

dti

**EQUALITY AND DIVERSITY:
COMING OF AGE**

Consultation on the draft
Employment Equality (Age)
Regulations 2006

JULY 2005



The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

Foreword



The goal of the Department of Trade and Industry is prosperity for all. We want to promote the opportunity for all to contribute to and share in that prosperity.

This is why we are committed to tackling age discrimination. It is only fair that those who experience age discrimination should have the same opportunities as others. But equally our economy is one in which the labour market struggles to meet the appetite of business for a skilled and adaptable workforce – we cannot afford to cast on the scrapheap some of our most experienced, skilled and valuable people on grounds of prejudice – deliberate or unthinking.

Of course, an important point that is often lost in the ageism debate is that younger people experience age discrimination too. We can only tackle age discrimination effectively by dealing with it across the board. The legislation we are introducing under the European Employment Directive will apply equally to all those in work or seeking work (or training), whatever their age.

Age discrimination legislation has far-reaching consequences. It touches on every aspect of the employment relationship either directly when there are specific age-based practices, or indirectly when for instance length of service is involved. It ranges over recruitment, promotion, pay, employment conditions, dismissal, retirement, occupational pensions... the list goes on. We believe that the policies reflected in the draft age regulations strike an appropriate balance between important new rights and opportunities for individuals, whilst allowing business to operate productively but fairly.

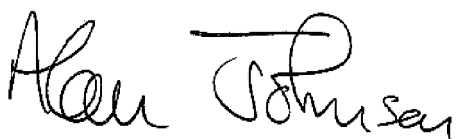
In December 2004 we announced how we would be implementing the legislation in relation to retirement ages. For many businesses this will require a considerable adjustment. Those that set their retirement age below the default age of 65 will have to justify it or change it. Growing numbers of firms are already successfully planning their workforce without fixed retirement ages, and in the longer term the Government's aim is to move to a position where business does not need to rely on a default retirement age. We believe that the new duty to consider requests to continue working longer will have the same success as the existing right to request flexible working, and that it will further change the retirement culture in this country.

In 2011 we will review whether all retirement ages that are not objectively justified should be outlawed. As we said when we announced the retirement age decision: "The review will be firmly grounded in evidence..." It will look at, among other things, the evidence on longevity, and employment patterns of older workers. If the evidence shows that we no longer need the default retirement age we will abolish it.

It is not only businesses that will be affected: the Government as an employer will have to adjust to the legislation in the same way. In addition, we are taking the opportunity to look carefully at Government programmes and existing legislation, to make sure that they are consistent with the requirements of the Directive. Where they are not, we shall make the necessary changes to remove any unjustified age element.

This consultation document sets out the detail of our legislative approach to tackling age discrimination, and accompanies the draft legislation. It is the final stage of the extensive consultative process we have adopted for exploring the complexities of the issues.

We are seeking your views on the draft age regulations. Do they deliver effectively what we say they are intended to achieve? How might they be improved? This is an important opportunity to make sure that the legislation is clear and understandable, so that when it comes into force in October 2006 everyone is clear about their rights and responsibilities.

A handwritten signature in black ink that reads "Alan Johnson". The signature is written in a cursive style with a large, stylized 'A' and 'J'.

Alan Johnson
Secretary of State for Trade and Industry

As a result of the European Employment Directive, we will introduce regulations outlawing age discrimination in employment and vocational training.

In our consultation *Age Matters*, we asked your opinions about our proposals for the most important policy issues. Taking into account your replies and after subsequent informal consultation with main stakeholders, we have finalised our policy, and translated it into draft age regulations.

We are now holding a final consultation on the draft age regulations. We are holding this consultation for the following reasons:

- to inform you of our decisions on what the regulations will require so that employers and providers of vocational training can prepare for them;
- to ask you whether the explanation in this consultation document is unclear on any issues, so that any such issues could be addressed in the guidance Acas will issue next year;
- to give you a chance to comment on whether the details of our decisions will give rise to significant practical difficulties; and
- to seek your views on whether the draft regulations effectively reflect our policy as set out in this consultation document.

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Chapter 1

Summary

Why are we holding this consultation?

1.1 In our *Age Matters* consultation, we asked your opinions about our proposals for the most important policy issues on age discrimination. Taking into account your replies and after subsequent informal consultation with main stakeholders, we have finalised our policy, and translated it into the draft Employment Equality (Age) Regulations 2006 (the “**Age Regulations**”). The Age Regulations will outlaw age discrimination in employment and vocational training.

1.2 We are now holding a consultation on the draft Age Regulations for the following reasons:

- to inform you of our decisions on what the Age Regulations will require so that employers and providers of vocational training can prepare for them;
- to ask you whether the explanation in this consultation document is unclear on any issues, so that any such issues could be addressed in the guidance Acas will issue next year;
- to give you a chance to comment on whether the details of these decisions will give rise to significant practical difficulties; and
- to seek your views on whether the draft Age Regulations effectively reflect our policy as set out in this consultation document.

There is a separate summary leaflet of this consultation, tailored to the needs of individuals, small businesses and other small organisations.

Why introduce new legislation?

1.3 Age discrimination prevents people of all ages from realising their full potential in the workplace. This in turn prevents employers from getting the best performance out of their business and delivering the best service to their customers. We have consulted over a number of years on our

plans for legislation outlawing age discrimination – we have said throughout that tackling age discrimination is good for business, good for individuals and good for society. This consultation is the final step in our exchange of views with you. It accompanies the draft Age Regulations.

What are the main points of the new legislation?

- 1.4 The Age Regulations will apply to all workers and to people who apply for work. In addition they will cover access to vocational training. The Age Regulations will prohibit direct and indirect age discrimination, harassment and victimisation.
- 1.5 Those with new obligations include:
- employers;
 - providers of vocational training (including adult, further and higher education);
 - trade unions, professional associations, and employers' organisations – in relation to their membership as well as in their role as employers; and
 - trustees and managers of occupational pension schemes.
- 1.6 In most situations, it will be unlawful to treat people differently on the grounds of age. However, employers and others with obligations under the Age Regulations will be able to justify doing so, but only by reference to specific aims and only if it is appropriate and necessary in the particular circumstances ("**objective justification**"). They will have to produce supporting evidence if challenged: assertions will not be enough.
- 1.7 The legislation dealing with other forms of discrimination (such as sex and race) provides for only very limited possibilities of justifying direct discrimination. The Age Regulations will be unique in that the possibility for justification will apply equally for direct and indirect discrimination.

Chapter 1 Summary

- 1.8 **Recruitment, selection and promotion:** decisions about recruitment, selection and promotion should not normally be based on age. The Age Regulations will not contain any specific provisions on these matters – different treatment on grounds of age in these areas will only be lawful if the employer can satisfy the test of objective justification.
- 1.9 **Employment benefits:** the Age Regulations will contain a number of provisions that will allow the use of length of service as a criterion in pay and non-pay benefits. For any other types of different treatment on grounds of age in employment benefits (for instance the use of a minimum age), only the general test of objective justification can be used to justify this.
- 1.10 **Retirement:** the Age Regulations will contain a national default retirement age of 65. This means that it will not constitute age discrimination if employers retire employees at or above the age of 65. Lower retirement ages will only be possible if the employer can objectively justify them. The Age Regulations will set out a new procedure that will have to be used for any compulsory retirement – the “duty to consider” procedure. Under this procedure an employer who wishes to retire an employee will have a duty to notify the employee in writing not more than twelve months and not less than six months before the intended date of retirement. At the same time the employee must be told that they have a right to request working beyond the intended moment of retirement. If the employee makes such a request, the employer will have to consider it seriously. Through these provisions we will ensure that unplanned retirement cannot be used as a back door route for dismissal, redundancy or termination of contract for any other reason.
- 1.11 **Unfair dismissal and redundancy:** we will remove the current upper age limit for unfair dismissal and redundancy rights. This means that workers 65 and over will get the same rights to claim unfair dismissal or to receive a redundancy payment as younger workers. However, retirement will not constitute unfair dismissal if it is at or after 65 (or the employer’s own lower retirement age, if this is justified) and the employer has followed the “duty to consider” procedure.

- 1.12 **Occupational pensions:** many rules in pension schemes are necessarily age-based and required for their proper operation. The Age Regulations will effectively exempt most age-related rules and practices. For instance it will remain possible for employers to offer new employees a pension scheme which is different from the one held by existing employees.

Monitoring and review

- 1.13 We will monitor the default retirement age from the outset so that in 2011 we can review whether it continues to be necessary. The review will be evidence based, looking at relevant data on trends in life expectancy; the number of individuals working beyond 65; and the impact of the regulations on business, including the extent to which businesses still rely on retirement ages for workforce planning. We will abolish it if the evidence shows that we have achieved the expected culture change and the default retirement age ceases to be necessary.

Benefits and costs

- 1.14 Over time, there will be overall net economic (not to mention social) benefits from the legislation, with potentially large effects on tax and national insurance receipts, and the long run potential of the economy. We believe that these benefits will arise principally due to increased employment rates and better matching of jobs to people.
- 1.15 There will be costs associated with the legislation as well, for instance the cost to employers of dealing with requests by those who wish to continue working past the firm's retirement age, but we believe that overall these are of a lower magnitude than the benefits.

When will the new legislation come into force?

- 1.16 The Age Regulations will come into force on **1 October 2006**.

Chapter 2

Introduction

2.1 Introducing age legislation

2.1.1 Until now there has been no legislation dealing with age discrimination in Great Britain. This will change in October 2006, when we will introduce legislation outlawing age discrimination in employment and vocational training.

What has happened so far?

2.1.2 In 2000, the Government joined the other Member States of the European Union in agreeing a Directive that required them to outlaw discrimination on the grounds of religion or belief, disability, age and sexual orientation in the areas of employment and vocational training (Employment Directive 2000/78/EC, the "**Directive**").

2.1.3 Disability legislation has been in place here since 1995 (although the Directive prompted a number of changes to our existing legislation). In accordance with the Directive, we introduced anti-discrimination legislation on religion or belief and sexual orientation in 2003. The final step in implementing the Directive will be the Employment Equality (Age) Regulations 2006 (the "**Age Regulations**").

2.1.4 We have consulted a number of times both on implementing the Directive and specifically on the difficulties involved in introducing legislation dealing with age discrimination:

- In December 2001, our consultation *Towards Equality and Diversity: Implementing the Employment and Race Directives* addressed general questions in relation to race, sexual orientation, religion, disability and age. We received over 1,050 responses to this consultation (of which 870 commented on age aspects).
- In July 2003, our consultation *Equality and Diversity: Age Matters* was devoted exclusively to the introduction of legislation dealing with age

discrimination. This consultation built on the responses to the 2001 consultation. It set out our initial proposals for age discrimination legislation. We received 427 replies. In December 2004, we published a summary report of the responses to *Age Matters*. It is available at: www.dti.gov.uk/er/equality/age_matters_con_resp.pdf.

- Finally, we have consulted informally with representatives of employees, employers and age equality organisations throughout the process.

2.1.5 Throughout this consultation document, we will (where appropriate) note what our proposals in *Age Matters* were, how you responded, and how the responses have affected our policy decisions.

What happens next?

2.1.6 The Directive requires age discrimination legislation to be in force by December 2006. In line with our policy to introduce new employment legislation only twice a year, we intend to bring the Age Regulations into force on **1 October 2006**.

2.1.7 The timetable until then will be as follows:

- this consultation will run until **17 October 2005**;
- we intend to submit the draft Age Regulations to Parliament in **early 2006**;
- when Parliament has approved the Age Regulations, we will publish an explanation of the law on the DTI website; and
- at the same time Acas will publish guidance that will help businesses and providers of vocational training to comply with the Age Regulations, and individuals to know their rights.

2.1.8 In the longer term, in 2011 we will review whether to maintain a national default retirement age of 65. The review will look at, among other things, the evidence on longevity, and employment patterns of older workers. Growing numbers of firms are already successfully planning their workforce without fixed retirement ages – for example, Marks and Spencer – while others, such as BT, FirstGroup and Nationwide, have arrangements in place that give people options to continue working longer.

What should you do?

2.1.9 **If you are an employer or provider of vocational training, you should act now to ensure that you are ready when the Age Regulations come into force.**

2.1.10 If you are an employer, you should – if you have not already done so – start a review of your employment practices and procedures now. You should identify where changes need to be made to comply with the Age Regulations, and where necessary you should enter into discussions with your employees or any trade unions involved to ensure that you can make those changes before 1 October 2006:

- **You should check your recruitment and application procedures:** if you use a recruitment agency, make sure you do not ask them to act unlawfully; if you do the recruitment yourself, check that for instance your job advertisements are not age-discriminatory. Ensure that those who conduct interviews and make decisions on job offers do not have any prejudices in relation to age.
- **You should check your employment rules and procedures:** this includes the employment contracts you use, the staff handbook and the employment benefits (salary and otherwise) you provide. This consultation document describes a few limited exceptions where difference of treatment on grounds of age will be allowed,

but otherwise you should remove any age discrimination, and (where necessary) agree this with your employees, employee representatives and trade unions.

- **You should check your retirement procedures:** if you use a retirement age for your staff, you should consider whether you need to keep this in place. If so, you will have to make changes to the procedures you use as set out in this consultation document.
- **You should tackle harassment:** make it clear to all your managers and other employees that harassment on grounds of age will not be tolerated.
- **You should know your staff:** the Age Regulations will not contain any obligation to collect information on the age profile of your workforce. However, it can be good practice to do so, since this will make it easier for you to check whether age discrimination is occurring. You will for instance be able to check whether older workers are receiving significantly less training than younger workers within your business. If you do, make sure that you follow the Code of Practice on data protection in employment (see www.informationcommissioner.gov.uk/eventual.aspx?id=437).

2.1.11 If you are a provider of vocational training, you should follow the above steps for your own employees (for instance your teachers), but in addition you will have to make sure that you are not discriminating on grounds of age against your students and those applying for places on your courses.

2.1.12 There are a number of organisations that can provide help and advice. Please see section 9.1 and annex B for details.

2.2 About this consultation document

Should you read this document?

