



Northern Ireland
Assembly

Committee for the Office of the First Minister
and deputy First Minister

OFFICIAL REPORT (Hansard)

Age Discrimination Legislation relating to
Goods, Facilities and Services: OFMDFM
Briefing

30 April 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Mike Nesbitt (Chairperson)
Mr Chris Lyttle (Deputy Chairperson)
Mr Leslie Cree
Ms Megan Fearon
Mrs Brenda Hale
Mr Alex Maskey
Mr Stephen Moutray
Mr George Robinson

Witnesses:

Ms Patricia Carey	Office of the First Minister and deputy First Minister
Mr David McGowan	Office of the First Minister and deputy First Minister

The Chairperson: I invite Patricia Carey and David McGowan to the table. Patricia, you are making the opening address.

Ms Patricia Carey (Office of the First Minister and deputy First Minister): Thank you, Chair, for the opportunity to brief the Committee on age discrimination legislation relating to goods, facilities and services. As the Committee knows, there is already a significant body of legislation here that outlaws discrimination in the employment sphere. There is also a significant body of legislation that outlaws discrimination in the provision of goods, facilities and services and other non-employment matters.

The biggest single gap in the framework of equality legislation relates to discrimination on the grounds of age in the provision of goods, facilities and services. Extending age discrimination legislation to this area would fill the gap. However, it is a very complex area.

The Ministers' intention is that the proposed legislation will prohibit treatment that amounts to unfair discrimination without removing any of the protections and privileges currently available to the different age groups. Already, there can be discrimination that serves a positive purpose. The intention of this legislation is to make sure that that is not undermined in any way. To achieve this, we are examining the various exceptions that will be needed to ensure that appropriate differential treatment for members of various age groups can continue.

When Ministers are satisfied that a full suite of policy proposals has been developed to achieve the intended outcome, we will submit our proposals to full public consultation. It is our view that OFMDFM

has an excellent record in ensuring that groups affected by legislation are consulted appropriately. We hope to continue that good relationship in any consultation on this legislation.

Individuals, businesses, service providers, lobby groups and section 75 groups — people affected by the legislation — will be able to have their say. We will ask people to think carefully about the effects that the proposals might have and to tell us whether our proposals are the right ones and, if not, how they should be changed. On several occasions, the junior Ministers, in particular, have met the Children's Commissioner, the Equality Commission, Robin Allen, who also gave a presentation to the Committee, and various other people to discuss the legislation. So, we have already begun engagement in that way.

The meeting with the Children's Commissioner and the Equality Commission was extremely useful and productive, and a number of options are now being considered as a consequence. We will discuss the implications of the legislation with other Departments. A presentation was made to the Delivering Social Change programme board on 9 April, and, obviously, all Departments are represented on that board. Follow-up discussions and meetings with officials in Departments are now under way. I am happy to take any questions you might have.

I should have introduced myself. I am Patricia Carey, and I have responsibility for equality and human rights matters in the equality, human rights and social change division. David McGowan is a member of our team working on legislation, including age goods, facilities and services legislation.

The Chairperson: Thank you very much. Patricia, you mentioned the Department's record on consulting. Will you repeat, or say exactly, what you said about how you felt that you have a good reputation?

Ms Carey: That is what I said. It is our view that we have an excellent record in ensuring that groups directly impacted by the work have the opportunity to know about this and contribute their views. We seek to discuss any policy proposals widely with groups. It is our intention, once a consultation document has been developed fully, to have those ongoing discussions.

The Chairperson: If you were applying this to the Department as a whole, I would have to say that, for example, we ran a stakeholder event upstairs on the six signature projects, and one of the main criticisms was that stakeholders had not been consulted and that the signature projects suffered because of that.

Ms Carey: I am sorry to hear that. In respect of anything within my personal knowledge and my personal areas of responsibility, it is my view — and I think I said that it is my view — that we have good and positive working relationships with people. However, we are obviously always seeking to improve that.

The Chairperson: I certainly accept that there could be a distinction between your Department and what you are doing and perhaps what is happening elsewhere in the Department. I will not ask you to comment on colleagues.

Ms Carey: Well, I was not actually making that distinction.

The Chairperson: I am; probably in your favour.

We were advised in February that officials were to discuss the potential implications of age goods, facilities and services (GFS) legislation with Departments over the next few weeks. Are those few weeks up?

