestic legal framework will not fully comply with international human rights obligations. The Commission notes that the document does not set out the rationale for excluding**

children and young people under 16 from the scope of the legislation. The Commission recommends OFMDFM clearly sets out the rationale for excluding under 16s (para 24).

- **if this proposed legislation is not extended to cover under 16s, recommends that OFMDFM provides an assurance that legislation will be introduced to ensure children under 16 are protected against discrimination in the range of functions and activities contained in the document, including the provision of goods, facilities and services within a specific and expedited timeframe (para 25).**
- **welcomes the provision on public functions in the consultation as it complies with the prohibition on discrimination by public authorities as envisaged by Article 26 ICCPR (para 30).**
- **welcomes the current proposal that any future age discrimination legislation should be subject to an objective justification test. This approach is consistent with the jurisprudence of the ECtHR. However given that the concepts of objective justification and exceptions are included in the proposals, this again brings into question the rationale for excluding children under 16, where such concepts could be equally applied in accordance with recognising evolving capacity as envisaged by the UNCRC, particularly Article 5 (para 39).**
- **welcomes the proposal that any future age discrimination should include provision on positive action measures, which is in line with principles in the general comments of UN Treaty Bodies (para 45).**



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Introduction

1. The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Office of the First Minister and Deputy First Minister (OFMDFM) in response to a consultation on proposals to extend age discrimination legislation to the provision of goods, facilities and services.
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
 - European Convention on Human Rights (ECHR);¹
 - International Covenant on Civil and Political Rights (ICCPR);²
 - International Covenant on Economic, Social and Cultural Rights (ICESCR);³
 - UN Convention on the Rights of the Child (UNCRC);⁴
 - UN Convention on the Elimination of Discrimination against Women (CEDAW);⁵
 - Charter of the Fundamental Rights of the European Union (CRFEU).⁶

¹ Ratified by the UK in 1951 and given further domestic effect by the Human Rights Act 1998

² Ratified by the UK in 1976

³ Ratified by the UK in 1976

⁴ Ratified by the UK in 1991

⁵ Ratified by the UK in 1986

⁶ Charter of the Fundamental Rights of the European Union, (2000/C 364/01)

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification and the provisions of the Northern Ireland Act 1998.⁷
4. In addition to the treaties, there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
 - UN Principles for Older Persons;
 - HRC General Comment No.18: Non-discrimination;
 - CESCR General Comment No.6 on the economic, social and cultural rights of older persons;
 - CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights);
 - CEDAW General Recommendation No.5 on Temporary special measures;
 - CEDAW General Recommendation No.27 of the UN CEDAW Committee on the Rights of Older Women ;
 - CRC General Comment No.1 on the Aims of Education;
 - CRC General Comment No. 4 on Adolescent health and development in the context on the Rights of the Child;
 - CRC General Comment No 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6);
 - CoE Committee of Ministers Recommendation on the Promotion of Human Rights of Older Persons.⁸
5. The Commission confines its response to the issues of proposed scope in the context of age, public functions, the principle of objective justification and positive action. The Commission will provide clause by clause advice to the Northern Ireland Assembly when the Bill is introduced in accordance with its statutory obligation under section 69(4) of the Northern Ireland Act 1998.

⁷ In addition, Section 26 (1) of the Northern Ireland Act 1998 provides that 'if the Secretary of State considers that any action proposed be taken by a Minister or Northern Ireland department would be incompatible with any international obligations...he may by order direct that the proposed action shall not be taken.' Section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.

⁸ Recommendation CM/Rec (2014) 2,

<https://wcd.coe.int/ViewDoc.jsp?id=2162283&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

Scope- Age

6. The consultation document proposes 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. This is an improvement on the current provision and goes further than the position elsewhere in the UK, where such protection has been extended to those aged 18 or over.
7. There are a number of human rights instruments that contain a general (freestanding) prohibition on discrimination. Article 26 of the ICCPR provides that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.' Article 26 also stipulates that the law has to prohibit discrimination and ensure equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This is a freestanding provision and therefore its application is not confined to the rights contained within the Covenant.
8. There are a range of other provisions that are not freestanding as they apply only when combined with other rights contained within the relevant instruments (known as parasitic provisions). These include Article 2 (1) of the ICCPR,⁹ Article 2(2) of the ICESCR¹⁰ and Article 14 of the ECHR which prohibits discrimination in the enjoyment of the rights contained within the Convention on a number of grounds, including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
9. General comments of the UN Treaty Bodies have elaborated on the non-discrimination provisions contained within the Treaties. For example, General Comment No.20 of the ICESCR Committee makes it clear that

