

dti

**EQUALITY AND DIVERSITY:
AGE MATTERS**

Age Consultation 2003



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Foreword



In the work we have been doing on implementing the European Employment Directive I have been struck by how ageism is widely held to be a milder form of discrimination. It is not viewed as seriously as sex discrimination, say, nor as being as socially divisive as race. It's true that, unlike other areas of discrimination, differences of treatment based on age are not often based on hostility or ill feeling. That might simply reflect the fact that age is a condition we all have in common, and that we're resigned to having been younger and to getting older. But the inevitability of age is no excuse for discrimination; nor should we ignore people's abilities just because they are the "wrong" age. Such attitudes damage individuals, employers, and the country.

This is our first consultation devoted solely to proposals for age legislation. *Towards Equality and Diversity* in 2001 started to explore the issues, and *The Way Ahead* subsequently touched on some matters of importance to the age strand of the Directive. In this document we discuss how we propose to outlaw age discrimination. We also discuss the extent to which we should use the Directive's powers to allow differences of treatment in certain limited circumstances. This is unique to age: no other strand allows what would otherwise amount to direct discrimination to be justified in that way.

This is an important consultation for everyone: individuals need to know what new rights they will have; employers and others covered by the legislation need to know about their new responsibilities; and we need to know what people think about our proposals. It is the final stepping stone to next year's consultation on the draft legislation itself.

We welcome views on all the issues raised in the consultation, but particularly on the question of employers' mandatory retirement ages. No decision has been made on this issue, which is explained fully in Chapter 4. Now is the time for an open debate on the rights and responsibilities of employers and employees at a time when our growing life expectancy is challenging old assumptions and prejudices.

A handwritten signature in black ink, appearing to read 'Patricia Hewitt', with a stylized flourish at the end.

Patricia Hewitt
Secretary of State for Trade and Industry and Minister for Women
and Equality

Chapter 1

Summary

- 1.1 Age discrimination blights employment opportunities for young and old alike. There is no room for it in the 21st Century when younger people are better trained and better qualified than ever before, and older people are living longer and more active lives. We want employers to draw on the full range of skills and talents available to them from the whole of the working population. It is good for business, good for individuals, and good for society.
- 1.2 We shall implement the age strand of the European Employment Directive¹ from October 2006. Age discrimination in employment and vocational training will then become unlawful.

Proposals

- 1.3 The law will apply to all workers and to people who apply for work. It will cover training in and for work. It will prohibit direct and indirect discrimination. Those with new obligations will include:
 - a. employers;
 - b. providers of vocational training, including further and higher education institutions and private training companies;
 - c. trade unions, professional associations, and employers' organisations – in relation to their membership as well as in their role as employers.
- 1.4 Exceptionally, treating people differently on the grounds of age will be possible, but employers and others with obligations under the Directive:
 - must be able to justify doing so by reference to specific aims and only if it is appropriate and necessary in the particular circumstances; and
 - they will have to be able to produce supporting evidence: assertions will not be enough.

¹ Council Directive 2000/78/EC of 27 November 2000.

- 1.5 *Retirement age*: retirement ages that employers set for employees will be unlawful under the Directive. We are seeking views on whether the legislation should provide for employers, exceptionally, to be able to justify mandatory retirement ages. They would be able to do so only by reference to specific aims listed in paragraph 3.15 and only if their particular circumstances made it appropriate and necessary. We are also asking for comments on a default age of 70 at or after which employers could require employees to retire without having to justify their decision.
- 1.6 *Recruitment, selection, and promotion*: decisions about recruitment, selection, and promotion should not normally be based on age. We propose that employers should be able to apply an age limit to recruitment but only if they can justify doing so.
- 1.7 *Pay and non-pay benefits*: legislation should allow employers to provide pay and non-pay benefits based on length of service or experience if they can justify doing so.
- 1.8 *Unfair dismissal*: provisions relating to unfair dismissal should be changed so that employees can seek redress at any age, but retirement at a justifiable retirement age will be a fair reason for dismissal. The calculation of financial compensation should be changed so that the basic award is no longer based on the employee's age. The calculation of the award will continue to take account of the employee's length of service, which will still be limited to 20 years.
- 1.9 *Statutory redundancy payments*: we propose making a number of amendments to the statutory redundancy payments scheme in order to remove some age-related aspects.
- 1.10 *Cross-cutting issues*: our approach is to be as coherent and consistent as possible across all the various strands of equality legislation. We propose taking an approach on who will be covered, and on indirect discrimination, harassment, victimisation, genuine occupational requirements, positive action, and discrimination after employment that is consistent with legislation covering sexual orientation and religion or belief.