Ms Carey: They are, and we have not made just as much progress as we would have liked to have made. We had a good discussion at the meeting of the departmental programme board on Delivering Social Change, during which some of the implications of the legislation were discussed. That was a high-level meeting with grade 3s from the various Departments. We thought that having that audience, on those particularly significant proposals, with people who have a wide range of responsibility in Departments, would be the best way to start that off, followed by meetings with people involved in front line delivery and developing policies closer to the delivery of services.

The Chairperson: So, why have you not made as much progress as you would have liked to have made?

Ms Carey: In respect of facilitating meetings, we have had some discussions. We thought that it would be better to wait for the initial meeting to kick off the process. We are looking for nominations and are making sure that we are talking to the right people in Departments. We are not sure that we have identified those people yet. It is partly to do with facilitating that and making sure that we talk to the right people. The legislation will have potentially significant impacts on Departments and the way in which they deliver their services, and that can affect quite a wide range of people. It has maybe not moved forward just as quickly as we had hoped it would have done by this stage.

The Chairperson: From what you are saying, would it be fair to say that you are pretty close to the starting line on this process?

Ms Carey: I would not say that; no. Although we are starting to engage in a round of discussions with Departments, we have had continuing conversations over the months and years that this project has been a Programme for Government (PFG) commitment. Many issues have already been flagged up with Departments. They have already identified for us the legislation that they have in place and that might be affected by this legislation. So, a fair bit of preliminary work has been done. This latest stage of consultations with Departments is really to fully inform the document that will go out for public consultation. Again, it is about taking full advantage of all the work that has been done so far, making sure that it is up to date and that Departments are fully aware of all the implications of the legislation, and connecting with people who may not have been there when the initial discussions took place.

The Chairperson: When was the meeting with the grade 3s?

Ms Carey: It was on 9 April.

The Chairperson: 9 April.

Ms Carey: Yes.

The Chairperson: But your letter in February said that you were going to spend the next few weeks in discussions.

Ms Carey: That was the intention. Given that there was a Delivering Social Change programme board meeting scheduled for April and that it was absolutely critical to get people at a senior enough level in the Departments to really take note of this, a decision was taken to have that first meeting at the next meeting of the Delivering Social Change programme board.

Taking advantage of the time available, a paper was developed to point out some of the implications of the legislation. It was a good and informed discussion. It has representatives from the Department at a senior level who are already involved in these kinds of issues. On balance, it was felt that it was better to proceed that way than to try to get a one-off meeting when diaries are full and when it can be quite hard to get that grade of person in the room.

The Chairperson: It sounds to me like that was a change from what you told this Committee in February.

Ms Carey: No, it was a different way of getting the Departments together. The intention was to have a quick meeting with the grade 3s and then have them identify people in Departments to go and talk to about some of the detail and get specific nominations around that. When we thought about the logistics of that, given other commitments in the diaries of people at very senior levels, it was felt that using an existing forum would be the best way forward. Unfortunately, the next meeting was not until 9 April. I accept that that did push it back.

The Chairperson: OK; but what you are saying to us here is that this meeting with grade 3s on 9 April was basically about logistics and who from their Departments they were going to appoint to be the point person?

Ms Carey: No; I apologise if I have given that impression. A paper was prepared that looked at some of the issues. It built on some of the work that had been done before. The intention behind that was really to ensure that people at a senior enough level in Departments were aware of the implications of this legislation and started thinking about it in terms of not just their functions but how those are delivered.

The Chairperson: OK. What were the issues?

Ms Carey: Some were around the fact that one of the ways of dealing with discrimination claims in any piece of anti-discrimination legislation is to have an argument of objective justification. If, for example, the Department of Health wanted to have bowel cancer screening for men over 50, the argument for that would be that it would be justifiable discrimination because a man in that age group is more likely, on the basis of clinical need, to need that kind of intervention or screening.

The discussion was around providing examples and issues to allow people to look at what they were doing and understand the implications of the legislation more fully. Age is different from many other pieces of anti-discrimination legislation in that there are not the easy comparators that there might be on gender — men, women, transgender, or sexual orientation, lesbian, gay, bisexual. It is difficult to get a grasp of what age might mean in practice. Does it mean 40 as opposed to 60? Does it mean 25 as opposed to 55? It was to get Departments to start thinking about those things in a focused way given that the consultation document would bring all the key issues together. So, although some of those discussions had taken place already and although Departments had been apprised of the issues and there had been discussions, it was to make sure, at this critical point in the process, that people at a very senior level knew what we were talking about and were well placed to look across their areas of responsibility, think about what the impacts might be and, as a consequence, identify who in those areas might be the best people for us to talk to.