- 2.2.1 If you are an employer or a provider of vocational training, you should read this consultation document. This will allow you to consider what you need to do to ensure that your organisation will be ready for the Age Regulations when they come into force in October 2006.
- 2.2.2 If you are an employee or student who has suffered age discrimination, or if you are generally interested in your rights, this consultation document will give you the most extensive preview so far of your new rights.
- 2.2.3 In either case, we want to ensure that the Age Regulations correctly reflect the policy that we are describing in this consultation document. Your input will help us to achieve this, so we encourage you to take the time to fill in the consultation response form.
- 2.2.4 This consultation document is a straightforward explanation of how the draft Age Regulations will work. However, the Age Regulations are not yet final, and this consultation document is not guidance. We do not expect the final Age Regulations to be substantially different, but there may be changes as a result of the responses to this consultation. Acas will publish guidance once the Age Regulations have been approved by Parliament.
- 2.2.5 Annex A contains further details on how to respond to this consultation and how to order additional copies of the consultation documents.

How is this document structured?

- 2.2.6 Throughout this consultation document, each section will explain what the Age Regulations will do, and what this will mean for you in practice. It will explain issues such as retirement ages, the new duty to consider, objective justification of age-based practices, and the removal of age limits on unfair dismissal and redundancy.

- 2.2.7 One of our guiding principles for the implementation of all the new equality strands covered by the Directive (sexual orientation, religion or belief and age) has been consistency where possible. For “cross-cutting” issues, the approach on age discrimination will, therefore, be similar to that taken in the sexual orientation and religion or belief strands. Where this is the case, we will keep the discussion short.
- 2.2.8 If you need further information on cross-cutting matters, you may also want to look at the guidance we provided for the regulations on sexual orientation and religion or belief. This can be found at www.dti.gov.uk/er/equality/so_rb_longexplan.pdf.
- 2.2.9 We will explain issues that are unique to age discrimination in more detail:
- we will indicate what the Directive says;
 - we will remind you what our proposals and questions in the *Age Matters* consultation of 2003 were; and
 - we will explain the reasons for our approach, and how we took your responses to *Age Matters* into account.
- 2.2.10 For reasons of readability, we will at times use terms loosely rather than in their strict legal sense in this document. Please refer to the glossary in annex D for details.

Chapter 3

Outlawing age discrimination

3.1 Broadly, the Age Regulations will apply in employment and vocational training. This chapter explains in some detail which areas will be covered, and who will be affected.

3.1 Employment and vocational training

What does the Directive say?

3.1.1 Articles 1 to 3 of the Directive require us to prohibit discrimination, harassment and victimisation on grounds of age in relation to employment and vocational training:

- Within the area of employment this means that aspects such as selection criteria, recruitment conditions, promotion, working conditions, pay and dismissal are all covered.
- Vocational training includes vocational guidance, retraining and practical work experience.
- In addition, membership or other involvement in trade unions, employers' organisations and professional associations is covered.

3.1.2 The rights and obligations of the Directive apply to anyone acting within its subject areas. This includes citizens of non-EU countries while they are on the territory of a Member State of the EU.

3.1.3 The Directive does not cover age discrimination in the supply of goods and services. This is different from sex, race and disability, where the legislation extends to the supply of goods and services.

Examples of age-based practices in the supply of goods and services are giving reductions on theatre tickets to students or older people and providing home insurance exclusively to older people.

What will the Age Regulations say?

3.1.4 The Age Regulations will give rights to the following groups:

- employees;
- self-employed people (including specific provisions for barristers, advocates and partners in a partnership);
- contract workers;
- office holders;
- members of trade organisations; and
- anyone in vocational training and anyone receiving or holding a professional or trade qualification.

3.1.5 The Age Regulations will also apply to job applicants and in other situations where people make applications within the areas covered by the Age Regulations (for instance persons applying for a place on a vocational training course or persons applying to become members of trade organisations).

3.1.6 The rights also apply after the relevant relationship has ended.

An 18-year-old employee has left his employer, and asks for a job reference. The employer refuses to provide this, stating that employees under the age of 20 will not receive job references because they have built up insufficient length of service to allow for a meaningful assessment. This situation would be covered by the Age Regulations.

Chapter 3 Outlawing age discrimination

3.1.7 In line with article 3 of the Directive, service in any of the naval, military or air forces of the Crown will be outside the scope of the Age Regulations. This will include regulars, full-time and also part-time reservists (when acting in their military capacity).

Why are we adopting this approach?

3.1.8 In line with the Directive, the Age Regulations will only apply to employment and vocational training. That is a major step, involving a number of complex issues as described throughout this consultation document. The Age Regulations will not cover the provision of goods and services.

3.1.9 However, we are currently undertaking a more general review of discrimination law. This will consider whether we can achieve greater consistency in the level of protection given by discrimination legislation in the various strands, including a possible extension of protection from age discrimination to the areas of goods and services. The review will aim for a simpler, fairer and more streamlined legislative framework for equality, to be implemented through a Single Equality Act. We will consult separately on the discrimination law review – it does not form part of this consultation.

What will this mean in practice?

Employers and employees

3.1.10 The Age Regulations set out the obligations for employers. They will protect both employees employed for an unlimited duration, and employees under fixed-term contracts.

3.1.11 Unpaid volunteers will not be covered. However, unpaid work will be covered where it forms part of a paid employment relationship or a vocational training relationship.

A trainee teacher is harassed on grounds of age during his or her (unpaid) teaching experience in school (see section 3.3 on harassment). The Age Regulations will apply in this situation.

- 3.1.12 Where the action of an employee constitutes age discrimination (or harassment or victimisation, see sections 3.3 and 3.4 below), the employer will be responsible for the action of his employee. The employee in question will be liable as well. Employers may have a defence if they took reasonable steps to prevent discrimination by their employees.
- 3.1.13 The term "employment" will have a wide meaning. It will include people who are not employed in the strict sense, but are contracted personally to do work.

An owner of a property contracts an architect personally to design a building. The architect will be protected under the Age Regulations.

- 3.1.14 The Age Regulations will clarify for the avoidance of doubt that they also apply to servants of the Crown.
- 3.1.15 Police officers usually do not have the status of employees. The Age Regulations will, however, ensure that they are covered in the same way as employees.

Contract workers

- 3.1.16 The Age Regulations will state that those seconded by their employer to another person or business are protected in their relationship to that other person or business as well. This covers for example those hired by employment agencies and contracted out to clients.

Chapter 3 Outlawing age discrimination

Albert is a personal assistant employed by an employment agency for the purpose of secondments to businesses for projects. The employment agency refuses to send him to a certain client because it considers him too young. In this case, Albert has a right not to be discriminated against by his employer.

He would also be able to take action if sent to a business where he suffers harassment on the grounds of his age in this business.

Employment agencies, careers guidance and advice

3.1.17 Employment agencies and (other) institutions offering careers or vocational guidance and similar services will have a range of obligations under the Age Regulations. They must comply with the Age Regulations in relation to:

- their own employees (like any other employer);
- their employees which they send to their clients as contract workers (as discussed above); and
- individuals who use their services, *i.e.* those who find jobs with their help and those who receive careers advice or guidance.

3.1.18 Where an employer looking for staff wants the employment agency to apply age-based selection criteria, the agency will be able to do this if it relied reasonably on a statement by the employer that those criteria were justified (chapter 4 below explains when age discrimination can be justified).

Office holders

3.1.19 Examples of office holders are judges, members of certain commissions or advisory bodies, some members of the clergy, and company directors.

They do not fall within the definition of employees, but they are generally within the scope of the Directive. The Age Regulations will give them the same rights as employees – for example, they will have the right not to be discriminated against when they are appointed or dismissed. The exception to this rule is that the default retirement age will not apply to them, see section 6.1.

- 3.1.20 Unlike unpaid volunteers, unpaid office holders appointed by the Crown will be protected; other unpaid office holders will not be covered.

Self-employed persons

- 3.1.21 Self-employed people will receive the same protection in the Age Regulations as employees in similar situations. This means that for instance they will be protected by the Age Regulations:
- in their relationship with those who hire them personally to do work (see also paragraph 3.1.13 above); and
 - in their relationship with trade organisations (see below on trade organisations).
- 3.1.22 The Age Regulations will contain specific provisions for certain types of self-employed people, covering barristers and advocates (and their pupils), and partners in a partnership.

Trade organisations

- 3.1.23 The Age Regulations define organisations of workers or employers and any other organisations whose members carry out a particular profession as “trade organisations”.
- 3.1.24 Trade organisations will have to comply with the Age Regulations, and the rights set out in the Age Regulations apply to members of such organisations (and those applying to become members or who have been members).

Chapter 3 Outlawing age discrimination

Vocational training

- 3.1.25 As in the other strands of equality legislation, vocational training will be a wide concept in the Age Regulations. It will include all forms of training and retraining courses, practical work experience and guidance that contributes to employability. It covers training provided by employers, further and higher education institutions and adult education programmes. Education of pupils in schools will be excluded, since this is not vocational training within the meaning of the Directive.
- 3.1.26 The Age Regulations will also cover bodies conferring qualifications arising from such vocational training.

3.2 Direct and indirect discrimination

What does the Directive say?

3.2.1 Articles 1, 2 and 6 of the Directive prohibit direct and indirect discrimination on various grounds including age unless justified. This section 3.2 will explain all aspects of direct or indirect age discrimination other than justification. Justification is discussed in chapter 4 below.

What will the Age Regulations say?

3.2.2 The Age Regulations will define direct age discrimination as occurring where someone treats one person less favourably on the grounds of his or her age than he or she treats or would treat other persons in a comparable situation, and there is no objective justification for doing so.

3.2.3 They will define indirect age discrimination as occurring where:

- an apparently neutral provision, criterion or practice puts or would put persons of a certain age group at a particular disadvantage compared with other persons;
- a person of that certain age group suffers that disadvantage; and
- there is no objective justification for the provision, criterion or practice.

3.2.4 Chapter 4 discusses objective justification.

3.2.5 Direct discrimination on grounds of age can also include discrimination based on the perception of someone's age, whether the perception is right or wrong.

Chapter 3 Outlawing age discrimination

What will this mean in practice?

Direct age discrimination

- 3.2.6 Direct age discrimination will only take place when someone's age is used as a reason for different treatment in a comparable situation.

For example it would constitute direct age discrimination if an employer applied age limits for recruitment or promotion (without justification).

Requiring applicants to pass a health or fitness test for recruitment or promotion would not constitute direct age discrimination. But it might be indirect age discrimination if people of certain ages were less likely to pass this test than other age groups (in which case the employer would have to objectively justify using the test, as explained in chapter 4 – using a health test will be justifiable if the test is set at a level necessary to indicate whether someone was capable of doing the job).

- 3.2.7 As long as the facts of the situation are clear, it is usually clear whether direct discrimination has taken place.

If a job advert contains a maximum age limit for recruitment, there is clearly an age criterion, therefore direct age discrimination (whether it is unlawful age discrimination depends on whether the age limit can be objectively justified, see section 4.1).

However, an employer may have an unstated policy of not hiring applicants above a certain age. In this situation, an applicant may suspect that direct age discrimination is occurring, but it will be more difficult to establish this.

Indirect age discrimination

- 3.2.8 A practice discriminates indirectly on the grounds of age if it does not involve age as a distinguishing criterion but nevertheless puts one or more persons of one age group at a particular disadvantage compared to other age groups.

A business requires applicants for a courier job to have held a driving licence for five years. This requirement does not mention age, but it is likely that a higher proportion of those aged, say, 40 will have fulfilled this requirement than of those aged, say, 25.

- 3.2.9 The burden of proof is discussed in section 9.3.

3.3 Harassment

What does the Directive say?

3.3.1 Harassment is prohibited under the Directive. Article 2 of the Directive defines harassment as unwanted conduct related to age which takes place with the purpose or effect of:

- violating the dignity of a person; *and*
- creating an intimidating, hostile, degrading, humiliating or offensive environment.

3.3.2 This means that under the Directive harassment can only occur if both the requirement relating to the person's dignity and the requirement relating to the environment have been fulfilled.

What will the Age Regulations say?

3.3.3 The Directive's definition of harassment is slightly stricter for complainants than the tests that have been developed in UK case law on other discrimination strands. For consistency we will stay close to the existing case law. The Age Regulations, therefore, will provide that anyone making a complaint about harassment will need to show:

- *either* that their dignity has been violated;
- *or* that they have been subject to an intimidating, hostile, degrading, humiliating or offensive environment.

What will this mean in practice?

3.3.4 The definition of harassment requires that the conduct in question be unwanted by the person affected. This does not mean that the person at whom the behaviour is directed has to make it explicit that the behaviour is unwanted – in many cases this will be perfectly clear. However, it may

not be considered harassment if, for instance, a person makes light-hearted jokes about his own age, and another person simply repeats those comments to him in the same context.

- 3.3.5 The Age Regulations only cover harassment on grounds of age. This does not mean that, for example, any harassment of an older person automatically constitutes age harassment. The reason for the conduct in question must be the person's age in order for the prohibition of harassment to be triggered.
- 3.3.6 If the conduct in question has the effect of violating a person's dignity or affecting the environment, that is enough to constitute harassment even if this was unintended. However, the Age Regulations also require that the conduct could reasonably be considered as having that effect. This means that in determining whether the criterion of "effect" has been fulfilled, Employment Tribunals will consider both objective aspects and the subjective view of the complainant.
- 3.3.7 Harassment is always unlawful. It cannot be justified.
- 3.3.8 The provision on harassment protects employees against harassment by their employer, and students against harassment by their training provider.
- 3.3.9 In addition, we mentioned in section 3.1 that employers are responsible for the actions of their employees. This applies to any age discrimination, victimisation or harassment within the scope of the Age Regulations carried out by an employee. This is most likely an issue for harassment: if an employee harasses anyone with rights under the Age Regulations (most likely another employee), the employer is liable unless he or she took reasonable steps to prevent the behaviour of the employee. In this situation the employee also acts unlawfully under the Age Regulations.

3.4 Victimisation

What does the Directive say?

3.4.1 Article 11 of the Directive requires Member States to protect employees against adverse treatment by the employer in response to any action taken under the age legislation.

What will the Age Regulations say?

3.4.2 The Age Regulations will define victimisation as less favourable treatment of a person as a consequence of something done by that person in connection with the Age Regulations.

What will this mean in practice?

3.4.3 Victimisation is included in the definition of discrimination used throughout the Age Regulations. This means that victimisation will be prohibited in all areas covered by the Age Regulations as described in section 3.1.

3.4.4 Victimisation is a two-stage process:

- firstly a person takes some sort of action, or makes some sort of complaint or allegation under the Age Regulations about age discrimination (this could also be assisting someone else with their age discrimination claim, for instance by giving evidence in support of a claim at a Tribunal hearing);
- secondly that person is treated less favourably because of such action, complaint or allegation.