Benefits and costs

- 1.11 Legislation on age discrimination is likely to result in increased participation rates for older and younger workers. This will lead to a wider pool of workers whose abilities and talents better match the requirements of employers when recruiting and developing their staff.
- 1.12 We believe there will be net economic, and social benefits from the legislation. The Cabinet Office report *Winning the Generation Game*, published in 2000, discussed the cost of low participation rates amongst older workers. It gives us an idea of the possible scale of impact in this policy area. It said: "The total economic cost is high. The drop in work rates among the over-50s since 1979 costs the economy about £16 billion a year in lost GDP and costs the public purse £3-5 billion in extra benefits and lost taxes".²
- 1.13 In the long term benefits will outweigh costs. However, our assessment shows that initially costs are greater than benefits. This is because we have necessarily omitted some significant benefits that are difficult to quantify. They are difficult to quantify because assessing labour market conditions in 2006, when the legislation comes into force, and beyond is problematic. And many of the costs reflect one-off costs, which are concentrated in the first couple of years of legislation, whereas benefits accrue over a longer period.
- 1.14 There is likely to be a significant effect on smaller firms. We expect the cost per small firm of assimilating the implications of the new legislation to be between £105 and £122, depending on the decision we make about retirement ages. Very small firms (those employing fewer than 10 people) are also those that are more likely to employ workers over 65. They will, therefore, be proportionally more likely to be taken to an employment tribunal.
- 1.15 Chapter 10 gives more information about our Regulatory Impact Assessment. The full version is available from www.dti.gov.uk/er/equality/age

² ISBN 0-11-430166-2. Available from the Stationery Office priced £19.50. Also available on the Cabinet Office website www.cabinet-office.gov.uk

How and when to comment

- 1.16 This consultation will continue until 20 October 2003. You can comment on our proposals by completing the consultation response form which we have enclosed with this document.
- 1.17 Please send your completed form to the address below before the closing date:
- Valerie Bainton
Department of Trade and Industry
UG61
1 Victoria Street
London SW1 0ET
- 1.18 If you have access to the internet you can download a copy of the form from www.dti.gov.uk/er/equality/age and return it by email to age.consultation@dti.gov.uk
- 1.19 We have included the relevant consultation questions at the end of each chapter to help you as you read through the consultation document. Please use the response form for your comments.

Next steps

- 1.20 We shall develop draft regulations in the light of responses to this consultation. We shall consult on them in the first half 2004. We aim to lay the legislation before Parliament by the end of 2004. We shall also develop guidance and publish it when the regulations have been approved by Parliament.
- 1.21 With the legislation coming into force on 1 October 2006, this will give employers, and others, some two years to complete preparations for their new obligations, and it will allow individuals to familiarise themselves with their new rights.

Chapter 2

Introduction

In this consultation we are seeking views on proposals for implementing the age strand of the European Employment Directive

- 2.1 If any further evidence were needed, the responses to our consultation "*Towards Equality and Diversity*" revealed how common age discrimination is. 50% of respondents³ believed they had either suffered age discrimination at work or had witnessed someone else suffering it. They thought discrimination took a variety of forms:

Being forced to retire after reaching a certain age	22%
Not being given a job they applied for	18%
Being prevented from attending training courses	17%
Being told their age was a barrier to general advancement	17%
Assumptions being made about abilities due to age	15%
Being selected for redundancy because of age	13%

- 2.2 Age discrimination happens because assumptions are made about employees or prospective employees – young and old – that are based on inaccurate, outdated, and inappropriate stereotypes. Such attitudes work against the interests of the individual, the workforce, and employers. They get in the way of creating prosperity for all.
- 2.3 We are determined to tackle this through effective legislation implementing the European Employment Directive – legislation which will introduce important new and enforceable rights for individuals but which will allow businesses to continue to operate effectively without stultifying bureaucratic burdens. We will build on the success of the Age Positive campaign and its associated voluntary Code of Practice, which promote the business benefits of age diversity. The Code offers a wealth of advice and guidance about good practice (see www.agepositive.gov.uk).