The Chairperson: At certain points, I hear you saying that you are just building on all the good work you have done over the past months and years but, at other points, I am getting the impression that you are starting with a blank sheet and want to draw up a schedule of the areas where there are legitimate grounds to have a distinction.

Ms Carey: I can see why you would think that. It is so important that, when we go to consultation, we look at all the issues properly and make sure that decisions are not taken ahead of a proper public consultation. We have to revisit the issues with Departments and make sure that it is clear that the legislation is going forward and that there will be an impact on them. It is refreshment rather than starting with a blank sheet, and it is because we are getting to the stage where it will make a huge difference. The responses we get to the consultation will depend very much on how well the issues are rehearsed, reflected and discussed in the consultation document. So, given that we are moving to a stage where the next step would be a move to full consultation, following approval by Ministers on a suite of proposals, it is important that we re-engage with Departments to make sure that all the information we have has been updated and that the people in post are fully up to speed with what is going on. Equally, there may well have been developments in the roles that Departments play and the services they provide. We have to make sure that all of that is captured.

The Chairperson: When you go to consultation, is it your desire to have a fairly comprehensive schedule of the sort of issues where it would be — *[Interruption.]* We have a new member. Sorry about that; somebody is looking for another Committee.

When you go to consultation, is it your expectation that you will have a solid schedule of the sort of issues where you could have justifiable exception, or are you saying, "Let us get out there and let the public and stakeholders tell us what should be on the schedule"?

Ms Carey: It is a combination of both. In the consultation document, we are proposing to highlight the areas where there might well be good reason for objective justification, for a decision to discriminate or, indeed, the need for a general exception that might take out, for example, age-related holidays or giving free bus fares to people of a certain age. We have done quite a bit of work to look at potential exceptions, and we have looked at legislation in other places, including in Great Britain, in the Equality Act, and the follow-up legislation that it produced on age, goods, facilities and services.

We have identified areas that might well be excepted because there is already discrimination on policy issues, and Ministers, the Executive and the Assembly might want to incorporate those into law. However, we should also test some of the objective justification arguments because, in any piece of

anti-discrimination legislation covering public authorities, account has to be taken of the fact that there are limited budgets and that we cannot possibly provide all the services that we want to provide to everybody. Objective justification on the basis of clinical need has to be a primary consideration, and the same applies to the functions of some other Departments. It is about getting the balance right between not wanting to have legislation with more exceptions than content and ensuring that any exceptions are justified and that the public, representatives, groups and others are content that that is the way to proceed.

The Chairperson: One of the examples we were given when we had the previous witnesses in front of us was of a young person being put into an adult ward in a hospital. We all get it that that is far from ideal and that it would be much better if the child were on a children's ward. However, there is a huge resource implication, as you are hinting. How does that work in practice?

Ms Carey: Again, it very much depends on how the legislation is written. In any anti-discrimination legislation of this nature, the intent would have to be clear. The remedies would be that a person could bring a claim of discrimination to a tribunal, and the tribunal or court would then take a decision. Often, judges are loathe to interfere with government functioning, and being allowed to make decisions around budgets, and are loathe to interfere with ministerial and Executive and Assembly responsibility. So, some of it would be covered by the general principle that, hopefully, the objective justification and the exceptions would ensure that there was no interference with allowing government to operate.

In respect of that specific example, there might be two main outcomes if it got to a court situation. The court could find that there had been discrimination, and action would have to be taken to ensure that provision is made for children to have facilities that are for children only, or a decision might be taken that there was justification, which had been made on the basis of objective need or other considerations, or in respect of exceptions that might cover areas where that situation would arise. So, that is a very good example that would be explored and tested fully in the consultation.

The Chairperson: Let us stick with that. I am sure that we would all like to think that a doctor or hospital administrator would have the humanity and common sense to say that a young person would not go into an adult ward inappropriately. However, if there is no space, and the option is to put the young person on an adult ward or not treat them at all, then clinically, the better decision would be to put them on the adult ward. But, this legislation could leave a young person with the ability to take a case. Let us say that they do take a case and are successful, does that mean that the Health Minister will be told, even though this happens once in a blue moon, that he or she would have to build another children's ward and resource it.