3.4.5 As long as the action, complaint or allegation was in good faith, the individual is protected against victimisation whether or not it proves founded. However, a person who knowingly makes false allegations or gives false information is not protected.

Chapter 4

Justifying age discrimination

4.1 The previous chapter explains what direct and indirect age discrimination is, and when it falls within the scope of the Age Regulations. The starting point is that difference of treatment on grounds of age will be unlawful. However, there may be circumstances when it is lawful. This will be the case:

- if those who want to apply an age-related rule or practice can offer “objective justification” for doing so; or
- where the Age Regulations will contain exemptions which will allow age-related criteria and practices in certain areas.

4.2 This chapter sets out the requirements for “objective justification”, and it explains that it will not be easy to meet these requirements. Chapter 5 will describe the exemptions.

4.1 Objective justification

What does the Directive say?

4.1.1 Article 2 and article 6 of the Directive provide that direct and indirect discrimination can be justified. Direct or indirect discrimination will be lawful if:

- it pursues a legitimate aim; and
- it is an appropriate and necessary (or proportionate) means of achieving that aim

(the “test of objective justification”).

What is the position in the other areas of equality legislation?

4.1.2 Justification of discrimination is treated similarly in the other strands of discrimination legislation (disability, sexual orientation, religion or belief,

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race and sex), with one important exception – in the other strands, the possibilities for justification of direct discrimination are much narrower. Most other discrimination legislation only allows direct discrimination in case of genuine occupational requirements; for age it will be possible to objectively justify direct discrimination in the same way as indirect discrimination.

What was said in previous consultation?

- 4.1.3 We set out our intention to apply the test of objective justification both to direct and indirect age discrimination (in line with the Directive) in the *Age Matters* consultation. However, we proposed additionally that we would restrict the legitimate aims that could be used to justify direct discrimination to a list of legitimate aims set out in the Age Regulations.
- 4.1.4 We asked respondents whether they thought that the list of aims that could justify direct discrimination should be expanded. Whilst 42% of respondents answered no, 40% said that the list was too restrictive, and mentioned a number of other potentially legitimate aims.

What will the Age Regulations say?

- 4.1.5 We considered the responses to *Age Matters*, and have concluded that an exhaustive list of legitimate aims for direct discrimination would be too restrictive and prescriptive. We would not want to prevent employers or providers of vocational training from demonstrating that age-related practices could be justified by reference to aims other than those in such a list.
- 4.1.6 The Age Regulations will contain the Directive's general test of objective justification: both direct and indirect discrimination will be justified and lawful if:
- it is a proportionate means of
 - achieving a legitimate aim.

4.1.7 The Age Regulations will also include a number of examples of situations where direct age discrimination may pursue a legitimate aim:

- the setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group;
- the fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people; and
- the fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

This list is not exhaustive.

4.1.8 As in the other strands of equality legislation, the Age Regulations will contain special provisions on justification of discrimination in two areas:

- genuine occupational requirements; and
- positive action.

These are discussed in section 4.2.

Why are we adopting this approach?

4.1.9 The approach to indirect discrimination is consistent with that in most other strands of equality legislation, most recently in the regulations dealing with sexual orientation and religion or belief.

4.1.10 The Directive allows more scope for justifying direct age discrimination than other strands because age may genuinely be a relevant factor for certain aspects of employment and vocational training. We will follow the approach set out in the Directive because we believe that it strikes the right balance between outlawing age discrimination where it is

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unjustified and on the other hand allowing those with duties under the Age Regulations to demonstrate that a certain practice is justified.

Examples of direct age discrimination

- 4.1.11 The wider possibility for justification of direct discrimination is a new concept, and we want to give as much clarity as possible to those who will have to apply it. This is why the legislation will include the examples of direct discrimination listed above. The list is based on a similar list included in article 6 of the Directive.
- 4.1.12 We have included only examples of direct discrimination – the purpose of the list is to clarify the difference between age discrimination legislation and the other strands of equality legislation. The practices contained in the list are examples, not exemptions. Employers and providers of vocational training will, if challenged, still have to show that in their circumstances the practice pursues a legitimate aim, and is an appropriate and necessary (or proportionate) means of achieving that aim (the test of objective justification).

What will this mean in practice?

- 4.1.13 The test of objective justification will not be an easy one to satisfy. The principle remains that different treatment on grounds of age will be unlawful: treating people differently on grounds of age will be possible but only exceptionally and only for good reasons.
- 4.1.14 In order to objectively justify different treatment on grounds of age it will be necessary to provide evidence when challenged. Assertions will not be enough.

4.1.15 The test of objective justification consists of two elements:

- pursuing a legitimate aim; and
- proportionality.

Legitimate aim

4.1.16 A wide variety of aims may be considered as legitimate. The aim must correspond with a real need on the part of the employer (or other person or organisation wishing to apply a discriminatory practice). Economic factors such as business needs and considerations of efficiency may also be legitimate aims. However, discrimination will not be justified merely because it may be more expensive not to discriminate.

4.1.17 We mentioned some examples of legitimate aims in our Age Matters consultation, as well as in the list of potentially justified direct discrimination in paragraph 4.1.7 above:

- health, welfare and safety (including protection of young or older people);
- facilitation of employment planning;
- particular training requirements;
- encouraging and rewarding loyalty;
- the need for a reasonable period of employment before retirement; and
- recruiting or retaining older people.

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4.1.18 The legitimate aim cannot be related to age discrimination itself.

A retailer of trendy fashion items wants to employ young shop assistants because it believes that this will contribute to its aim of targeting young buyers. Trying to attract a young target group will not be a legitimate aim, because this has an age-discriminatory aspect.

Proportionality

4.1.19 If the discriminatory provision, criterion or practice pursues a legitimate aim, it still needs to be “proportionate”. This is the same as the Directive’s requirement that the means of pursuing the aim “are appropriate and necessary”.

4.1.20 The requirement of proportionality has a number of aspects:

- The provision, criterion or practice must actually contribute to the pursuit of the legitimate aim. For instance if an employer or provider of vocational training wishes to use an age-related provision, criterion or practice in order to encourage loyalty, he must be satisfied that it actually does so.
- The importance of the legitimate aim that is being pursued should be weighed up against the discriminatory effects. For instance if the legitimate aim is the protection of people's lives and safety, it is likely that a bigger discriminatory effect will be permissible than where the legitimate aim is rewarding employees' loyalty.
- Where the legitimate aim can be achieved equally well by a measure that has a big discriminatory effect and a measure that has a small discriminatory effect (or that does not discriminate at all), the latter should be used. In other words: one should not discriminate more than necessary.

4.2 Genuine occupational requirements and positive action

What does the Directive say?

- 4.2.1 Article 4 of the Directive allows Member States to include a provision in the implementing legislation stating that it is lawful to set a discriminatory criterion that is a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
- 4.2.2 Article 7 of the Directive allows Member States to adopt measures to prevent or compensate for disadvantages linked to any of the grounds covered by the Directive.

What will the Age Regulations say?

- 4.2.3 As is the case in the legislation on most of the other discrimination strands, the Age Regulations will contain specific provisions for genuine occupational requirements and positive action.

Genuine occupational requirements

- 4.2.4 The Age Regulations will stipulate that an employer is entitled to use an age requirement where (having regard to the nature of the employment or the context in which it is carried out):
- this is a genuine and determining occupational requirement; and
 - it is proportionate for the employer to apply the requirement.

Positive action

- 4.2.5 Anything done in connection with:
- giving persons of a particular age access to vocational training; or

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- encouraging persons of a particular age to use employment opportunities will be lawful if this is reasonably expected to prevent or compensate for disadvantages suffered by such persons.

Why are we adopting this approach?

- 4.2.6 We believe that these two provisions will be less significant for age discrimination than in some of the other strands. In the other strands, positive action and genuine occupational requirements are the only instances of justifiable direct discrimination; on age, the general test of objective justification is available for any kind of direct discrimination.
- 4.2.7 We are nevertheless including them because it will provide a specific route map for objective justification in these two areas. This will help those with obligations under the Age Regulations to take positive action if necessary, or, more exceptionally, to stipulate that age is a genuine occupational requirement.

What will this mean in practice?

Genuine occupational requirements

- 4.2.8 We consider that age will only be a genuine occupational requirement in very few cases. It could be used for instance for acting jobs. Where this is the case, it would still have to be established that the use of the age requirement is proportionate (section 4.1 discusses proportionality).

Positive action

- 4.2.9 The provision on positive action covers only discrimination in two narrowly described situations (giving access to vocational training facilities and encouraging persons to take advantage of employment opportunities). It does not cover what is generally regarded as “positive discrimination”, *i.e.* for instance recruiting someone because they are in an underrepresented age group, or refusing to recruit someone because they are in an overrepresented age group. Such positive discrimination could only be justified through the general test of objective justification.

4.2.10 Within the limited situations covered by the positive action provision, its requirements are easier to fulfil than the test of objective justification described in section 4.1:

- the legitimate aim is already given in the regulation (preventing or compensating for disadvantages suffered by persons because of their age); and
- instead of the requirement of proportionality in the test of objective justification, it only requires that it reasonably appears that the measure pursues the aim of preventing or compensating for such disadvantages.

An employer places a job advertisement only in a magazine for young people, because this age group is underrepresented in his business. This may in practice encourage applications mainly from younger people, so it may be indirectly discriminatory. If so, it would fall under the positive action provision. It will be lawful if it reasonably appears to the employer that this helps to compensate for a disadvantage suffered by this age group.

The same applies if the employer asks a headhunting firm to search particularly for candidates in a certain age group (because that age group is underrepresented in its workforce). As long as applications from people in other age groups are not excluded, this is covered by the positive action provision.

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A provider of vocational training offers a computer-training course restricted to those over 60. This will be lawful under the positive action provision if it reasonably appears to the training provider that this will help to compensate for disadvantages suffered in the labour market by this age group. This is a less onerous requirement than the requirement of proportionality in the test of objective justification, because under that requirement the training provider would for instance also have to consider whether the same objective could be achieved by a less discriminatory measure, for instance keeping the course open to all age groups, but charging younger people a higher fee.

- 4.2.11 Where the provisions for positive action and genuine occupational requirements do not apply, the employer (or training provider) may nevertheless be able to satisfy the general test of objective justification.

4.3 Recruitment, selection and promotion

4.3.1 Section 4.1 described the general approach to objective justification of age-based practices. In this section we will discuss how this will apply in recruitment, selection or promotion in employment, and selection for vocational training.

What was said in previous consultation?

4.3.2 In *Age Matters*, we proposed to include a specific provision for employers to be able to apply an upper age limit to recruitment if they can justify doing so. 73% of respondents agreed with this proposal.

What will the Age Regulations say?

4.3.3 There will be an exemption from the Age Regulations for recruitment above a justified retirement age (see section 6.1 for details on retirement ages).

4.3.4 Other than that, there will be no outright exemptions from the Age Regulations for recruitment, selection or promotion. This means that discrimination in these areas will only be lawful if it satisfies the test of objective justification (described in section 4.1 above).

4.3.5 However, the Age Regulations will mention upper age limits for recruitment in the list of examples of potentially justified direct discrimination (see paragraph 4.1.7 above). This is to indicate that, depending on the circumstances, it is possible to justify upper age limits if, for example, they are necessary because of the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Why are we adopting this approach?

4.3.6 Decisions about recruitment, selection and promotion should not normally be based on age, but rather on the skills required for the job.

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Nevertheless, there may be some instances where direct or indirect age discrimination is justified. If so, the possibility of objective justification will allow employers and providers of vocational training to maintain such practices.

In a job advertisement, a computer games company asks for several years of relevant work experience in the computer games industry. This requirement may be indirect age discrimination – older people may be less likely to fulfil this requirement than younger people.

If this experience is actually needed for the job in question, it will be objectively justified to ask for it. This may be the case for instance if the advertisement is for a games designer.

However, putting this requirement into all job advertisements (simply because the company wants all staff to "fit in") may not be objectively justified. For instance when advertising for a secretary, someone with work experience in a different industry may well be able to do the job as well as someone with experience in the games industry.

What will this mean in practice?

4.3.7 There are other age aspects of recruitment, selection and promotion besides upper age limits that are not explicitly mentioned in the Age Regulations, for example:

- **Requiring a birth date or age on job application forms:** this is not age-discriminatory in itself. However, an employer could use this information to make age-discriminatory decisions. For the avoidance of doubt an employer may prefer to move questions regarding age to a diversity monitoring form (which those who take the recruitment decisions would not get to see).

- **Requiring a certain length of experience for recruitment or promotion:** particularly young people may be less likely to fulfil this. Employers would have to objectively justify this. They would be likely to succeed in this justification if there is a real need to have a certain amount of experience in order to carry out the work of the post properly.
- **Requiring a certain qualification:** again, this may put certain age groups at a disadvantage (for instance older people will be less likely to have a degree in media studies). As above, an employer would have to objectively justify such a requirement.
- **Graduate recruitment schemes:** an employer wishing to recruit graduates may not be able to justify setting a requirement of a certain maximum age. Students could be of any age, and it will be difficult to show why older students should be excluded from applying. However, in our view it will be easier for employers to justify indirect discrimination in the form of recruitment drives at universities (“milk rounds”), provided employers do not exclude applications from other sources.
- **Selection for and access to vocational training:** the same applies as what has been said above for employment. Where providers of such training wish to set a certain age limit (direct age discrimination), or a requirement of a certain amount of experience or a certain qualification (indirect age discrimination), they will have to objectively justify this.
- **Employment agencies targeting specific age groups:** for instance an employment agency stating that it specialises in finding work for people above 50. This in itself would be unlikely to constitute difference of treatment on grounds of age. However, if a 30-year-old wanted to use the agency's services and was refused because of his or her age, the employment agency would have to objectively justify this.

4.4 Employment-related insurance

What does the Directive say?

4.4.1 As noted in section 3.1, the Directive does not cover the provision of goods and services. This means that insurance as such is outside the scope of the Directive.

For instance if an individual takes out car insurance, the insurance provider is not prevented from applying age-related criteria.

4.4.2 However, age discrimination in the availability of insurance could lead to age discrimination in a relationship that is covered by the Directive, most likely an employment relationship.

This could for instance occur if:

- an employer is unable to obtain insurance that is legally required for employees (for example liability insurance, or motor insurance for drivers); or
- an employer offers free health insurance to employees, but does not want to give it to employees of certain age groups because the insurer charges a higher premium for such age groups.

What was said in previous consultation?