⁹ Article 2(1) ICCPR provides that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

¹⁰ Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains a non-discrimination provision, stating 'the State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

although age is not specifically mentioned in Article 2 , it is considered as protected under 'other status'.¹¹

10. Article 14 of the ECHR does not explicitly refer to age discrimination, however, the European Court of Human Rights (ECtHR) jurisprudence provides useful guidance on the interpretation of the Convention in this regard. The case of *Schwizgebel v Switzerland* considered the issue of age under the ambit of other status for the purposes of Article 14 (in conjunction with Article 8).¹² The state may permit differential treatment on the grounds of age, if the difference in treatment is objective and reasonable.¹³ The ECtHR has also ruled that once the applicant has shown a difference in treatment, the State has a burden of proof to show that the treatment is justified.¹⁴
11. Given that Article 14 can only be invoked if it falls within the scope of another Convention right, there are a number of ECHR provisions that are relevant in context of non discrimination in the provision of goods, facilities and services including Article 6 (the right to a fair trial), Article 8 (the right to respect for private and family life), Article 10 (freedom of expression), Article 11 (freedom of association), Article 12 (the right to marry and found a family), Article 1 of Protocol 1 (the right to property) and Article 2 of Protocol 1 (the right to education).
12. Further to the UN Treaties and ECHR, Article 21 of the CFREU prohibits discrimination on the grounds of age. In addition, a number of other articles of the CFREU are relevant in the context of OFMDFM's proposals on goods, facilities and services including Article 36 which recognises and respects access to services of general economic interest and Article 38 which provides that Union policies shall ensure a high level of consumer protection.¹⁵
13. There are a number of human rights instruments that specifically relate to older persons, including older women. These include the UN

¹¹ CESCR 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/20 para 29.

¹² *Schwizgebel v Switzerland*, 10 June 2010, Application No.25762/07. This case involved alleged age discrimination in the State's refusal of her application to adopt a second child.

¹³ *Ibid*, Para 97. The Court did not find a violation, finding that the difference in treatment was objective and reasonable and that the State has a broad margin of appreciation as well as the need to protect the best interests of the child.

¹⁴ *DH v Czech Republic and Others*, 13 November 2007, Application No 57325/00 para 177

¹⁵ The CRFEU also includes Article 6 (right to liberty and security of the person), Article 7 (the right to respect for private and family life), Article 12 (freedom of association) and Article 14 (right to education).

Principles for Older Persons,¹⁶ ICESCR Committee's General Comment No. 6 on the economic, social and cultural rights of older persons,¹⁷ General Recommendation 27 of the UN CEDAW Committee on the Rights of Older Women,¹⁸ Article 25 of the CFREU,¹⁹ and the CoE Committee of Ministers Recommendation (2014)2.²⁰

14. The Commission welcomes the general principle of prohibiting age discrimination in the provision of goods, facilities and services, charities, premises, education, public functions and private clubs and associations. The Commission advises that OFMDFM reflect in the document that the purpose of the proposals are in accord with a number of human rights principles and obligations and that legislation would partially give these principles and obligations domestic effect.

15. The consultation document recognises that 'there will be concerns and disappointment that those aged under 16 are not included at this stage.'²¹ OFMDFM has reported that it will continue to work with a wide range of people within the children and young people's sector to address this issue. The Commission notes that the document does not set out the rationale for excluding children and young people under 16 from the scope of the legislation.