Ms Carey: In identifying this kind of example and testing it through this kind of process, this is a really valuable scrutiny role that the Committee plays. Looking at how we draft the legislation, and thinking about that situation, we would ask ourselves, "What is the outcome that we want?" If we want the outcome to be that the doctor is able to place the child in the adult ward so that the child can be treated, and that that is in the best interests of the child, we would ensure, as far as possible, that the legislation is drafted to allow for that.

One of the protections, or safeguards, that we intend to build into this legislation is that any existing age limits in legislation that are currently on the statute book would not be affected by this legislation. So, if there are already decisions being made on the basis of age, and that that is in statute, it will not be affected by this legislation unless decisions are taken, following consultation and scrutiny, that that will not be the case. That will allow for need and existing legislation to be taken into account. In the example you gave, it allows for those kinds of issues to be tested and for the real intention of the legislation to be looked at and thought about so that, rather than have that outcome after a tribunal or court case, we could build it in so that a decision on how it would go could, as far as possible, be taken through the drafting and presentation of the legislation.

The Chairperson: I am just thinking out loud here. I wonder about the extent to which, if the legislation were in play and were being used in these sorts of cases, the Health Minister could find that his or her hands were tied because any available resource — and we know that there is really no available resource for health — would have to be directed to satisfying court decisions based on this legislation.

Mr McGowan: In essence, you are correct. Invariably, cases will be brought before the courts and tested. In many cases, the courts will give a decision. How that decision is actually enforced will be a

matter for Departments to decide. So, issues in a range of areas will come before the courts and be tested.

The Chairperson: It raises the question of whether we, as legislators, want our legislative programme to be dictated by the judiciary.

Ms Carey: Absolutely not. That is why full consultation and exploration of the issues is critical. Already, the basis on which the legislation around children is taken forward is that it is in the best interests of the child. Nothing will be brought forward in this legislation that would be in conflict with that kind of approach.

Invariably, some law gets tested through court decisions, and rarely can anybody predict the workings of legislation exactly. However, there are things that we can do ahead of time to make it as robust and clear as is possible. As part of that process, and in line with other anti-discrimination legislation, quite a bit of work will be done with the Equality Commission in particular, which has a statutory role in this respect, to provide codes of practice or guidance that make clear what the impact of the law would be. Given that this would be worked up in the same timescale as consultation and development of the legislation itself, that is another way to test how some of the issues would work out.

With any legislation, there is the potential for consequences at some stage down the line that were not exactly intended. There are some very famous examples in disability legislation where the UK Government intended indirect discrimination on the grounds of disability to be covered by the legislation, whereas, in court, it was decided that that was not covered. So, the Government brought forward new legislation. Even in cases where you would like to think that you could have every example covered and could ensure adequate protection for people, and even when the intention of the Government is to have that protection, sometimes that is not how it works out in practice.

The Chairperson: Before I bring in Mr Maskey, I have a question. You hinted that you are off the starting line on the journey towards publishing the consultation. What is the timeline for that?

Ms Carey: We do not have a definite date yet, because we are still meeting Departments and working up the policy proposals. I cannot give you a date today, but I can certainly take your question back and see whether we can provide a better estimate than I am able to give you today.

The Chairperson: Would you accept that many will find that disappointing?

Ms Carey: Obviously people are anticipating the legislation being brought forward. As I said at the start, it will fill the biggest single gap in equality legislation here. So, most people will be looking for as much progress as possible.

Mr Maskey: Thanks very much, Patricia and David, for being available here today and for your presentation. I am coming at this from a different angle. Our party wants to see young people, the under-18s, included in this legislation. From that point of view, I want to put a couple of things to you. It is fairly simple and, in one way, you have already covered an element of it. Does the Department not consider a blanket exclusion of everybody who is under 18 to be discrimination in its own right?

Ms Carey: As you know, no decisions have been taken on that. There are different ways to tackle discrimination; it does not always have to be through legislation. The fact that legislation is being brought forward would obviously open up the debate and require examination of who was being included and why. However, there has not been age discrimination legislation for goods, facilities and services here. For a long time, there was no age discrimination legislation for goods, facilities and services in GB or the Republic of Ireland. In fact, very few Administrations around the world have age discrimination legislation for goods, facilities and services. That does not necessarily mean that those people are being discriminated against. There is always a view to be taken on how best to address discrimination. One way is to do it through legislation, but there are other means. That is one of the issues that will be tested through this process.