4.4.3 This issue only arises if age is actually used as a criterion by insurance companies. In *Age Matters*, we asked whether this is the case. The responses to *Age Matters* indicated that in many cases the group insurance schemes used by employers generally did not have age criteria. Where age was used, it did not prevent acceptance to insurance schemes, but it could affect premium costs or the level of benefits.

What will the Age Regulations say?

- 4.4.4 The Age Regulations will not make special provision for employment-related insurance.
- 4.4.5 However, there will be specific provisions for the use of length of service as a criterion. These provisions may apply where the employer wishes to use length of service as a criterion for awarding or increasing insurance benefits. See section 5.1 for more details.

Why are we adopting this approach?

- 4.4.6 When age is a factor in insurance arrangements, and where those with obligations under the Age Regulations (usually employers, but it could also be a professional body, for instance) would feel compelled to discriminate on the grounds of age as a consequence, they will be able to use the general test of objective justification.

Chapter 5

Exemptions

5. 1 As set out in the previous chapters, the Age Regulations will introduce a broad prohibition on age discrimination in the areas of employment and vocational training unless objectively justified. However, there are a number of specific areas where age-based requirements are justified, and where it would not be helpful to make employers provide individual justification.
5. 2 The Age Regulations will contain specific exemptions in the following areas:
- pay and other employment benefits (see section 5.1);
 - pay related to the national minimum wage (see section 5.2);
 - acts under statutory authority (see section 5.3);
 - retirement (see chapter 6); and
 - occupational pension schemes (see chapter 7).
5. 3 If an age-related criterion, provision or practice meets the requirements of one of these exemptions, it will be lawful - an employer (or other person applying it) will not have to justify it.

5.1 Service-related pay and benefits

- 5.1.1 Chapter 4 explains the general test of objective justification that applies to all age discrimination. It shows how this will apply in a number of specific areas such as recruitment, selection and promotion, and employment-related insurance. A further important area is employment benefits (pay or non-pay benefits). In many cases employers require a certain length of service before the benefit is given or increased. This will often amount to indirect age discrimination because some age groups are more likely to have completed the required length of service than others.
- 5.1.2 The Age Regulations will contain a number of specific provisions dealing with the use of length of service in employment benefits. These are explained below.

What does the Directive say?

- 5.1.3 Article 6 of the Directive mentions that the fixing of conditions of seniority in service for access to certain employment advantages can constitute justified (and therefore lawful) discrimination. However, the Directive does not provide for an outright exemption.

What was said in previous consultation?

- 5.1.4 In *Age Matters*, we proposed that age discrimination in employment benefits should be allowed if employers could justify it under the general objective justification test.
- 5.1.5 There was widespread consensus among respondents that such benefits were desirable and that it should be possible to maintain the age-discriminatory elements in them. However, it was evident that there was a risk that if employers had to justify such benefits individually they might want to avoid this by withdrawing benefits or levelling them down.
- 5.1.6 These responses suggested that a specific exemption for employment benefits should be considered.

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What will the Age Regulations say?

5.1.7 The Age Regulations will contain a general provision and two specific exemptions on employment benefits, all of which cover the use of length of service as a criterion for awarding or increasing benefits in specified circumstances.

General provision

5.1.8 This will be a provision covering all instances of use of length of service for all types of employment benefits. It provides that such use is lawful if:

- awarding or increasing the benefit is meant to reflect the higher level of experience of the employee, or to reward the loyalty of the employee, or to increase or maintain the motivation of the employee;
- the employer has concluded that there will be a business benefit resulting from the higher level of experience of staff or from rewarding staff loyalty or increasing or maintaining staff motivation; and
- the employer applies the length-of-service criterion similarly to staff in similar situations.

Specific exemptions

5.1.9 The Age Regulations will also contain two specific exemptions:

- any length-of-service requirement of five years or less (counting both continuous and non-continuous service) will be exempted and will be able to continue (the “**five-year-exemption**”);
- any length-of-service requirement that mirrors a similar requirement in a statutory benefit will be exempted and will be able to continue.

Why are we adopting this approach?

- 5.1.10 The exemptions are carefully tailored to distinguish between situations where it is clear that the use of length of service in benefits is justified, and situations where this is not always certain:
- We believe that in any case during the first few years of service using length of service as a criterion for awarding or increasing benefits is justified – we consider five years a reasonable limit. The Age Regulations will provide for a complete exemption for this period. This is because it would be unnecessarily bureaucratic for employers to have to justify such benefits individually, and the risk of having to do so could lead some employers to withdraw them altogether.
 - Service longer than five years as a criterion for employment benefits may still be justified, but not automatically so. The general provision makes it clear to employers which conditions have to be fulfilled for this to be the case.
 - In all other situations – for instance using a minimum or maximum age for providing employment benefits – neither the general provision nor the specific exemptions apply. Where necessary employers can use the general test of objective justification.

What will this mean in practice?

- 5.1.11 The general provision and the exemptions cover all types of employment benefits – not only pay, but also any other (non-pay) benefits, such as annual leave, employer reductions on certain goods or services (for instance a reduced-interest mortgage), or a company car. Pay includes pensions, but see chapter 7 for more information about the treatment of occupational pension scheme rules under the Age Regulations.

Chapter 5 Exemptions

Only length of service exempted

5.1.12 They cover only the use of length of service as a criterion. This includes pay scales (where pay is increased for instance at the end of each year of service) and qualifying periods (where the employer only starts providing a certain benefit after the employee has completed a certain length of service).

Criteria other than length of service

5.1.13 Employers may use a range of criteria other than length of service to determine if and when an employee gets a benefit – for instance performance appraisal, a minimum or maximum age, or passing a health check. Such other criteria are not exempted:

- To the extent that such other criteria do not discriminate on grounds of age, the Age Regulations will of course not affect them. For instance using performance as a criterion is not age discrimination, so the Age Regulations will not in any way restrict this.

An employer offers a pay scale where the employee gets an increase in pay at the end of each year up to four years of service. Beyond the fourth year, further pay rises depend on the performance appraisal of the employee.

The rises related to length of service will fall under the five-year-exemption.

The fact that the employer uses performance as a criterion for pay rises after the fourth year is outside the scope of the Age Regulations – the employer does not need to do anything with respect to this criterion.

- Employers might, however, use age-discriminatory criteria other than length of service. In that case the Age Regulations do apply, but the provisions and exemptions on length of service cannot be used. If

employers want to keep such criteria, they will have to justify them under the test of objective justification (see section 4.1).

An employer provides free private health insurance to his employees using the following criteria:

- two years length of service; and
- maximum age of 60;

The five-year-exemption will allow the employer to use the criterion of two years of length of service. However, the use of a maximum age of 60 will only be lawful if the employer can objectively justify this.

The general provision

5.1.14 Because this provision can be used for all length-of-service criteria in employment benefits, it contains a few conditions which must be fulfilled to ensure that it is only applied in situations where this is justified:

- The employer first has to establish the aim of awarding the benefit: only benefits given to reflect a higher level of experience, to reward loyalty, or to increase or maintain motivation are covered. This ensures that the provision only applies if the benefit is given for a good reason.
- Secondly, the employer has to conclude that – overall – the aim pursued by awarding the benefit will bring business benefits. In other words: the employer has to be convinced that more experienced staff do a better job, or that rewarding staff loyalty or boosting staff motivation is good for his business (for instance, because it reduces staff turnover).
- The final requirement is that the employer applies the length-of-service criterion similarly to staff in similar situations.

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5.1.15 The general provision is specifically tailored towards employment benefits, so it is easier to use for employers than the general test of objective justification. However, it still requires the employer to make judgements on the aim and effect of the benefit.

The five-year-exemption

5.1.16 The five-year-exemption is a simple, unbureaucratic way for employers to use length-of-service criteria up to five years.

5.1.17 However, employers should be aware of two restrictions:

- The exemption only applies if the length-of-service criterion is applied to all staff doing similar work.

A law firm uses a four-year pay scale for trainees, a five-year pay scale for junior associates, and a five-year pay scale for senior associates. The natural progression for lawyers at this firm is to rise automatically through each of these scales in turn.

The question arises whether, for the purposes of the five-year-exemption, they should be seen as a single pay scale of 14 years (in which case the last nine years would not be covered by the five-year-exemption). In order to use the five-year-exemption for all three scales, the employer would have to demonstrate, if challenged, that all three apply to sufficiently different kinds of work. It might be argued for instance that the responsibilities of trainees, junior associates and senior associates are different.

- The exemption can only be used if it counts all years of service carried out in the range of posts to which the service criterion applies. The exemption cannot be used if the service criterion starts counting from zero again after a career break.

A department store has a qualifying period of three years' continuous service before staff get access to a store discount card. So staff who work for two years, take a career break of a few years and then come back have to start from zero again. This qualifying period is not exempted under the five-year-exemption (although the department store may be able to use the general provision).

The exemption relating to statutory benefits

- 5.1.18 Where an employer provides a contractual benefit that mirrors a statutory benefit, it will not constitute age discrimination if the employer applies the same (or shorter) length-of-service criteria or qualifying periods that are used in the statutory benefit.

The statutory redundancy payments scheme contains a qualifying period of two years' continuous service. Furthermore it provides that the payment goes up for each year of service of the employee, up to a maximum of 20 years (see section 8.1 for further details on redundancy).

An employer provides a contractual redundancy scheme that mirrors these provisions, but contains a qualifying period of only one year. Both the qualifying period and the length-of-service provisions are exempted.

5.2 National minimum wage

5.2.1 National minimum wage legislation contains age bands for younger employees. The current minimum wage is £3.00 per hour for employees aged 16 and 17, £4.10 for those 18 to 21 (inclusive) and £4.85 for those 22 and beyond. We will maintain these age bands. We consider that they are objectively justified because:

- many employers would be unwilling to pay younger employees the same (higher) minimum wage that employees over 21 are getting, so the age bands make it easier for younger workers to find employment; and
- the age bands encourage young people to stay in full-time education.

5.2.2 It makes sense that employers should be able to follow the age bands used in the national minimum wage legislation.

What was said in previous consultation?

5.2.3 In the *Age Matters* consultation, we indicated that the age bands are consistent with the Directive. We did not ask for views on this point.

What will the Age Regulations say?

5.2.4 Provided that employers are paying at least the national minimum wage, the Age Regulations will contain an exemption allowing employers to pay:

- employees aged 22 and over more than those under 22 even where they are doing the same job, where those under 22 are paid less than the adult rate of £4.85; and
- employees aged between 18 and 21 more than those under 18 even where they are doing the same job, where those under 18 are paid less than the adult rate of £4.85.

- 5.2.5 The exemption will not allow employers to pay different rates to those in the same age category.

Employers will not be able to pay a 19-year-old less than a 20-year-old doing the same job, unless they could justify this under the test of objective justification.

Why are we adopting this approach?

- 5.2.6 We believe that it is important to encourage employers to take on young workers. The exemption will allow employers to take on young workers and pay them the minimum wage whilst paying adult workers more, without the fear that this could be unlawful.
- 5.2.7 The exemption, however, will not cover all pay differences based on the age bands used in the national minimum wage. Only those situations are covered where the employees in the lower age group (those aged 16-17 or those aged 18-21, as the case may be) are paid less than the adult minimum wage of £4.85. Where employees in the lower age group and employees in the adult age group are paid at different levels, but both at or above the adult rate of the national minimum wage, there is no longer any reason to provide a special exemption based on the national minimum wage – the normal rules as set out in section 4.1 (objective justification) should apply.

An employer pays those 16-17 £10 per hour, those 18-21 £12, and those above 21 £14. The exemption does not apply – the employer could only maintain these pay differences if he or she could objectively justify them.

5.3 Statutory authority

- 5.3.1 Age criteria are used widely in legislation. As a consequence, those who have to comply with legislation may have to discriminate on the grounds of age.

For instance, the Licensing Act 1964 prohibits employing persons under 18 in any bar at a time when the bar is open for the sale or consumption of intoxicating liquor.

- 5.3.2 Those who have to comply with such legislation should not have to fear that in doing so they would violate the Age Regulations.

What does the Directive say?

- 5.3.3 Article 6 of the Directive allows Member States to retain age aspects in legislation where this is objectively justified, but it does not set out what happens when individuals or companies are forced to discriminate on the grounds of age as a consequence.

What will the Age Regulations say?

- 5.3.4 The Age Regulations will make it clear that any act done in order to comply with a requirement of a statutory provision will remain lawful (the "statutory authority exemption").

What will this mean in practice?

- 5.3.5 The effect of the statutory authority exemption will be that anyone who has to discriminate on grounds of age in order to comply with legislation will have a complete defence against any claims that result from this.

Chapter 6

Retirement

- 6.1 In many cases retirement is an occasion for which the employee has planned and to which the employee is looking forward. In these cases it takes place either by mutual agreement between employer and employee, or by the employee giving notice to leave work. If so, the law has no further role to play.
- 6.2 However, if the employee does not want to retire, retirement constitutes a dismissal. Questions arise about the approach employers should take in this situation. Two issues have to be considered here:
- Compulsory retirement will constitute direct age discrimination under the Age Regulations. The Age Regulations will provide for a default retirement age, which will allow employers to retire employees at or above 65. Compulsory retirement below 65 will only be lawful if the employer has objectively justified it. This is explained in more detail in section 6.1.
 - In addition, because compulsory retirement is a dismissal, the rules in the Employment Rights Act 1996 on unfair dismissal will apply. We will change these rules to say that a genuine retirement conducted in accordance with the rules in the Age Regulations (including following the right procedures) will be a fair dismissal. For the complete picture on unfair dismissal implications, this chapter should be read together with section 8.2, which deals with changes to the unfair dismissal legislation.

6.1 Retirement ages

6.1.1 It is important to distinguish between retirement age and pension age. The retirement age is the age at which an employee stops working; the pension age is the age at which a pension plan starts paying out pension benefits. The two are separate. For instance when individuals reach the state pension age, they can choose to start receiving their state pension or to defer it, regardless of whether they continue to work or not. Also, tax rules preventing people from drawing their occupational pension whilst continuing to work will be abolished in April 2006. The provisions in the Age Regulations on retirement, as described in this chapter, have no direct effect on pension ages. See chapter 7 for more detail on occupational pensions.

What does current legislation say?

6.1.2 Until now employees have usually had no recourse against compulsory retirement. This is because:

- there has been no legislation outlawing age discrimination; and
- the unfair dismissal rules, set out in the Employment Rights Act 1996, contain an upper age limit which restricts the rights of employees who have reached their employer's retirement age (if the employer has one) or the age of 65.