³ There were 434 responses to this question (question 31 of the consultation: "Have you suffered age discrimination at work, or witnessed anybody else suffering age discrimination?").

Our approach to developing specific proposals

- 2.4 Implementing the Directive is a significant undertaking. It is important that measures are workable and make a real practical difference in the short term, as well as in the longer term. Our proposals in this consultation document aim to:
- a. strike the right balance between regulating and supporting new legislation through other measures designed to achieve culture change;
 - b. achieve as coherent an approach as possible across all the equality strands, since that should reduce costs for business and bureaucracy for individuals.
- 2.5 Clear and accessible guidance will be important in ensuring that everyone understands the law and their rights and responsibilities. We shall develop guidance separately once we have decided the final contents of the implementing legislation.

Consultation

- 2.6 In the consultation – *Towards Equality and Diversity* – which took place from December 2001 to March 2002, we sought views on a number of broad key issues. We also asked:
- a. what age-based practices employers had;
 - b. why they had them;
 - c. why and if they needed to keep them.
- 2.7 We had 870 responses. This document refers throughout to relevant responses we had to *Towards Equality and Diversity*. A summary of the responses to that consultation is available. It can be ordered from the DTI Publications Order line (see paragraph 6 of Annex A for more details). It can also be downloaded from www.dti.gov.uk/er/equality/age.

2.8 A subsequent consultation – *The Way Ahead* – which ran from October 2002 to January 2003, sought views on proposals covering religion and belief, sexual orientation, race, disability, and sex discrimination. Some of those issues also affect age. They are discussed in chapter 9 of this document.

Legislation

2.9 In paragraph 3.2 of *Towards Equality and Diversity* we explained that we intended to bring the various strands of the Directive into force by means of regulations under section 2(2) of the European Communities Act 1972. That continues to be our intention for age legislation.

Timetable

2.10 The age provisions will come into force on 1 October 2006. This is in line with our commitment to bringing in employment legislation only twice a year in future – on 6 April and 1 October. We are aiming for the regulations to be laid before Parliament by the end of 2004. We shall publish guidance when the regulations have been approved by Parliament. This will allow plenty of time for preparation before the legislation comes into force.

2.11 We shall consult on the draft regulations in the first half of 2004.

Chapter 3

Outlawing Age Discrimination

Age discrimination in employment and vocational training will be unlawful from October 2006. The law will give new rights to workers and to people who apply for work. Direct and indirect discrimination will be prohibited. Employers and people who provide vocational training, such as further and higher education institutions, will have new obligations.

- 3.1 We want to prohibit unfair practices based on discriminatory attitudes or inaccurate assumptions in order to remove the barriers which people of all ages face if they want to work, or undertake vocational training, or join professional associations and trade unions. That means combating age discrimination through legislation.
- 3.2 We shall outlaw direct and indirect discrimination. But, the Directive does not mean that employers have to recruit, promote, retain, or train people who are not competent, capable, and available to perform the essential functions of the post concerned or to undergo relevant training.

Who will be protected?

- 3.3 The law will protect:
 - a. people who are working, whether they are directly employed, or working under another type of contract, such as agency workers and some self-employed people;
 - b. people who apply for work;
 - c. office holders appointed by the Crown and some other paid office holders (these can include company directors and the members of some independent public bodies);

- d. people undertaking or applying for employment related training;
- e. people undertaking or applying for courses in further and higher education institutions, but not in schools;
- f. in some circumstances, people who have left work, or work related training, or further and higher education institutions;
- g. people who are members of, or who apply to join, trade unions or trade or professional bodies.

3.4 Unpaid voluntary work will not be covered.

Who will have new obligations?

3.5 Those with new obligations will include:

- a. employers;
- b. providers of vocational training, including further and higher education institutions and private training companies;
- c. trade unions, professional associations, and employers' organisations – in relation to their membership as well as in their role as employers.