¹⁶ UN Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>. the principles provide that older persons should have access to health care to help them maintain the optimum level of physical, mental and emotional well being and to prevent or delay the onset of illness. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

¹⁷ CESCR General Comment No. 6 set out the general principle that rights should be enjoyed by all people including older people. The Committee noted that the covenant does not refer explicitly to age, as at the time of drafting of the Covenant 'the problem of demographic ageing was not as evident or as pressing as it is now.' See General Comment No. 6 (1995) 'The economic, social and cultural rights of older persons'. Available at http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/INT_CESCR_GEC_6429_E.pdf

¹⁸ CEDAW "General Recommendation no.27 on Older Women and Protection of their Human Rights" 16 December 2010, CEDAW/C/GC/27, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/53/PDF/G1047253.pdf?OpenElement> makes a number of recommendations to tackle the adverse impact of discrimination against older women in a number of areas including: health, participation in public life, education and economic empowerment.

¹⁹ The CFREU provides that 'the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.'

²⁰ Recommendation CM/Rec (2014) 2, provides that older persons shall enjoy their rights and freedoms without discrimination on any grounds, including age. Member states should also consider making explicit reference to age in their national anti-discrimination legislation and should take effective measures to prevent multiple discrimination of older persons.

²¹ OFMDFM 'Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) Consultation Document, July 2015, p 23

16. The domestic law in Northern Ireland makes distinctions between children and adults in a number of areas. The age of consent to have lawful sexual intercourse is 16 in Northern Ireland.²² Persons aged 16 may marry. However if they are under the age of 18, they will need permission from: either their parent or guardian; where a residence order is in place, the consent of the person with whom he/she lives; or where a care order is in force, the consent of the Health and Social Care Trust.²³ A person may not vote or participate in jury service until they are 18.²⁴ The age of majority is 18 years in Northern Ireland and legislation provides that a person under full age is defined as a minor.²⁵
- 17. The Commission notes the distinctions made between children and adults in a number of areas of domestic law. It recognises that these distinctions will remain in force through the proposed exception for statutory authority. The Commission further accepts the legitimacy of this approach.**
18. Article 1 of the UNCRC provides that for the purposes of the convention, 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' Article 2 requires State parties to respect and ensure the rights contained in the Convention are applied without discrimination. Article 3 of the UNCRC provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Article 15 recognises the right of the child to freedom of association. Article 24 of the UNCRC requires State parties to ensure the right of the child to the highest attainable standard of health. Article 31 recognises the right of the child to rest, leisure, engage in play and recreational activities.
19. A number of the UNCRC provisions recognise the concept of the child's evolving capacity. Article 5 calls on State parties to recognise and respect the role of parents and guardians to provide direction and guidance to the child in exercising their convention rights, in a manner consistent with evolving capacity. Article 12 recognises the right of children to express

²² Sexual Offences (Northern Ireland) Order 2008

²³ Age of Marriage Act (Northern Ireland) 1951 and Article 22 and Schedule 9 of the Marriage (Northern Ireland) Order 2003. It should be noted that a County Court can make an Order dispensing with the relevant consents if it is satisfied that the marriage is in the best interests of the child and it is not practicable to gain consent, the person withholds consent or there is uncertainty to whose consent is required (Article 23).

²⁴ Section 1 of The Representation of People Act 1983, The Juries (Northern Ireland) Order 1996 and

²⁵ Section 1 and section 7 of the Age of Majority Act (Northern Ireland) 1969

views freely and that the views of the child will be given due weight in accordance with age and maturity.

20. General Comment No.1 of the UNCRC Committee also elaborates on the concept of evolving capacity. The CRC provides that 'schools should foster a humane atmosphere and allow children to develop according to their evolving capacities.'²⁶ General Comment no. 4 of the CRC on adolescent health also recommends the need for minimum ages of sexual consent, marriage and the possibility of medical treatment without parental consent that 'closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity.'²⁷ This reflects the duties of the State in the UNCRC to ensure the child is protected. For example, Article 3 (2) of the UNCRC which states 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.' General Comment No.5 on general implementation measures notes that Article 4 of the UNCRC requires that State parties 'take all appropriate legislative, administrative and other measures for implementation of the rights therein.' The General Comment provides that 'ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental.'²⁸
21. The concluding observations of the CRC on the UK's State report in 2008 recommended that the State party ensure full protection against discrimination by taking all necessary measures to ensure that cases of discrimination against children are addressed effectively, including through the use of disciplinary, administrative or if necessary penal sanctions.
22. The Commission recommended in its recent submission on the UK's State report under the UNCRC that the CRC ask the Northern Ireland Executive through the State party what legislative measures will be taken to ensure that children under 16 are not discriminated against on the

²⁶ CRC 'General Comment No.1: The aims of education' CRC/GC/2001/1, Para 12

²⁷ CRC 'General Comment No.4: Adolescent health and development in the context of the Convention on the Rights of the Child' CRC/GC/2003/4, para 9.