What does the Directive say?

6.1.3 As discussed in section 4.1, the Directive allows age discrimination if it is objectively justified. This means that Member States can set a national default retirement age where they can justify doing so.

6.1.4 A national default retirement age is not an obligatory retirement age. However, it will allow employers to set a retirement age within their firm at or above the level of the default retirement age if they want to. Where employers want to retire employees who are younger than the default

retirement age, the Age Regulations will only allow this if it the employer can objectively justify it.

What was said in previous consultation?

6.1.5 In *Age Matters*, we proposed the following options:

- a national default retirement age of 70; or
- no national default retirement age.

6.1.6 In both cases, employers would still be able to set their own retirement ages, but under the second option they would always have to objectively justify doing so. Under the first option they would only have to provide objective justification for any retirement ages below the national default retirement age.

6.1.7 In *Age Matters*, we asked whether we should set a national default retirement age. The response was divided, with 52% in favour of a default retirement age, and 43% against. In addition to the written consultation (*Age Matters*), we held a series of meetings with representatives of employers, trade unions and age equality organisations in 2004 to discuss the issue of retirement ages. These meetings confirmed the conclusion from *Age Matters* that opinions were divided on this issue.

6.1.8 As to the level of a possible default retirement age, the response was more one-sided: only 24% were in favour of 70 as the default retirement age; 65% were against.

What will the Age Regulations say?

6.1.9 The Age Regulations will contain an exemption (the “**national default retirement age**”) allowing employers to:

- retire employees at or above 65; and
- set retirement ages within their firm at or above 65.

6.1.10 In addition, employers will be able to justify retirement and retirement ages below the national default retirement age if they can satisfy the general test of objective justification (discussed in section 4.1).

6.1.11 There will be a duty on employers to consider requests from employees to stay on beyond the moment at which the employer wants to retire them. The duty to consider is discussed in more detail in section 6.3 below.

6.1.12 As mentioned above, current legislation contains an upper age limit that generally prevents older workers from making unfair dismissal (or redundancy) claims. This upper age limit will be removed. This is discussed in more detail in chapter 8 below. We mention it here because it means that an employee may be able to claim unfair dismissal if the employer did not comply with the duty-to-consider procedure, even where the retirement was above the national default retirement age. The procedure for retirement is explained in sections 6.2 and 6.3.

6.1.13 The rules on retirement described in this chapter apply to all employees, *i.e.* those working under either fixed term or unlimited term employment contracts. They do not apply to office holders (including the police). Retirement ages for office holders will only be lawful if they are objectively justified.

Why are we adopting this approach?

- 6.1.14 In setting the default age, we have taken careful note of a number of representations we received in the course of consultations, which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. This is our primary reason for setting the default retirement age.
- 6.1.15 Our consultations have also shown that if at the time the legislation was introduced employers only had the option of individually justified retirement ages, this could risk adverse consequences for occupational pension schemes and other work-related benefits. Some employers would simply reduce or remove benefits they offer to employees to offset any increase in costs. If in future increasing numbers of firms no longer relied on the default retirement age, and increasingly devised age-neutral benefits packages, then this would be expected to be less of a problem.
- 6.1.16 Under the default retirement age of 65, employers will only be able to retire employees below 65 where they can objectively justify this. If challenged they would have to show that it was appropriate and necessary to do so. This is a big step forward in meeting the demands of an ageing society. Until now, companies have been able to set the age at which their employees retire without any need to justify their choice. Employees may have had to retire at age 60 or even younger, whether or not they wished to continue working. Currently only 30% of people are in employment by the age of 65. A major part of the response to the ageing society will be for more people to choose to work to that age.

What will this mean in practice?

Retirement by mutual consent versus retirement as dismissal

- 6.1.17 If employer and employee agree about the retirement, there is of course no need to follow the procedures for retirement set out in this chapter. In practice, most retirements within a company may be by mutual consent.
- 6.1.18 However, the employer should not just assume that the employee will consent to retirement. The employer should establish this clearly and early on. If not, the employer may have failed to comply with the duty-to-consider procedure. Whether the retirement is by mutual consent or not, it will be good practice for the employer to inform the employee of the right to request working beyond the intended retirement date.
- 6.1.19 If the employee does not agree to retirement, the employer can only retire the employee through dismissal. If the employer relies on the national default retirement age and follows the duty-to-consider procedure for retirement (see section 6.3 below), the retirement will be a fair dismissal (provided the dismissal is a genuine retirement, see section 6.2). For retirement earlier than the default retirement age the employer will additionally have to demonstrate (if challenged) that it is objectively justified.

Extending working life

- 6.1.20 We want to encourage employers and employees to extend working life beyond the national default retirement age of 65. It is important to note that the default retirement age will not be a mandatory retirement age. This means that:
- employers are in no way forced to retire employees at 65, either under the existing rules or under the new rules; and

- keeping employees on past the national default retirement age does not prejudice employers' rights to retire employees at or after the retirement age. If employers do not retire employees at the retirement age, they can still do so later if necessary.

Effect on employers' existing retirement ages

- 6.1.21 **Employers who currently have a retirement age of 65, or no retirement age:** under the existing upper age limit in the unfair dismissal rules, employers have been able to retire employees at any time from age 65 onwards. Under the national default retirement age this will remain the case for genuine retirements (although the Age Regulations will introduce the new duty-to-consider procedure to be used for retirement – see section 6.3).
- 6.1.22 **Employers who currently have retirement ages above 65:** retirement ages of 65 and above will be covered by the national default retirement age, so such employers will not have to change or justify the retirement age (although again it will need to be a genuine retirement and they will need to comply with the duty-to-consider procedure).
- 6.1.23 **Employers who currently have retirement ages below 65:** it will no longer be possible to maintain retirement ages below the national default retirement age by relying on the upper age limit of unfair dismissal claims. Under the Age Regulations, such employers will have to objectively justify retirement ages below 65 (see section 4.1). Alternatively, they will have to abolish them or raise them to the level of the national default retirement age (where they keep a retirement age, they will also have to comply with the duty-to-consider procedure).

Review

- 6.1.24 We will review whether it is still appropriate to have a default retirement age in 2011 (five years after the Age Regulations come into force). See section 6.4 below for more details on this review and the monitoring strategy that will support it.

6.2 Planned retirement

6.2.1 Employers cannot simply use the retirement procedure for any and all dismissals of employees above the retirement age. The employer needs to establish accurately what the principal reason for dismissal is. Besides retirement, there are a number of other (potentially fair) reasons for dismissal:

- redundancy;
- conduct;
- competence; and
- some other substantial reasons.

6.2.2 The procedures that apply to these other reasons for fair dismissal are different from the duty-to-consider procedure for retirement:

- redundancy involves a redundancy payment to the employee; and
- the employer will generally need to follow the statutory dismissal procedure, which contains additional safeguards for the employee, allowing him or her to challenge the employer's allegations relating to conduct or performance.

The employer should not try to avoid these by applying the retirement procedures where the dismissal is actually a redundancy, or a dismissal on grounds of competence or conduct.

6.2.3 If the employer uses the retirement procedures to dismiss an employee, and the employee feels that the "retirement" was for other reasons, the employee can challenge the retirement as being unfair dismissal.

What will the Age Regulations say?

6.2.4 The Age Regulations will distinguish between a “planned” retirement dismissal and other retirement dismissals:

- In case of a “planned” retirement, the Age Regulations will assume that the employer is correct in saying that the reason for dismissal is retirement. The employee will have a heavy burden of proof if he or she wants to show that dismissal was for a different reason.
- In other retirement situations, the employer will have to satisfy the Employment Tribunal that the reason for dismissal was retirement. The burden of proof rests on the employer.

6.2.5 A retirement will be “planned” for these purposes if:

- it takes effect at the national default retirement age of 65;
- it takes effect at the employer's normal retirement age; or
- the employer has informed the employee of the retirement date at least six months in advance.

Why are we adopting this approach?

6.2.6 Where retirement takes place at the expected retirement date, or after the employer has planned for it and told the employee about it at least six months in advance, it is unlikely that the “retirement” is in reality a redundancy, for example. If the employee feels differently, it is reasonable – in these situations – that he or she has to provide convincing proof.

6.2.7 In other situations (a “retirement out of the blue”), it is reasonable for the employer to have to explain why such a dismissal is a retirement (rather than for instance a covert dismissal on performance grounds).

What will this mean in practice?

- 6.2.8 In case of planned retirement, the employer will enjoy a high degree of protection against claims from the employee that the retirement was not a retirement. Of course, the employer will still have to comply with the correct procedure for retirement to avoid the retirement being an unfair dismissal. This procedure (the duty-to-consider procedure) is explained in the next section (6.3).
- 6.2.9 Where employer and employee agree that the employee can keep working beyond the default retirement age or the employer's normal retirement age, agreeing a fixed term of at least six months for the extension of employment can be useful for both sides. From the point of view of the employer, this makes a retirement when the term expires a "planned retirement". From the point of view of the employee a fixed term clarifies expectations. At the end of such a term, the parties can again agree to a further extension.

An employer, Widgets Ltd, agreed with its employee Barbara that she would continue working for three years beyond the default retirement age of 65. During the second year of this three-year period, Widgets considers it necessary to have a round of redundancies. It makes a number of employees under age 65 redundant, but instead of making Barbara redundant, it retires her. Barbara could make a claim for unfair dismissal, redundancy and age discrimination. Widgets would have to satisfy the Tribunal that the dismissal was a retirement. In these circumstances, this would be difficult.

In a different scenario, both Widgets and Barbara let the moment where she reaches 65 go by without discussing retirement. At 66, Widgets informs Barbara that she will be retired in one year's time. Barbara believes that the real reason for dismissal is not retirement but competence (*i.e.* that Widgets thinks that she is no longer up to the job). Widgets has informed her more than six months in advance, so this is a planned retirement. Unless Barbara has strong evidence, the Tribunal will not uphold her claim.

6.3 Duty-to-consider procedure

- 6.3.1 We intend to give employees more choices about how long they work and when they retire. We want to move away from a culture that retires people without regard to the contribution that they can still make to the labour market. However, we recognise that – for the time being – there is still a need for employers to rely on a default retirement age.
- 6.3.2 We will drive the culture change initially by encouraging employers and employees to enter into a dialogue on the issue of retirement. We are, therefore, introducing a “duty to consider” for employers, under which an employer who wishes to retire an employee will have to inform the employee of his right to request to work beyond the set moment of retirement. If the employee makes a request, the employer will have to discuss it with the employee and consider it.
- 6.3.3 The duty to consider will be modelled on the existing right to request flexible working, which applies to parents of young children. This has proved a successful and light-touch way of encouraging employers to think about whether a different pattern of work could be accommodated in the workplace. Of course, retirement is a different situation. Employees whose request to continue working is turned down will not be able to carry on working, unlike those whose flexible working request is turned down. Some aspects of the procedure need to be adjusted to reflect this.

What was said in previous consultation?

- 6.3.4 We have discussed the new duty to consider with representatives of employer organisations, trade unions and age equality organisations. Some have been concerned that it would not do enough to shift the workplace culture. Other stakeholders, however, felt that it could be a useful step forward, and that, by ensuring that employers thought carefully about an individual's need to retire, the culture change would be encouraged. However, all agreed that the duty to consider could contribute to the desired culture change.

What will the Age Regulations say?

6.3.5 The Age Regulations will provide for a procedure to be followed for compulsory retirement (the “**duty to consider**” procedure). The main rules of the procedure will be as follows:

- The employer has a duty to inform the employee of the right to request working longer at least six months (but no more than twelve months) before the intended moment of retirement. The employer must also inform the employee of the intended retirement date at this point. An employer who fails to do this may have to pay the employee a compensation of up to eight weeks’ pay.
- If the employer has not informed the employee as required above, he or she has an on-going duty (until two weeks before dismissal) to inform the employee of his right to request working longer and of the intended retirement date. If the employer fails to do this, the dismissal will be automatically unfair.
- The employee has a right to request not to be retired (*i.e.* in effect to continue working beyond the moment where he or she would otherwise be retired).
- If the employee makes a request, the employer will have to consider it if it is made at the earliest one year before the expected moment of retirement, and at the latest six weeks before retirement (the six week deadline does not apply if the employer had failed to inform the employee about the right to request).
- In considering the request, the employer will have to hold a meeting with the employee to discuss it (unless the employer agrees to the request). The employer will then have to inform the employee of the decision within two weeks. The employment will continue until this has been done, even if this is after the intended date of retirement.

- The employee will be able to appeal against the employer's decision within two weeks of receiving it. If the employee does appeal, the appeal meeting can be held after the retirement has taken effect.

6.3.6 As long as employers follow the duty-to-consider procedure correctly, they may (where the reason for dismissal is genuinely retirement, see section 6.2) rely on the default retirement age without being at risk of losing unfair dismissal proceedings.

6.3.7 The existing statutory dismissal procedure (the "three step" dismissal procedure) will not apply to retirement dismissals – only the duty-to-consider procedure will apply.

Why are we adopting this approach?

6.3.8 The new duty to consider means that employees who want to work beyond normal retirement age will be able to discuss this with their employer. This will ensure that employers listen to employees and think about whether they can agree. In doing so, it will help promote a culture change including on workforce planning and the design of employee benefits, and move towards a position where fixed retirement ages are relied on only where they can be objectively justified by the employer.

6.3.9 There will be no qualifying period – any employee coming up to retirement will have the right to request that they be allowed to continue working. Whilst the existing right to request flexible working has a 26 week qualifying period we see no reason to limit the new right in the same way.

6.3.10 Allowing the employee to make a request at the earliest one year, and at the latest six weeks before the due retirement date ensures that:

- the discussion takes place sufficiently close to retirement so that both parties can be expected to decide what they want; and
- there is a minimum period between the moment of the request and the moment of retirement to give the employer time to consider the request.

What will this mean in practice?

6.3.11 The duty-to-consider procedure can result in a new retirement date being set, later than the previous one. Once this is agreed, the employee has the same employment rights as an employee has up to the default retirement age of 65. As the new date approaches, the duty-to-consider procedure applies again in exactly the same way. It applies whenever the employer wishes to retire the employee (other than by mutual agreement). This means that it applies:

- irrespective of the age at which retirement takes place (it applies not just for instance at the default retirement age of 65);
- irrespective of whether the retirement in question is the “first attempt” at retirement, or whether it is retirement at the end of an extension following an earlier request; and
- irrespective of whether the moment of intended retirement is also the moment when the term of employment ends (for an employee on a fixed-term contract).