Mr Maskey: Thanks for that, Patricia. I am not a lawyer, but I fail to see how we can have anti-discrimination legislation that, once you introduce it, might not include others. I cannot fathom how a Department could then argue that you can just blanket-exclude a section of the population. You have given your response, and I appreciate that. I am just giving you our response.

You have already covered part of my next question. If we bring forward legislation to deal with this issue in its entirety, you were quite clear in your earlier response that that does not usurp existing legislation that protects parental responsibilities, for example, and some of the stuff that the Chair referred to earlier. I am just putting that on the record. You already made that point.

Section 75 duties obviously take on board young people. You referred earlier to the consultation processes. Will you elaborate on the extent of the Department's work on the section 75 screening?

Ms Carey: Any policy and legislation is screened for section 75 impacts and, where appropriate, full equality impact assessments are carried out. We are aware of that. Obviously, we have been thinking very much around the equality impact assessments and compatibility with section 75, as we would in any policy area. However, final decisions have not been taken and all the policies have not been fully worked up, so we are still in the process of screening. A final screening document accompanying any consultation document would look at all those issues, but what goes into the screening document will very much depend on what goes into the policy document. We are very much aware of our section 75 responsibilities, and we are taking those into account in our development of proposals. No equality screening has been finalised yet, and no full EQIA has been completed yet because we are not yet at a stage to do that.

Mr Maskey: I appreciate that answer, but it is important for us to probe from where we are coming from. There has been consultation, which you said was very good. I cannot imagine that it has not come up in the consultation thus far. This is a chicken-and-egg situation. When you are considering something at as high a level as this, a fair amount of work has been done in the Department, and there have been discussions. For the life of me, I cannot understand why a Department cannot say, "Well, we were actually going to do this, but we're not".

Ms Carey: Representations have been made on a range of issues. Very strong arguments about the compatibility of section 75 and the impacts on particular groups have been made to Ministers. I mentioned earlier that the Children's Commissioner and the Equality Commission have already made representations. The Commissioner for Children and Young People and the Equality Commission have commissioned an opinion from Robin Allen QC, who gave a presentation to the Committee that very clearly set out some of the issues around equality generally and section 75. The issues have been identified and brought to Ministers' attention. There is absolutely no doubt about that. No decisions have yet been taken on what should go into a consultation document. They inform where we are at the minute, but they do no more than that for the moment. The extent to which there is an issue will depend on what the final decisions are.

Mr Maskey: I have just one final point. You are valiantly giving explanations, but they do not address the issue for me. I am not suggesting that you can finally do that. In fact, I am quite sure that you cannot. Again, I am putting it on the record on behalf of our party that I fail to see how it has been presented to the Department, legal opinion has been provided to you, and yet the Department does not seek its own opinion. You may not and probably cannot answer that, but it is important for us to put on record that it is bizarre and, to my mind, unacceptable.

Ms Carey: There are different opinions about how the whole issue should be taken forward. An argument has been presented that not all jurisdictions have discrimination of this nature and, as I said earlier, policy interventions can deal with issues. There has not been a full equality impact assessment or screening of the policy implications because decisions have not been taken. Obviously, Robin Allen is a very eminent QC and a very able and informed person but, equally, there will be others from the legal profession who will not necessarily take that view. Again, we are using that to inform what we are doing and we are taking advice on issues as they arise from both the Departmental Solicitor's Office and the Office of the Legislative Counsel. We would do that as any piece of legislation is being developed. Where there is a need, you can have no doubt that appropriate opinion will be taken and any decisions that are taken will be in full knowledge of what the legal implications are.

Mr Maskey: Patricia, thank you for your responses. I appreciate the difficulty that you are in as an official, but I just want to put it on the record that, once you go down the line of saying that we are going to, hopefully, introduce anti-discrimination legislation but you are going even to consider blanket-banning a certain age group, I just cannot find it acceptable in any shape or form and I cannot get a response to that. I respect your own limitations on that.

The Chairperson: It is a ministerial issue.

Mr Maskey: Yes, but I am putting on the record, on behalf of Sinn Féin, that it is not acceptable that we do not even have the section 75 obligations carried out at this point, when it is clearly staring you in the face that you are likely to discriminate. I have not been given one example of where there could be a policy decision that could negate the need for legislation, for example.