²⁸ UNCRC General Comment No 5 (2003) on 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5, para 1.

basis of age when accessing goods, facilities and services.²⁹ The issue will be raised in the forthcoming examination of the UK's report in October at the pre-sessional working group which will draft a List of Issues and at the dialogue in 2016.

23. The Commission notes comments made by the Joint Committee on Human Rights (JCHR) in its report on Children's Rights in 2009. The JCHR concluded:³⁰

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

The objective justification test and proposed exceptions in the consultation document are noted by the Commission. Provided these are proportionate and meet a legitimate aim, such provisions should as observed by the JCHR be generally acceptable for the purpose of compliance with human rights obligations.

24. **The Commission welcomes in principle the prohibition of age discrimination in goods, facilities and services but is concerned with the gap in the protection of children under the age of 16. Whilst welcoming the proposals generally, the document brings into sharp relief that the overall domestic legal framework will not fully comply with international human rights obligations. The Commission notes that the document does not set out the rationale for excluding children and young people under 16 from the scope of the legislation. The Commission recommends OFMDFM clearly sets out the rationale for excluding under 16s.**
25. **If this proposed legislation is not extended to cover under 16s, the Commission recommends that OFMDFM provides an assurance**

²⁹ NIHR 'submission to the UN Committee on the Rights of the Child on the UK's Fifth Periodic Report on compliance with the UN Convention on the Rights of the Child' July 2015, p 9.

³⁰ JCHR 'Children's Rights' Twenty Fifth Report of session 2008-09, HL Paper 157, HC 318, para 45

that legislation will be introduced to ensure children under 16 are protected against discrimination in the range of functions and activities contained in the document, including the provision of goods, facilities and services within a specific and expedited timeframe.

Public Functions

26. The document proposes to prohibit age discrimination in the exercise of public functions. The consultation proposes that activities that would be covered by the term 'public functions' include: the decisions of Ministers, policing functions (e.g detention and investigation of crime), regulatory functions, licensing functions, and policy making decisions of government.
27. There is an issue of public functions being exercised by private bodies. The consultation document highlights activities carried out by private authorities on behalf of the state are covered under section 6(3)(b) of the Human Rights Act (HRA) 1998. The Consultation proposes to mirror the HRA in this regard.
28. The document provides that the law does not provide a clear basis for legally challenging discrimination on the grounds of age in the exercise of public functions, although notes limited possibilities such as challenges under section 75 of the Northern Ireland Act 1998, Article 14 of the ECHR which fall within the scope of other convention rights or through judicial review on the ground of irrationality.
29. As highlighted earlier, Article 26 ICCPR is a free-standing non discrimination provision. The UN Human Rights Committee (CCPR) elaborated on the scope of Article 26, highlighting that whilst Article 2 ICCPR limits the scope of rights to be protected against discrimination to those provided for in the Convention, Article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities. The Human Rights Committee states that when legislation is adopted by a State party, it must comply with Article 26 and its content should not be discriminatory.³¹ This is broader than the protections in Article 14 of the ECHR which can only be invoked if it engages another convention right and section 75 of the Northern Ireland Act 1998.
30. **The Commission welcomes the provision on public functions in the consultation as it complies with the prohibition on**

³¹ HRC 'General Comment No. 18: Non Discrimination', para 12.

discrimination by public authorities as envisaged by Article 26 ICCPR.