6.3.12 For each retirement occasion, the employee can make one formal request. However, there is of course nothing to prevent employees raising the issue of working beyond normal retirement at any time and as often as they like outside the formal framework of the duty-to-consider procedure.

Combining “planned retirement” with the duty-to-consider procedure

6.3.13 The employer must inform the employee in writing of both the intended retirement date and the right to request at least six months in advance – both for retirements at and above the retirement age. This allows the employer to comply with the six-month rule under the duty-to-consider procedure and to benefit from the concept of “planned retirement” (see section 6.2) by means of a single notification.

Managing the retirement process

6.3.14 Extending working life can bring benefits both to employer and employee. It is, therefore, advantageous from both points of view not to accept retirement as a given, but to manage the retirement process actively.

6.3.15 Managing the retirement process means:

- the employer should consider in plenty of time before the expected moment of retirement whether there are business benefits to keeping the employee, and, if so, discuss this with the employee;
- if the employer wants to retire the employee, he or she should again discuss this with the employee in plenty of time to establish whether the employee agrees, and inform him or her about the right to request continuation of employment and of the intended retirement date;
- if the employee makes a request to continue working, and the request is agreed, the parties should clarify their expectations – in particular they should clarify for how long the employment is intended to continue;
- just as in the run-up to the original moment of retirement, the parties should discuss in good time what will happen at the end of the extension, *i.e.* retirement or a further extension.

6.3.16 The statutory request by the employee is to continue working under the same terms and conditions as had applied up to the retirement date. However, there is nothing to prevent the employee proposing, or the employer suggesting, a different working pattern that might suit them both better. Neither side will be obliged to accept proposals for change.

Chapter 6 Retirement

An employer, Useful Services Ltd, has a retirement age of 67 in place. Its employee, Debra, is approaching this age, but she is currently leading a project which is expected to continue for a year beyond the retirement age.

There is no need for Useful Services Ltd to retire Debra immediately when she reaches 67. Useful Services could for instance consider that it wants her to go on until the project finishes. If neither Useful Services nor Debra raises the issue, the employment will continue unchanged beyond the retirement age.

Alternatively, Useful Services may initially intend to retire Debra at 67. It notifies her of the retirement date and the right to request longer working seven months before this point (this is in accordance with the duty to do this at least six months ahead of time). Debra puts in her request to continue working two months before the retirement date. (again, this complies with the relevant deadline of six weeks before the retirement date). Although she does not need to make any specific proposals in her request, she proposes to keep working until the project has been completed. Upon receipt of the request, Useful Services concludes that this is a good idea, and agrees to it without holding a meeting (this is possible - if the employer agrees to the request, no meeting is necessary).

Useful Services and Debra have not agreed a clear new retirement date. In order to retire Debra at the end of the project, Useful Services will therefore still have to notify Debra of the exact retirement date six months in advance in order to benefit from the concept of "planned retirement" (see section 6.2). At that point, Debra will again be able to put in a request to continue working (if she wants to).

6.4 Monitoring and review

- 6.4.1 Section 6.1 explains our decision to have a national default retirement age of 65. In 2011 we will review our decision to have a default retirement age, and decide whether it is still necessary. If it is not, we will abolish it. Until then, we will collect relevant information from a number of sources to ensure that our decision is based on evidence.
- 6.4.2 If the default retirement age were to be abolished, employers who wanted to retain compulsory retirement ages would have to objectively justify them.
- 6.4.3 This section summarises how we will take the decision, and what we will do in the period leading up to the decision. More details, particularly on the information sources that we will use as the basis for our decision, are available in the Regulatory Impact Assessment (see chapter 10 for more details on the Regulatory Impact Assessment).

What will the review consider?

- 6.4.4 The default retirement age is necessary because many businesses need it for reasons of workforce planning, and because not having a default retirement age could have adverse effects on pensions and other employment benefits.
- 6.4.5 In 2011, our decision on whether to keep or abolish the default retirement age will focus mainly on two factors:
- whether, in the light of the evidence, the default retirement age remains appropriate and necessary to facilitate workforce planning and to avoid adverse effects on pensions and other employment benefits; and
 - the influence of any other social policy objectives.

What information will we collect to help us make the decision?

6.4.6 We will look at the evidence on **longevity**, and **employment patterns of older workers** in particular. Changes to longevity are important because they might be expected to have implications for the labour market. With rising longevity more individuals might be expected to seek to work for longer; to help support longer retirements; and, with older people a growing proportion of the overall population employers might be expected to look to them as an increasingly important labour supply. Through such channels, changes to longevity could indirectly bear on the costs and benefits of maintaining a fixed retirement age. Other areas to be examined will include:

- **information relevant to workforce planning:** such as evolution of employers' use of age in workforce planning – both in businesses that have retirement ages and in the growing number of those that do not;
- **information relevant to pensions:** such as trends in life expectancy, individual savings patterns and financial planning, and any changes to occupational pensions (what the changes are, why they have occurred, and any conclusions we can draw about the effect on pensions of removing the default retirement age);
- **information relevant to other employment benefits:** such as any changes to employment benefits (what the changes are, why they have occurred, and any conclusions we can draw about the effect on employment benefits of removing the default retirement age); and
- **other relevant information:** such as changes in people's expectations of retirement ages, changes by employers to their retirement ages (and the reasons for doing so), changes in participation rates in the labour market of those over 65 compared with other age groups (and the effect of the new duty to consider on this), changes in the numbers of requests to work beyond normal retirement age as well as in the percentages of accepted requests, and changes in patterns of work for older workers (including part-time work and other forms of flexible working).

- 6.4.7 We will use both independent information sources and informal discussions with our main stakeholders to monitor the developments in these areas between now and 2011.

Independent sources of information

- 6.4.8 This will involve the use of surveys (both surveys that use statistical information and surveys that use case studies) and official databases. Some examples of the surveys we will use are the Labour Force Survey (LFS), the survey of Factors Affecting the Labour Market Participation of Older Workers (FALMPOW), the DTI/ DWP Survey of Employment Practices and the Employers' Pension Provision Survey (EPPS).
- 6.4.9 More detail on the complete list of surveys, the information we expect to get from them and the methods for interpreting the information is in the Regulatory Impact Assessment (see chapter 10).

Informal contacts with stakeholders

- 6.4.10 The main organisations with an interest in the Age Regulations are representatives of employers, employees and age equality organisations. These include Age Concern, British Chambers of Commerce, the Confederation of British Industry, the Chartered Institute of Personnel and Development, the Chartered Management Institute, Employers Forum on Age, the Federation of Small Businesses, Help the Aged, Third Age Employment Network and Trades Union Congress.
- 6.4.11 We have developed our policy on age discrimination (including retirement ages) following extensive consultation with these stakeholders. We will continue to stay in close contact with them during the period leading up to the formal review. Their views will help us gauge the extent to which we are achieving the desired cultural change, which will influence the decision. In addition, stakeholders may be able to give anecdotal feedback on the impact of the legislation "in the real world". They may also be able to provide us with additional data from any surveys or monitoring activities that they carry out.

Chapter 7

Occupational pensions

What does the Directive say?

- 7.1 The Directive covers occupational pension schemes and occupational invalidity benefits provided as part of the pension scheme or separately. The term “occupational pensions” is used here to include so-called defined benefit and defined contribution schemes. Personal pensions (*i.e.* pension schemes other than those provided by the employer) are not covered, except for any employer contributions into such pensions.
- 7.2 The Directive does not cover state pensions. The Age Regulations will not affect them.
- 7.3 Article 6 of the Directive allows Member States to exempt certain aspects of occupational pensions and invalidity benefits from age legislation:
- the fixing of ages for admission or entitlement to occupational pensions and invalidity benefits, including the fixing of different ages for employees or groups or categories of employees; and
 - the use of age criteria in actuarial calculations.
- 7.4 In addition, article 6 of the Directive contains the general test of objective justification (see section 4.1). This allows Member States to provide that age-related rules in occupational pension schemes remain lawful if they are justified by a legitimate aim, such as a legitimate objective of social or employment policy.

What was said in previous consultation?

- 7.5 In *Age Matters*, we said we would take advantage of the provisions in the Directive that allow occupational pension schemes to set ages for admission or entitlement to retirement benefits.

What will the Age Regulations say?

- 7.6 The Regulations will make it unlawful for trustees or managers of an occupational pension scheme, when carrying out their functions, to harass or discriminate against a member or prospective member of the scheme on grounds of age. Every occupational pension scheme will be treated as including a non-discrimination rule and trustees and managers will be given power to alter schemes in order to comply with the rule.
- 7.7 The Age Regulations will provide that certain age-related rules or practices in occupational pension schemes are effectively exempted. These will include:
- closing pension schemes or parts of pension schemes to new members;
 - providing different pension schemes to employees of different ages or with different lengths of service;
 - the use of minimum and maximum ages for admission to pension schemes;
 - setting different ages of admission to a pension scheme for different groups of employees;
 - having a normal pension age in a pension scheme (*i.e.* the age at which a person normally becomes entitled to receive retirement benefits);
 - both age-related and flat-rate employer contributions into pension schemes;
 - the use of age criteria in actuarial calculations;
 - setting the level of pension benefits by reference to years of service;
 - adjustments to the level of pension benefits where there is a difference of more than a given number of years between the member and spouse;

Chapter 7 Occupational pensions

A company pension scheme provides a pension for widowed spouses of employees who die in service. Where the dependant spouse is more than ten years younger than the employee, the pension is reduced. The company is concerned that it will face claims of indirect age discrimination. Under the Age Regulations, reduction of benefits paid to the spouse of a member where the spouse is more than a given number of years younger will continue to be lawful.

and

- age limits on payments of pensions to dependant children.

A company pension scheme provides a pension for any dependant children under the age of 23 where an employee dies in service. The company is concerned that this might amount to indirect age discrimination on the basis that applying a cut-off at age 23 is likely to affect adversely employees of a certain age more than others. Under the Age Regulations, it will continue to be lawful to apply age limits to those dependants to whom benefits may be paid.

The Schedule to the draft Age Regulations dealing with occupational pension schemes contains the full list of exemptions. We expect that these exemptions will cover most age-related rules in pension schemes.

- 7.8 In addition, it will be open to trustees and managers to objectively justify any other age-related provisions in occupational pension schemes (see section 4.1).

Why are we adopting this approach?

- 7.9 Our aim is to tackle unfair age discrimination without risking the continuing provision of occupational pensions. We do not believe that the Directive intends to undermine the provision of occupational pensions.
- 7.10 We recognise that employers and other providers of occupational pensions have many competing pressures and face some difficult decisions on how they run their schemes in the future. Since many rules in schemes are necessarily age-based, we consider the most sensible approach is to make use of the flexibility in the Directive to make clear that certain age-related rules in pension schemes are exempt. We think that this strikes the right balance between tackling unfair age discrimination and maintaining the integrity of occupational pensions.

What will this mean in practice?

- 7.11 Employers and managers or trustees of occupational pension schemes will have to examine the rules of their pension schemes. Any age-related aspects that are listed in the Age Regulations will remain lawful. In addition, employers and providers of pensions may objectively justify other rules (see section 4.1).
- 7.12 We expect pension schemes to be able to operate largely as they do now.

Chapter 8

Changes to other legislation

- 8.1 As part of our policy to ban unjustified age discrimination, it is important to review existing domestic legislation, and to remove any age limits that are no longer needed from such legislation. This is also a requirement of the Directive (article 16).
- 8.2 We have reviewed all relevant legislation in Great Britain in order to identify any age-discriminatory provisions. We will remove some of those provisions because we do not believe that they are justified as required under the Directive. This chapter discusses the most important changes that will be made to existing legislation to remove age-discriminatory aspects.

8.1 Statutory redundancy payments

- 8.1.1 The statutory redundancy payments scheme provides for redundancy payments to be made by the employer to employees with two years' qualifying service who are made redundant.

What was said in previous consultation, and what will the Age Regulations say?

- 8.1.2 The scheme has a number of age-related aspects. We discussed them in *Age Matters*. The following lists our proposals for these aspects in *Age Matters*, the responses and the final approach in the Age Regulations.

Entitlement

- 8.1.3 The scheme has a lower age limit of 18 on entitlement. We proposed to remove this. 79% of respondents agreed. The Age Regulations will do so.
- 8.1.4 There is also an upper age limit on entitlement, which is set at the normal retirement age of the business in question, or 65 if the business does not have a retirement age. In *Age Matters*, we proposed to remove the upper age limit only if there was to be no default retirement age. In the Age Regulations, however, we have decided to remove the upper age limit in spite of our decision to have a default retirement age. This is further explained below.

- 8.1.5 A final age-related rule on entitlement requires two years of continuous service before entitlement starts (this might indirectly affect certain age groups more than others, and might therefore constitute indirect age discrimination). We did not discuss the two-year qualifying period in *Age Matters*. This qualifying period will remain in place.

Calculation

- 8.1.6 The scheme uses length of service for the calculation of the redundancy payments (this could amount to indirect discrimination), and it uses a cap of 20 years on the length of service that can be taken into account for the calculation. We proposed to retain both elements. We asked whether consultees agreed that length of service should be maintained as a factor in the calculation. 88% agreed. Accordingly, the Age Regulations will not change this.
- 8.1.7 The statutory redundancy payment gradually tapers down to zero for those employees who are within one year of the upper age limit. We proposed to remove the tapering-down rule. 65% of respondents agreed. The Age Regulations will do so.
- 8.1.8 The calculation of the redundancy payment uses a multiplier with age bands: the payment is determined by multiplication with a number of weeks of pay ranging from half a week for younger workers to one and a half weeks for older workers. We proposed to remove the age bands, so that the same number of weeks of pay is used for the purpose of calculating redundancy payments for employees of all ages. We proposed that this multiplier should be brought to the average level of one week. 62% of consultees agreed with this approach, but many pointed out that they did not support the proposed level of one week's pay for the multiplier, since this would result in lower payments to older workers. The Age Regulations will remove the multiplier based on wide age brackets; we have not yet determined the level of the multiplier.