What is covered?

3.6 *Direct discrimination* occurs when a decision is made on the basis of a person's chronological age. The law will also apply to decisions made on the basis of someone's perceived age.

3.7 *Indirect discrimination* happens when a policy or practice applies to everyone but causes disadvantage to a certain group (such as younger or older people), unless there are good reasons for it. Indirect discrimination is often inadvertent.

- 3.8 Chapter 9 gives more information about what will be covered by the legislation.

Joanna, aged 30 and with a postgraduate MBA, applies for a job as a management consultant. Despite her excellent academic record and job references she isn't short-listed for interview because she doesn't have the required 10 years experience.

The requirement for 10 years experience is likely to disadvantage younger applicants such as Joanna in which case it would amount to indirect discrimination unless the employer can objectively justify it. The employer would have to justify why applicants should have 10 years experience rather than, for example, requiring them to demonstrate their suitability against a clearly drawn up job specification based on the required competences.

Justifying differences of treatment

- 3.9 Age discrimination will be outlawed. We expect decisions on selection, recruitment, promotion, training needs etc to be made on the basis of merit and competence, not because the person has reached an arbitrary chronological age.
- 3.10 Nevertheless, we recognise that there might be exceptional circumstances when differences of treatment – or exceptions to the general rule of non-discrimination on the grounds of age – might be able to be justified.
- 3.11 The Directive⁴ allows Member States' implementing legislation to permit practices that otherwise amount to direct discrimination where they are objectively justified by reference to specific aims⁵ and are appropriate and necessary. Article 6 contains an illustrative list of the types of differences of treatment that may be justified, including:

⁴ Article 6.1.

⁵ The Directive says "objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary".

- a. special conditions on access to employment and vocational training for particular categories of people in order to promote their vocational integration or to ensure their protection;
- b. minimum conditions of age, professional experience or seniority for particular advantages at work;
- c. a maximum recruitment age based on the training requirements of the post.

What you said in consultation

3.12 Our formal and informal consultations have tended to show a general acceptance of competence-based approaches to employment practices rather than age-based ones. However, there were a number in favour of keeping the ability to retain certain practices in certain circumstances, including:

- arrangements for retiring staff;
- the ability to determine pay and non-pay benefits on the basis of length of service or experience;
- setting an upper age limit on recruitment based on the likely time an employee had in post before retirement.

Our proposed approach

3.13 We do not want to outlaw initiatives that improve opportunities for people to enter or return to work or training, through New Deal for example. Nor do we want to ban employment practices that can be reasonably and objectively justified. Businesses must be able to operate productively.

3.14 Employers and others with obligations under the Directive who, exceptionally, wish to adopt an age-based approach will have to be able to justify it – at an Employment Tribunal, if challenged. It will not

simply be a matter of asserting that their age-based policy is necessary. In line with Article 6 of the Directive, they will have to justify it, with evidence, by reference to:

- a. specific aims; and
- b. the particular circumstances that make the practice appropriate and necessary.

3.15 The sort of specific aims which might justify differences of treatment in exceptional circumstances could be:

- a. health, welfare, and safety – for example, the protection of younger workers;
- b. facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;
- c. the particular training requirements of the post in question – for example, air traffic controllers, who have to undergo 18 months theoretical and practical training at the College of Air Traffic Control, followed by further on the job training;
- d. encouraging and rewarding loyalty;
- e. the need for a reasonable period of employment before retirement – for example, an employer who has exceptionally justified a retirement age of 65 might decline to employ someone only a few months short of 65 if the need for, and the cost and length of, training meant that the applicant would not be sufficiently productive in that time.

Specific practices

3.16 Therefore we propose that, whilst outlawing age discrimination generally, the legislation should:

- provide that certain discriminatory practices will be capable of justification by reference to specific aims set out in legislation;

if

- employers and others with obligations under the Directive (see paragraph 3.5) can show that the practices are appropriate and necessary.

3.17 Subsequent chapters discuss specific practices in detail:

- a. retirement age;
- b. pay and non-pay benefits based on “seniority”;
- c. age limits for recruitment, selection, and promotion.