The Chairperson: It is on the record, Alex.

Mr Lyttle: I appreciate that you have already answered the question in relation to timescales but, in respect of the far end of the timescale, I presume that there is an aim to deliver the legislation in this Assembly mandate.

Ms Carey: Yes, there is. Given all of the various stages, we have satisfied ourselves, and Ministers are satisfied, that that is still possible. Obviously, there is quite an elaborate process for any legislation but there is time between now and the end of the mandate to bring forward the legislation. It is still the Ministers' intention to do that.

Mr Lyttle: Were you able to follow the evidence session of the Committee that took place with the relative commissioners?

Ms Carey: Yes.

Mr Lyttle: I felt like we were actually getting into some of the detail in some of the discussions around parental rights versus children's rights and how best to word some of the potential exemptions that might need to be delivered. Have you any opinion in relation to those types of issues, or can you update the Committee on progress that the Department is making in relation to those issues?

Ms Carey: In any anti-discrimination legislation, it is important that any exceptions are as narrowly construed as possible. That is in line with European law and a human rights approach because, obviously, nobody wants to allow people to discriminate unlawfully. The legislation, as I said earlier, presents challenges that other legislation does not present, because there are so many areas where discriminating on grounds of age can have a positive impact. That ties into the fact that age is a continuum or a spectrum, and it can be appropriate at different stages of different people's lives to have age-related considerations. So, quite a bit of work has been done on what areas might be included in that type of situation. I mentioned one example around health and another around transport. There are others that are potentially less clear cut — for example, age-related holidays. Robin Allen, the Equality Commission and the Children's Commissioner argue that, unless there is a legitimate social aim underpinning an exception, then it should not be included in the legislation, so there would have to be consideration of whether something like Saga holidays, 18-24 holidays or other age-related holidays would be a legitimate exception. It might be, on consultation, that a lot of people think that it should be included. Again, there can be different opinions.

There are some exceptions for which it will be much easier to decide whether they should be included, for example where there is an existing policy or practice, such as on free transport. On the other hand, the argument against that is whether the money that is provided to give people over a certain age free transport should be ring-fenced and the potential income from that excluded from use in some other part of the public service. Those are the type of arguments that are looked at.

Ministers have very clearly said that, where there is a beneficial impact or a potential beneficial impact, they would like to see those exceptions included. However, again, those will have to be tested. Quite a lot of scoping work has been done to look at what those might be, including looking at the GB legislation and legislation that others have introduced. We are at a slight disadvantage in that not many other countries have this type of legalisation. Indeed, the GB legislation has not been in place for very long, so there has not been a lot of case law or cases being brought to test the law. Again, at this stage, we are trying to explore the policy considerations as much as possible, and it might be that the legislation will try to capture the fact that there will be an exception only where there is a social aim to be achieved. However, that would require a definition of a social aim.

It might also be that specific exceptions would be included. I mentioned the issue of objective justification and, of course, there is also the possibility of genuine occupational requirement, whereby, in certain circumstances, such as with gender, there could be a requirement for a woman or a man to

carry out a particular role because of privacy or confidentiality issues. In such cases, it might be appropriate to have genuine occupational requirements or genuine occupational service exceptions.

Mr Lyttle: Chair, you may have asked this question and I may have missed it. Do you have a timescale for commencing consultation?

Ms Carey: Not at the minute. We are aware of the fact that the legislative programme has a number of stages and we want to consult as early as possible. However, I do not have an answer on that today.

Mr Lyttle: Do you sense a high level of frustration among older people's organisations and people who are concerned that the legislation should apply to all age groups about the speed of delivery?

Ms Carey: Various representations have been made to Ministers. We sense a degree of frustration from groups generally that there is not more for them at the moment to look at in order to get involved in discussions on the policy proposals.

The Chairperson: Will the consultation be the full 12 weeks?

Ms Carey: Yes.

The Chairperson: Thank you.

Ms Fearon: Thank you, Patricia and David. I have a question on the preparation work that you spoke about that will inform the public consultation. You said that the consultation should bring together all the key issues of the debate. My question is on the preliminary work that is being done with other Departments to check what implications it will have for them and all the rest of it. What has been the scope of that work? Has the Health Department looked into older people's issues, or has it looked at the legislation on the whole?