Chapter 8 Changes to other legislation

- 8.1.9 The calculation of the redundancy payment is also based on the employee's weekly pay, subject to a statutory limit. The limit is currently £280 per week. This factor is not age-related, but it needs to be considered alongside the multiplier. Any change to the statutory limit would also impact on other payments, such as those made under the insolvency provisions of the Employment Rights Act 1996 (including arrears of pay, holiday pay and compensatory notice pay).
- 8.1.10 In assessing how to set the calculation, the principal objective will be to strike the right balance between minimising the cost and administrative burden to employers, whilst ensuring employees who lose their jobs through no fault of their own are protected by a minimum financial "safety net". A range of approaches could be adopted including gearing the payments more heavily to length of service. To meet this policy objective we will take steps to gauge stakeholder opinion, with a view to settling on the most appropriate method of calculation and level of payment to be included in the Age Regulations.

Redundancy Payments Pensions Regulations 1965

- 8.1.11 Finally, we proposed that the Redundancy Payments Pensions Regulations 1965 should be revoked. These regulations allowed employers to off-set certain pension or lump sum payments against statutory redundancy payments. We explained that the Regulations no longer serve a useful purpose, and have fallen into disuse. 49% of respondents agreed, with 41% having no strong feelings either way. We will remove these regulations.

Why are we adopting this approach?

- 8.1.12 The reasons for our approach were set out in *Age Matters*. We believe that most of the age limits in the redundancy legislation no longer have a valid reason, and we can therefore not justify maintaining them.

8.1.13 We will maintain the use of length of service as a factor in the calculation of redundancy pay. This is justified because it ensures that the redundancy payment rewards past loyalty of the employee, expressed in the length of service. There is a very high level of support for this. This is also in line with the exemptions we are including in the Age Regulations for service-related benefits, see section 5.1 above.

Removal of the upper age limit

8.1.14 Whereas in *Age Matters* we considered removing the upper age limit if there was no default retirement age, we have now decided to remove it in spite of the decision to have a default retirement age. We have taken this decision for a number of reasons:

- We believe that it is objectively justified to set a default retirement age because this pursues legitimate aims such as workforce planning and protecting pensions and other employment benefits (see section 6.1). However, the redundancy upper age limit does not form part of the default retirement age. We do not believe that there are legitimate aims supporting discrimination against older employees in the form of an upper age limit on redundancy payments.
- It is important to distinguish between retirement and redundancy. We support employers' needs to retire employees, but retirement should not be a cost-free alternative for the employer where the redundancy procedure is appropriate. If employers feel the need to make employees redundant, they should not be able to start by making all employees above the default retirement age redundant. They should make decisions on redundancy without regard to age.
- We want to encourage employers to keep employees past the default retirement age of 65. Maintaining the upper age limit on redundancy rights might seem like an incentive for employers to do this, since employers would not have to fear any potential redundancy costs for older employees. However, we do not believe it is right to pursue

Chapter 8 Changes to other legislation

the aim of extending working life by continuing to deny older workers rights that have no relation with their age. We want to encourage a culture change that will result in employers keeping employees on past the retirement age because they recognise the continued valuable contribution that they can make, not because it is cheaper to make them redundant.

- Removing the upper age limit brings the policy on redundancy in line with that on unfair dismissal (see section 8.2 below). It sends a clear signal that the default retirement age is an exception to the rule that older workers should receive the same treatment as younger workers, and that this exception should only apply to retirement but not to other dismissals.

What will this mean in practice?

- 8.1.15 Employers who provide the compulsory minimum redundancy payment set out by the statutory redundancy rules will have to be aware of the changes described above. They will have to ensure that they apply the new calculations to any redundancies occurring after the Age Regulations come into force on 1 October 2006.
- 8.1.16 Many employers will have contractual redundancy schemes that are more generous than the statutory one, but that follow the same structure as the currently existing statutory scheme. As set out in this section, we are removing a number of age-discriminatory elements from the statutory schemes. This means that such employers should also check that their own contractual schemes do not contain age-discriminatory provisions that they cannot justify.
- 8.1.17 We are also keeping a few age-related aspects: length of service as a factor that determines the calculation of the redundancy payment, and the current qualifying period of two years of continuous service. The Age Regulations will allow employers to do the same for their contractual redundancy schemes (see section 5.1 for details on this exemption).

8.2 Unfair dismissal

- 8.2.1 Under the Employment Rights Act 1996, most employees who have one year's qualifying service with their employer have the right not to be unfairly dismissed.
- 8.2.2 Employees who successfully claim unfair dismissal can be awarded financial compensation in the form of a basic award, calculated in the same way as a redundancy payment, and a compensatory award (the compensatory award will not be discussed here since it does not contain age-related aspects).
- 8.2.3 Many of the age-related provisions in unfair dismissal legislation are the same as those in the statutory redundancy payments scheme, so this section should be read together with section 8.1, which deals with statutory redundancy payments.

What was said in previous consultation?

- 8.2.4 We discussed the age-related aspects of the unfair dismissal legislation in *Age Matters*. Our discussion of these issues in *Age Matters*, and the input received from respondents are summarised below:
- **Entitlement:** There is currently an upper age limit on the right to claim unfair dismissal which is similar to the upper age limit on redundancy payments – in most cases, employees at or above the normal retirement age of the business in question (or 65 if the business does not have a retirement age) cannot make unfair dismissal claims. We proposed to remove the upper age limit. We did not ask a question about this in *Age Matters*.
 - **Calculation:** The calculation of the basic award for unfair dismissal currently relies on a number of age-related factors: it uses the same age bands as statutory redundancy payments, and it gradually tapers down to zero for those employees who are within one year of the

Chapter 8 Changes to other legislation

upper age limit. We proposed to remove both age aspects. 74% of respondents to *Age Matters* agreed. Finally, the scheme uses length of service for the calculation of the unfair dismissal basic award, and it uses a cap of 20 years on the length of service that can be taken into account for the calculation. Both elements could amount to indirect discrimination, but we proposed to retain them. We asked whether consultees agreed that length of service should be maintained as a factor in the calculation. 88% agreed.

8.2.5 Contrary to the statutory redundancy payments rules, there is no minimum age requirement of 18 for unfair dismissal claims.

8.2.6 The removal of the upper age limit allows employees of all ages to make unfair dismissal claims. However, where retiring an employee is justified and carried out in accordance with the correct procedures (as discussed in chapter 6), it is necessary to ensure that this is not then regarded as an unfair dismissal. In *Age Matters*, therefore, we proposed that where employers retire employees on the basis of a justified retirement age, they should be able to defend the dismissal as fair. 66% of responses supported this.

What will the Age Regulations say?

8.2.7 The Regulations will:

- remove the upper age limit to unfair dismissal claims and the tapering-down provisions which reduce the award in the period leading up to the upper age limit; and
- harmonise the age bands for the calculation of the basic award in the same way as for redundancy pay.

8.2.8 As with statutory redundancy pay (section 8.1), the other age-related rules (use of length of service, and the qualifying period of one year) will be maintained.

8.2.9 The Age Regulations will set out when retirement is a fair or an unfair dismissal. Dismissal on grounds of retirement will be a fair dismissal if:

- it is genuinely a dismissal on grounds of retirement (see section 6.2);
- it takes place at or after the national default retirement age of 65, or a lower retirement age which has been set and objectively justified by the employer; and
- it takes place in accordance with the new procedural requirements for compulsory retirement (see section 6.3).

8.2.10 A dismissal on grounds of retirement will be automatically unfair in the following situations:

- prior to retiring the employee, the employer has not informed the employee at all of the right to request to continue working and of the intended retirement date, or the employer has informed the employee less than two weeks before the retirement date;
- the dismissal takes effect while a duty to consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision; or
- once a duty-to-consider procedure has started, the employer fails to comply with it properly.

Why are we adopting this approach?

Removal of the upper age limit

8.2.11 The current upper age limit on unfair dismissal claims allows employers to set retirement ages and to retire employees at or above the level of the upper age limit. However, the upper age limit goes well beyond this: it withholds rights from employees aged 65 and over against a wide range of forms of unfair dismissals that are unrelated to retirement.

Chapter 8 Changes to other legislation

They include, for instance, allegations of theft or incompetence, and where the dismissal is carried out with an unfair procedure. It is not justifiable to prevent older employees from complaining about unfair dismissals in such circumstances.

8.2.12 Removing the upper age limit on unfair dismissal claims, and at the same time allowing for retirement in the form of a fair dismissal (if in accordance with the rules described in chapter 6) will allow employers to retire employees in a fair manner, whilst giving older employees the same possibilities as other employees to challenge dismissals in other situations.

Removal of age aspects from the calculation of the basic award

8.2.13 We are making the same changes to the calculation of the basic unfair dismissal award as to the statutory redundancy payments. This is because the basic award is meant to ensure that employees get at least the same payment if they are unfairly dismissed as they would have received in the case of a (fair) redundancy.

Duty-to-consider notification less than two weeks before retirement

8.2.14 The employer is obliged to notify the employee of the intended retirement date and his "right to request" at least six months in advance, yet the sanction of automatic unfair dismissal is only triggered if the employer fails to notify at least two weeks in advance of the retirement date. The reason is that it will still be reasonably possible for the employee to put in his request to continue working even if the employer notifies him or her less than six months in advance. If he does so, both parties can still complete the duty-to-consider procedure as normal. This is different if the notification is given less than two weeks in advance. In this case the employee would not have a reasonable opportunity to make a request.

Chapter 9

Support and legal action

9.1 This chapter explains:

- how to get further help and advice in dealing with age discrimination and adjusting to the Age Regulations; and
- how to take legal action against age discrimination once the Age Regulations have come into force.

9.2 Taking legal action against age discrimination will work largely in the same way as already established for other strands of equality legislation (particularly the recent regulations on sexual orientation and religion or belief). We will only explain the main points here.

9.1 Guidance and support

What advice and guidance will be available?

9.1.1 This consultation document contains the first explanation of the full draft Age Regulations. This will help those with obligations under the Age Regulations in their preparations. However, it is not guidance. We will publish guidance when the Age Regulations have been approved by Parliament.

9.1.2 A number of Government organisations can provide further advice on the current discrimination legislation and how to prepare for the introduction of the Age Regulations. Annex B contains a list of these organisations.

What about the Commission for Equality and Human Rights?

9.1.3 Discrimination legislation on race, sex and disability has been in place here for some time, and for each of these areas there is currently a separate equality commission – the Commission for Racial Equality, the Equal Opportunities Commission (sex equality) and the Disability Rights Commission.

Chapter 9 Support and legal action

- 9.1.4 We are creating a single Commission for Equality and Human Rights (the “CEHR”) that will take over the duties of the commissions on race, sex and disability as well as responsibility for the three new equality strands: sexual orientation, religion or belief and age. The CEHR is planned to be in place by October 2007. We recognise that this means that there will be an interim period during which there will be no commission dealing with age discrimination.
- 9.1.5 It is likely that the CEHR will have the full range of enforcement powers matching those of the existing commissions on race, sex and disability. This means that as well as providing advice, guidance and best practice support on age diversity, the CEHR will have the power to challenge age discrimination by supporting organisations and individuals in securing their right to equal treatment under the Age Regulations.

9.2 Legal action

9.2.1 Where a person feels discriminated against, harassed or victimised on the grounds of age, it is usually best to raise this with the responsible party (the employer or other person with obligations under the Age Regulations, such as a provider of vocational training). It may be possible to find a solution in this way.

What will the Age Regulations say?

9.2.2 If the dispute is an employment matter other than a dismissal, the employee will need to follow the statutory grievance procedure before he or she can take legal action.

9.2.3 Age discrimination claims relating to employment and vocational training will be dealt with through the Employment Tribunals. The main exception to this rule is that claims against providers of further or higher education (as opposed to other vocational training) must be brought in the County Courts (England and Wales) or the Sheriff Courts (Scotland).

What will this mean in practice?

9.2.4 Further information on starting legal action is available from Jobcentre Plus offices or local Citizens Advice Bureaux.

See also: www.employmenttribunals.gov.uk; www.hmcourts-service.gov.uk/infoabout/county/index.htm; and www.scotcourts.gov.uk/sheriff/index.asp

9.2.5 An employee who has been dismissed, and believes this was for an age-discriminatory reason, can claim both age discrimination and unfair dismissal. In addition, claims based purely on unfair dismissal could arise in cases of compulsory retirement where the employer complies with the national default retirement age of 65 (so there are no grounds for an age discrimination claim), but fails to comply with the duty-to-consider procedure (see section 6.3).

9.3 Burden of proof

What will the Age Regulations say?

9.3.1 As in other strands of discrimination legislation, there will be two stages to proving age discrimination, harassment or victimisation:

- **Difference of treatment:** to get the claim off the ground, the complainant (this is the employee or other person with rights under the Age Regulations) only has to prove facts from which the court could conclude that difference of treatment (directly or indirectly), harassment or victimisation has taken place. Once the complainant has succeeded that far, it is up to the respondent (this is the employer or other person with obligations under the Age Regulations) to prove facts that show the contrary.
- **Justification:** if the respondent cannot do so, he or she will then have to demonstrate that such difference of treatment was justified (see section 4.1 on justification). Harassment or victimisation cannot be justified.

What will this mean in practice?

9.3.2 The burden of proof will work in the same way for any age discrimination claims both before the Employment Tribunals and the County or Sheriff Courts.

Indirect discrimination – comparator pools

9.3.3 Proving the facts in case of indirect age discrimination requires a comparison with a "comparator pool":

- In case of indirect discrimination, the allegation is that the complainant suffers a disadvantage on grounds of age from certain treatment, even though the treatment in question does not use any (obvious) age criteria.

- In order to establish that there is in fact difference of treatment on grounds of age, the complainant will therefore not only have to show that the treatment causes a disadvantage for the complainant and the age group to which the complainant belongs, but also that it does not cause that disadvantage for a relevant different age group (called the “comparator pool”).

A newspaper requires its journalists to pass a fitness test as a condition for assignments abroad. This requirement does not contain an age criterion. Charles is a 60-year-old journalist working for the newspaper. He feels that he is less likely to pass the test because of his age. In order to establish that the test constitutes difference of treatment on grounds of age, Charles will have to show that his age group is less likely to pass the test than a relevant other age group, for instance employees in their thirties.

- The comparator can be actual or hypothetical, and can be a group of people within the same employer or within the labour market as a whole.

In the above example, if the newspaper happens to employ only journalists above, say, 50, it may not be appropriate to use other employees within the same business as a comparator pool. The comparator pool could be younger employees in the labour market as a whole.

- 9.3.4 The claimant can use any kind of evidence, including statistical information. As stated above, the claimant does not have to show facts that conclusively prove difference of treatment on ground of age, only facts from which the Tribunal or Court could conclude this.