Objective Justification Test and Exceptions

31. The consultation includes the proposal that any future age discrimination legislation should include a provision for an objective justification test and service providers would have to meet this test to continue age based practices. In order to meet the objective justification test, the treatment must be proportionate; it must be an appropriate way of achieving the legitimate aim; and must be necessary in order to achieve it.³²
32. The concept of an objective justification test is generally in line with the jurisprudence of the ECtHR. In the case *Thlimmenos v Greece*, the ECtHR ruled that the right under Article 14 not to be discriminated against is violated when States without a reasonable and objective justification treats differently persons in analogous situations or fails to treat differently persons whose situations are significantly different.³³
33. In the case of *Kiyutin v Russia*, the court reiterated that the justification for difference in treatment must be objective and reasonable, that is to say that it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.³⁴
34. The general approach of the European Court of Human Rights in the application of 14 of the ECHR was outlined in the recent UK Supreme Court case *SG and others v Secretary of State for Work and Pensions* in 2015 as follows:³⁵

In order for an issue to arise under Article 14 there must be a difference in treatment in analogous or relatively similar situations. Such difference in treatment is discriminatory if it has no objective and reasonable justification, in other words it does not pursue a legitimate aim or if there is not a reasonable relationship of

³² OFMDFM 'Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) Consultation Document, July 2015, p 44

³³ *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97 ,para 44, 28 October, 1987. See also *Inze v Austria*, 28 October 1987, Application No. 8695/79 ,para 41; *Pretty v UK*, 29 July 2002, Application No. 2346/02 para 88; and *DH v Czech Republic*, 13 November 2007, Application No. 57325/00, para 175.

³⁴ *Kiyutin v Russia*, 16 March 2011, Application No. 2700/10 para 62. See also *Stec and others v UK*, 12 April 2006, Application Nos. 65731/01 65900/01, para 5.

³⁵ *SG and others v Secretary of State for Work and Pensions* [2015] UKSC 16, para 7

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

35. Article 24(1) ICCPR specifically makes reference to children and the principle of non-discrimination, stating:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State

36. Article 24 of the CFREU provides for the rights of children to protection and care that is necessary for their well-being. Furthermore, Article 24 reflects Article 3 of the UNCRC as it stipulates that all actions relating to children, whether by public authorities or private institutions, the child's best interests must be the primary consideration.

37. The Commission notes the document contains general and specific exceptions to allow age related practices to continue, such as age related holidays, age based concessions and age restricted schemes. The Commission recognises that these provisions allow proportionality to be applied within the margin of appreciation of the ECHR. The Commission has not done a clause by clause analysis but will do so when introduced.

38. Articles 3, 5 and 12 of the UNCRC recognise the role of the state to ensure the best interests of the child are of primary consideration, the role of the parents and guardians in providing guidance in a manner consistent with evolving capacity and that the view of the child will be given due weight in accordance with age and maturity.

39. **The Commission welcomes the current proposal that any future age discrimination legislation should be subject to an objective justification test. This approach is consistent with the jurisprudence of the ECtHR. However given that the concepts of objective justification and exceptions are included in the proposals, this again brings into question the rationale for excluding children under 16, where such concepts could be equally applied in accordance with recognising evolving capacity as envisaged by the UNCRC, particularly Article 5.**

Positive Action

40. The consultation document proposes that service providers should be allowed to take positive action measures to treat people in a particular

age group more favourably where those actions are a proportionate means of achieving the aim of overcoming disadvantage, meeting the different needs of the particular age group or increasing the participation of a particular age group in the particular activity.

41. The HRC has emphasised that States are required to take affirmative action measures to achieve the principle of equality and prevent discrimination prohibited by the Covenant. The HRC advised State parties to the ICCPR that:³⁶

For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

42. The ICESCR Committee advised that State parties may be under an obligation to adopt special measures to address discrimination. The Committee stated:³⁷

Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved.

43. The approach of human rights law to positive action is to apply the nature of temporary special measures. The general principles have been laid out by a number of Treaty Bodies. The Convention on the Elimination of Discrimination against Women (CEDAW) stated:³⁸

Adoption by State parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objective of equality of opportunity and treatment have been achieved.

³⁶ HRC 'General Comment No.18: Non- Discrimination' Thirty-seventh session (1989), para 10

³⁷ CESCR 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/20 para 9.

³⁸ Article 4(1) CEDAW

44. The Committee on the Elimination of Discrimination against Women recommended that State parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.³⁹ Whilst this recommendation relates to sex, the same principle may apply to age.
45. **The Commission welcomes the proposal that any future age discrimination should include provision on positive action measures, which is in line with principles in the general comments of UN Treaty Bodies.**

³⁹ CEDAW 'General Recommendation No.5: Temporary Special Measures' seventh session (1988)