Ms Carey: Work was done some time ago. As I said to the Chair at the outset, in preparing for this, quite a bit of preliminary work has been done in which Departments were asked to look at what legislation they had in place that might be affected by this legislation and to look generally at how their Departments could be affected by it.

As to how that was interpreted, going back a number of months, or maybe longer, as I understand it a general request was made to Departments to consider the potential implications of the legislation. How they did that work has not necessarily been determined by us. However, I know that many of the returns that we have received from Departments, particularly on existing legislation that would be affected, considered legislation that would affect people of any age. They have not necessarily started to try to work out whether legislation would be included within the scope of our legislation, but just came back with everything that might be affected. Those initial discussions were held on a very general and open basis.

Ms Fearon: What is the scope of the overall preparation work that is being done for the Department?

Ms Carey: The point of the discussions, which are being carried out on a without-prejudice basis, is to ask Departments to look at the potential implications of the legislation for them and to think about that. Nearly the worst thing that could happen is that, after the legislation is brought in, people suddenly begin to think about what the implications are. So, this is as much to inform Departments about the potential outworkings of the legislation and to allow them to use their knowledge of their functions to think about what the implications will be and whether there is anything in particular that they need to come forward with as an exception or as an area that needs to be examined.

The legislation will work on the basis that anything that is not included as an exception is covered. In a way, that is what we are asking Departments to do. If the legislation comes in and there is an area that has not been thought about, we will have the kind of scenario that the Chair outlined: it will be in the hands of the courts. So, Departments have been asked about it on that basis, but they have not been asked to start differentiating; they have been asked to look at it in their own terms and in terms of how they see the issues affecting them.

Ms Fearon: You are talking about the legislation, but what I am getting at is that the age scope has not been decided yet. When Departments look at what implications this might have, will they come back and decide that it will probably apply just to older people, or are they looking at what the implications will be for younger people as well? This is to see whether, if we are on a tight timescale, the proper preparation work has been done for consultation.

Ms Carey: We have been working on it on a very open basis with Departments, in that we tell them about and ask them to look at the possible implications. As I said, the legislation that they have identified has come back, and it is across age ranges that may or may not be included in the legislation. So, again, at this stage, there is a danger that consideration will be given to areas that will not ultimately be included in the legislation. Equally, there is a danger that those areas will not be looked at until firm decisions have been made. However, again, we are not being prescriptive with Departments. We are really using this as an awareness-raising issue for them because, ultimately, they are the ones that will be able to tell us the impact of the legislation. Without a detailed knowledge of every single Department and how it operates and delivers its services, we cannot reach that conclusion. So, for the purposes of the legislation, which will be an Executive Bill and cover all Departments, except where there are specific exceptions, we are trying to get to a position where the Departments are fully apprised and aware of the potential issues. However, we have not been prescriptive about that. Again, it is for them to really think about that.

Ms Fearon: Do you not think that it would be best if you were prescriptive?

Ms Carey: Because decisions have not been made, we are not in a position at the minute to be prescriptive. Departments are aware that decisions have not been made and that the two possible scenarios that I indicated are possible: either that they could spend quite a bit of time looking at areas that might not be included, or that, if they do not consider those areas in great detail now, they may have to revisit them at a later stage, which will put pressure on the process later on. Because decisions have not been taken, that is, I think, the best approach that we can take at the minute.

Ms Fearon: OK.

The Chairperson: OK. Thank you. I think that that is it from the members.

To complete the discussion, Patricia, you mentioned the work of Robin Allen QC, who gave evidence to the Committee along with the Commissioner for Children and Young People and the Equality Commission, which, between them, gave us a joint paper. What engagement have you had with them on their paper?

Ms Carey: The paper was provided to us, and we have read it. We have been involved in meetings about that paper with Ministers. The engagement that we have had with them has been very much through that ministerial route.

The Chairperson: Have you actually sat down with them and discussed it?

Ms Carey: As officials?

The Chairperson: Yes.

Ms Carey: No.

The Chairperson: I have to say that I think that that is extraordinary. The reason I say that is that I am looking at your risk register, and I see that you have three risks. For the first risk, your mitigation is engagement with key stakeholders, and for the third risk, mitigation is early engagement with key stakeholders. Are the Equality Commission and the Children's Commissioner stakeholders?

Ms Carey: Although we have not sat down with them, we have read the paper and the opinion, and we are very clear on what their views are.

The Chairperson: Sorry; are they stakeholders in your view?