Unfair dismissal

- 9.3.5 Section 6.2 explains that the Age Regulations will introduce specific burden of proof rules where there is an unfair dismissal dispute as to whether the real reason for dismissal was retirement or something else.

9.4 Remedies

What will the Age Regulations say?

Age discrimination

- 9.4.1 If the Tribunal or Court upholds a claim for age discrimination, it will be able to award financial compensation (including damages for injury to feelings). There is no limit on the amount of compensation.

Unfair dismissal and the duty-to-consider procedure

- 9.4.2 A compulsory retirement will not be age discrimination if it complies with the national default retirement age or a retirement age below 65 that the employer has objectively justified (provided it is a genuine retirement). However, it could still be an unfair dismissal if the employer has failed to follow the duty-to-consider procedure correctly (see section 6.3). If so, normal unfair dismissal compensation applies as with any other unfair dismissal claim.
- 9.4.3 There is one exception, regarding the employer's duty to inform the employee of his right to request longer working at least six months before the intended retirement date (this duty only applies if the employee was not already aware of this right). If the employer informs the employee less than six months in advance (but more than two weeks in advance), the employee can be awarded a compensation of up to eight weeks' pay. If the employer informs less than two weeks in advance (or not at all), normal compensation rules apply again.

Chapter 10

Benefits and costs

10. 1 We have considered the impact of the Age Regulations on the economy as a whole, employers and individuals, and on public expenditure. This analysis is referred to as the Regulatory Impact Assessment.
10. 2 We gave a first summary of the Regulatory Impact Assessment in our 2003 consultation, *Age Matters*. This chapter will provide an update. The table at the end of this chapter summarises the benefits and costs of each element of the Age Regulations to firms, individuals and the Exchequer.
10. 3 The full Regulatory Impact Assessment will be finalised when the Age Regulations are brought before Parliament. A link to the current full version can be found at: www.dti.gov.uk/er/equality/age.htm.

What are the benefits and costs of introducing the Age Regulations?

The economy overall

10. 4 Over time, there will be overall net economic (not to mention social) benefits from the legislation, with potentially large effects on tax and national insurance receipts, and the long run potential of the economy. We believe that these benefits will arise principally due to increased employment rates and better matching of jobs to people.
10. 5 There will be costs associated with the legislation as well, for instance the cost to employers of dealing with requests by those who wish to continue working past the firm's retirement age, but we believe that overall these are of a lower magnitude than the benefits.
10. 6 There are major uncertainties about how the economy would react to an increased participation of older workers. In addition, determining the benefit of the Age Regulations means drawing a comparison with the expected development if no age legislation were introduced – this comparison is very difficult because of uncertainties about future labour force participation in the absence of the proposed legislation (for example because of pension reforms and demographics). These factors make

quantifying difficult. However, our modelling work suggests that the Age Regulations could result in an increase in the labour market of around 15,000 to 29,000 per year by 2016, leading to an increase in gross domestic product of £0.6 billion to £1.25 billion per year.

Business

- 10.7 There will be an estimated net loss of £220 million to a net benefit of £75 million to firms in the first year. However, the average net annual benefit to firms in the first ten years will be between £20 million and £240 million. These estimates exclude the impact of the changes in the way statutory redundancy payments and the basic award for unfair dismissal will be calculated once the Age Regulations come into force, because the multiplier used for these calculations has not yet been finalised (see section 8.1).
- 10.8 Smaller firms will be likely to bear comparatively higher implementation costs because of the complex nature of age discrimination. Small firms are also more likely to rely on informal methods, such as word of mouth and the use of informal contracts, and so may have to make more changes to comply with the Age Regulations. Total implementation costs for all small firms are expected to be about £165 million, or £140 each. Like all companies they will benefit from improvements in the functioning of the labour market. The net effect on small firms is a small loss (the range of estimates is for an average loss over ten years of £21 per firm to an average gain of £8.50 per firm).

Individuals

- 10.9 Individuals will benefit from being treated more fairly when applying for jobs or being selected for training, as well as while in employment or training. They will also benefit from having greater control over their retirement age. This will result in higher pay while in work and increased

labour participation rates. The total benefit to individuals is expected to be between £44 million to £250 million in the first year of the legislation and to average between £59 million to £340 million each year in the first ten years – again, this is excluding the impact of changes to the formula for calculating statutory redundancy payments and basic awards for unfair dismissal.

Public expenditure

- 10.10 The net benefits to the Exchequer are expected to be between £1 million and £44 million in the first year and £17 million and £140 million on average each year in the first ten years of the legislation coming into force (as above this is excluding the changes to redundancy payment calculations).

Chapter 10 Benefits and costs

| Summary of costs and benefits of age discrimination legislation | | | |
|---|--|--|----------------------|
| | Benefits Annual | Costs Annual | Costs One-off |
| Employers | | | |
| Total implementation costs for all policy strands (Awareness and decision making) | | | £228m |
| Total enforcement | | £30m | |
| Retirement | £4.4-22m in first year, falling to £3.5-18m in year 10 | £0.5-2.0m in first year rising to £0.5-2.5m in year 10 | |
| Statutory redundancy payment | Depends on formula chosen | | |
| Unfair dismissal awards | Depends on formula chosen | | |
| Recruitment | £14-85m | £4.0-8.8m falling to £3.1-8.2m in year 10 | |
| Training | £44-370m | £51-420m | |
| Promotion | £35-180m | £14-180m | |
| Total | £83-710m | £76-410m | £228m |
| Individuals | | | |
| Retirement | £12-67m in first year rising to £50-300m by year 10 | | |
| Statutory redundancy payments | Depends on formula chosen | | |
| Unfair dismissal awards | Depends on formula chosen | | |
| Training | £5-42m | | |
| Promotion | £27-140m | | |
| Total | £44-250m in first year rising to £82-490m by year 10 | | |
| Exchequer | | | |
| Enforcement | | £8m | |
| Retirement | £8.8-51m in first year rising to £42-240m by year 10 | | |
| Redundancy | Depends on formula chosen | | |
| General | Improvements in the macroeconomy will mean higher tax and national insurance receipts. | | |
| Macroeconomy | | | |
| | Total macroeconomic benefit could be about £0.7-2.0bn by 2016. | | |

Annex A

About this consultation

What is in this consultation package?

A.1 This consultation package consists of:

- the draft Employment Equality (Age) Regulations 2006;
- this consultation document;
- the consultation response form; and
- a summary leaflet.

A.2 Electronic versions can be found at: www.dti.gov.uk/er/equality/age.htm.

A.3 You may make copies of the consultation documents without seeking permission.

How can you respond?

A.4 A copy of the consultation response form is enclosed.
An electronic version is also available at:
www.dti.gov.uk/er/equality/age.htm.

A.5 A response can be submitted by letter, fax or email to:

Age Legislation Team
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET
Phone: 020 7215 5000
Fax: 020 7215 5319
Email: age.response@dti.gsi.gov.uk
Minicom: 020 7215 6740

If you have a visual impairment and wish to respond orally, please telephone 020 7215 5000 and ask to speak to a member of the Age Legislation Team.

Annex A About this consultation

- A.6 When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
- A.7 Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested. Access to information held by or on behalf of DTI is governed by the Freedom of Information Act 2000. Any requests for information received by DTI in relation to this consultation will be administered accordingly. We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

When does this consultation close?

- A.8 This consultation closes on **17 October 2005**.

Do you have any comments or questions?

- A.9 Questions about the policy issues raised in the document can be addressed to DTI Response Centre at:

DTI Response Centre
1 Victoria Street
London SW1H 0ET
Phone: 020 7215 5000
Fax: 020 7215 5319
Email: correspond@dti.gsi.gov.uk



A.10 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Nick Van Benschoten
Consultation Co-ordinator
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET
Email: nick.vanbenschoten@dti.gsi.gov.uk

A.11 A summary of the Government's Code of Practice on Consultation is in annex C.

How can you order additional copies?

A.12 Further copies of this and other documents in this consultation can be obtained from the DTI Publications Order Line:

Phone: 0845 015 0010
Fax: 0845 015 0020
Email: publications@dti.gsi.gov.uk
www.dti.gov.uk/publications
www.dti.gov.uk/er/equality/age.htm

Annex A About this consultation

Please quote the following reference numbers:

| Printed format | Reference code |
|--------------------------------------|-----------------------|
| Draft Age Regulations (English) | URN 05/1174 |
| Draft Age Regulations (Welsh) | URN 05/1178 |
| Full consultation document (English) | URN 05/1171 |
| Full consultation document (Welsh) | URN 05/1175 |
| Response form (English) | URN 05/1173 |
| Response form (Welsh) | URN 05/1177 |
| Summary leaflet (English) | URN 05/1172 |
| Summary leaflet (Welsh) | URN 05/1176 |

- A.13 You can also obtain the following alternative formats from the DTI Response Centre (phone 020 7215 5000, further contact details above): Braille, 3.5" floppy disc, CD ROM or large print.

Annex B

Sources of advice

| Service | Description | Contact Details |
|--------------|--|---|
| Age Positive | The Age Positive campaign promotes the benefits of employing a mixed-age workforce that includes older and younger people. It encourages employers to make decisions about recruitment, training and retention that do not discriminate against someone because of their age to help employers prepare for legislation in 2006 to outlaw age discrimination in employment. | <p>Age Positive Team Department for Work and Pensions Room W8d Moorfoot SHEFFIELD S1 4PQ www.agepositive.gov.uk</p> <p>General enquiries agepositive@dwp.gsi.gov.uk</p> <p>Media enquiries England ruth.mcgivern@geronimocommunications.com</p> <p>Wales melissa.rajan@geronimocommunications.com</p> <p>Scotland alistair.haw@geronimocommunications.com</p> |
| Acas | Advisory, Conciliation and Arbitration Service (Acas) are the employment relations experts, helping people work together effectively. Acas can help provide impartial information and help, preventing and resolving problems between employers and their workforces, settling complaints about employees' rights, and encouraging people to work together effectively. | <p>National 0845 7474747 textphone: 0845 6061600</p> <p>Scotland 0141 248 1400</p> <p>Wales 029 2076 2636</p> <p>www.acas.org.uk</p> |

Annex B Sources of advice

| Service | Description | Contact Details |
|-------------------------|--|--|
| Business Link | A national service, which provides help and advice to business owners and managers on all aspects of setting up and running a business. | 0845 600 9006 www.businesslink.gov.uk |
| Citizens Advice Bureau | The Citizens Advice Bureau service offers free, confidential, impartial and independent advice on problems that are central to people's lives. These include debt and consumer issues, benefits, housing, legal matters, employment, and immigration. Advisers can help fill out forms, write letters, negotiate with creditors and represent clients at Court or Tribunal. | England and Wales 020 7833 2181 www.citizensadvice.org.uk Scotland 0131 550 1000 www.cas.org.uk |
| Community Legal Service | To make it easier for the public to get legal help and advice, the Community Legal Service brings together organisations offering these services into local networks. The networks include solicitors, Citizens Advice Bureaux, law centres, local authority services (including libraries), community centres and a host of other organisations. Many of the organisations within the CLS offer some or all of their services for free. The recently launched Community Legal Service Direct provides free information, help and advice direct to the public on a range of common issues via a website and a dedicated helpline. | England and Wales 0845 345 4 345 www.clsdirect.org.uk |
| DIALOG | The Diversity Action in Local Government unit provides information for local authority managers on legislative developments and good practice on equality matters. The unit promotes the new Equality Standard for Local Government. | England and Wales 020 7296 6600 www.lg-employers.gov.uk |

| Service | Description | Contact Details |
|--------------------------------|--|---|
| Equality Direct | This service is designed to give business managers easy access to authoritative and joined-up advice on a wide range of equality issues. | 0845 600 3444 www.equalitydirect.org.uk |
| Small Business Service | The Small Business Service (SBS) is a Government agency, which champions the interests of small businesses. | 020 7215 5000 www.sbs.gov.uk |
| Equal Opportunities Commission | The Equal Opportunities Commission (EOC) is an agency working to eliminate sex discrimination in 21st Century Britain. | National 0845 601 5901 Scotland 0141 245 1800 Wales 029 2034 3552 www.eoc.org.uk |
| Disability Rights Commission | The Disability Rights Commission (DRC) is an independent body set up by the Government to help secure civil rights for disabled people. | 0845 7622 633 www.drc.org.uk |
| Commission for Racial Equality | The Commission for Racial Equality is a publicly funded, non-governmental body set up under the Race Relations Act 1976 to tackle racial discrimination and promote racial equality. | England 020 7939 0000 Scotland 0131 524 2000 Wales 0292 0729 200 www.cre.gov.uk |

Annex C

Government's Code of Practice on Consultation

- Consult widely throughout the process, allowing a minimum of twelve weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the Cabinet Office's web site, address: www.cabinet-office.gov.uk/servicefirst/index/consultation.htm.

Annex D

Glossary of terms

| | |
|-------------------------------|---|
| Age discrimination | The legal definition of age discrimination consists of two questions: whether there is difference of treatment on grounds of age, and whether it is justified (see section 3.2). Only unjustified difference of treatment constitutes discrimination in the legal sense. However, where this aids the flow of the text, this consultation document uses the term "discrimination" more widely, to include any kind of difference of treatment on grounds of age (both justified and unjustified). |
| Age Matters | Our previous consultation that dealt exclusively with age discrimination, published in 2003 (see section 2.1). |
| Age Regulations | The Employment Equality (Age) Regulations 2006, the draft of which is the subject of this consultation. We intend to bring the Age Regulations into force on 1 October 2006. |
| Default retirement age | The age (65) from which employers may retire their employees compulsorily without having to justify their decision (see section 6.1). |
| Directive | The European Employment Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation). A Directive is a legal instrument that is binding on all Member States of the European Union. A Directive must be "implemented" into domestic law by regulations or primary legislation. |
| Exemption | We deviate from the strict legal meaning of this term where this aids the understanding of the text in this consultation document. We use the term to indicate any rule stating that a specific provision, criterion or practice shall not constitute unlawful age discrimination. |

Annex D Glossary of terms

Strand

A subject matter of legislation that outlaws discrimination against people with a particular characteristic. The six equality strands in Great Britain are sex, race, disability, sexual orientation, religion or belief, and age.

Test of objective justification

This is the term we have used to describe the possibility, set out in the Directive, to justify age-based practices (see section 4.1).



Printed in the UK on recycled paper with a minimum HMSO score of 75.

First published July 2005. Department Trade and Industry.

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DTI/Pub 7851/3k/07/05/NP.

URN 05/1171