Ms Carey: Yes, they are stakeholders.

The Chairperson: How are you defining engagement then? Reading a paper?

Ms Carey: It is engagement and consultation. We have not gone to formal consultation. Inevitably, once we have taken clear decisions on what will be in that consultation, that will give us the opportunity to have informed discussions with the Equality Commission and others. However, the important thing is that we understand their opinion. We have got information from them —

The Chairperson: Sorry, Patricia, the important thing is that your mitigation actions are engagement, and, as I understand the English language, we are engaging by dialogue. Reading a paper that you are sent is a pretty thin definition of engagement.

Ms Carey: We engage in different ways. The purpose of consultation and engagement is to understand the perspective that is being offered, understand the viewpoints and understand where people are coming from. As far as possible in this area, we have done that and, although we have not sat down, as officials, with the Equality Commission, we have been involved in the meetings with Ministers and have engaged at that level with Ministers. So, as an official, if a Minister is engaging and I am party to that discussion, I get as much information out of that. The commission is there giving its very strong views and arguing the various issues and, having participated in and been present at those meetings, that is as much engagement on the issues as I really need. The fact that I am not chairing or conducting the meeting myself does not get in the way of understanding the issues and being fully engaged with them.

The Chairperson: That is as much engagement as you need. Is it as much engagement as your stakeholders need?

Ms Carey: I would argue that if the commission is getting to meet Ministers and present its opinions to them, that is probably better than meeting officials because they have the ear of the decision-makers.

The Chairperson: Let us take a look at the three risks. Number one is:

"Political and/or public opposition to the proposals."

The probability of that happening, on a scale of 0 to 5, on which 5 is disastrous, scores 5, and the impact, where 5 is disastrous, scores 5. So, there is a perfect storm there.

Number two is:

"Crowded legislative timetable delays Primary legislation".

The probability is 4 and the impact is 5. Your mitigation actions are:

"Plan to ensure that the primary is introduced as early as possible in the legislative programme ... Forward planning and preparation to minimise the impact of any delays ... Develop subordinate in parallel".

The third risk is "Delay at committee stage". That scores 3 out of 5 on probability but the impact, again, is the top score of 5. Your mitigation actions are:

"Maintain effective working relationships ... Early engagement with key stakeholders to minimise adverse presentations to Committee ... Develop any necessary subordinate in parallel".

What does early engagement with key stakeholders to minimise adverse presentations mean?

Ms Carey: It means that, when agreed decisions are taken, we engage as early as possible with stakeholders. Because we are not in a position to do that yet, we have not done it. There is still time in the legislative programme and in the consultation process to do that. We intend, as I indicated, and Ministers intend, to hold a full 12-week consultation. As part of that, we intend to have a rigorous and detailed consultation with as many groups as we can, including the Equality Commission, the Children's Commissioner and others. So, it is not, I would argue, a perfect storm just yet because we still have, in the time available before the end of the mandate, the opportunity to address most of those issues.

Preventing negative presentations to the Committee has maybe not been mitigated through those representations and engagements. However, the fact that junior Ministers have met the Commissioner for Children and Young People at least twice, and the Equality Commission, indicates a willingness to listen to and be challenged on the issues. I do not think that I am betraying any confidence in saying that there were robust discussions and very strong points of view from all those parties in making representations to Ministers.

The Chairperson: Finally, we are two years from the end of the mandate. Obviously, you will not get the consultation out before the summer. We will be the scrutiny Committee. Are you confident that you will get this over the line during this mandate based on the Committee doing the scrutiny within the minimum period? I am not confident that we will not need an extension.

Ms Carey: We have based our achievement of the legislation in this mandate by working back and, by and large, looking at minimum timescales.

The Chairperson: Minimum timescales?

Ms Carey: By and large.

The Chairperson: Including the Committee? Are we in the "by" or the "large"?

Ms Carey: You are probably in the "by". We are hoping that —

The Chairperson: Just to be clear, Patricia, are you basing this on the Committee doing our work in the minimum of 30 days?

Ms Carey: We have allowed for what would be regarded as the minimum timescale. Even with minimum timescales, some time can be freed up in the process. We hope that we would have enough time so that, if the Committee did require extra time, there might be some leeway. However, it is very tight and very challenging to do it in that way.

Mr McGowan: We have recognised in the timetables that there may be a need for an extension.

The Chairperson: OK. David and Patricia, thank you very much indeed.