Indirect discrimination

3.18 Indirect discrimination arises when:

- a. employers or others with obligations under the Directive apply an apparently neutral provision equally to employees or prospective employees or to others protected under the Directive (see paragraph 3.3); but
- b. it puts people of a particular age at a particular disadvantage; and
- c. an individual can show that he/she has suffered that disadvantage.

- 3.19 Indirect discrimination will be unlawful except where it can be justified objectively. In contrast to direct discrimination, there is no need for the Member State to specify the specific aims that employers can use if challenged on indirect discrimination. Employers and others with obligations under the Directive, therefore, will not have to rely exclusively on the aims set out in paragraph 3.15.
- 3.20 Indirect discrimination is also discussed in paragraph 9.5, which explains that we propose taking the same approach for age as we are for religion or belief, and sexual orientation.

Age rules in UK legislation

- 3.21 The Directive requires Member States to abolish any legislation contrary to the principle of equal treatment that affects employment or vocational training.⁶ However, there is a specific exemption for state benefits or similar schemes.⁷ This means that rules of entitlement based on age can continue to apply to Job Grant, and tax credits, for example.
- 3.22 Other legislation contains a large number of age related limits and rules. Some of them can be objectively justified under the Directive – for example:
- a. National Minimum Wage. The Directive expressly envisages that different pay rates might be set for young people in order to promote their vocational integration. Our goal of helping younger workers to find jobs in competition with older workers is consistent with the Directive; and
 - b. the 1998 Working Time Regulations restriction on the number of hours worked by adolescents, which reflects European Community requirements on the health and safety of adolescents at work.

⁶ Article 16.

⁷ Article 3.3.

- 3.23 Where other legislation necessarily continues to specify age limits, we intend to provide an exemption for employers and others with obligations under the Directive so that they can continue to comply with the provisions of the other legislation. This might apply, for example, to a road haulage contractor whose lower age limit for employing lorry drivers is linked to the age limits for obtaining a large goods vehicle (LGV) licence.⁸
- 3.24 Chapters 5 and 6 discuss proposals for the unfair dismissal and statutory redundancy payments scheme provisions in sections 109 and 156 of the Employment Rights Act 1996.

Questions

Outlawing age discrimination

- Do you think there are practices other than those listed in paragraph 3.17 that employers should be able to justify in certain circumstances?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you agree with the aims in paragraph 3.15?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think there are other aims which might justify differences of treatment:

Yes or no.

If yes, please specify.

⁸ The Road Traffic Act 1988 allows people aged 18 to drive Category C1, and people aged 21 to drive Category C+E vehicles.

Chapter 4

Retirement Age

Retirement ages that employers set for employees will be unlawful under the Directive, unless they can be objectively justified. We are seeking views on whether the legislation should provide for employers, exceptionally, to be able to justify mandatory retirement ages according to their own circumstances and by reference to specific aims.

We are also asking for comments on a default age of 70 at or after which employers could require employees to retire.

4.1 The Government is committed to supporting more flexible approaches to retirement for the benefits that offers employers and individuals. That is why we are tackling the barriers that currently restrict individual choice and opportunities to stay in work longer. We will hold the State Pension age at 65⁹, because to increase it would adversely affect those people on the lowest incomes. However it is important that people have the choice to work beyond age 65. To support this the Government will increase the financial incentives for those people who want to defer receipt of their State Pension – so we would expect people will start drawing their State Pension at a range of ages starting at 65.

4.2 In the Green Paper *Simplicity, Security and Choice: Working and Saving for Retirement*¹⁰ we said:

“ Under the Directive, compulsory retirement ages are likely to be unlawful unless employers can show that they are objectively justified.”

⁹ the State Pension age for women is being phased up to 65 (see paragraph 4.13)

¹⁰ Copies are available from Stationery Office Bookshops. Summary versions in Braille, large print, audiocassette, and Welsh are available free of charge from Welfare Reform, Freepost (HA4441), Hayes UB3 1BR. The Green Paper and Summary are also available from www.dwp.gov.uk/publications or www.agepositive.gov.uk

- 4.3 We also made it clear that employers will need to adopt more flexible approaches to retirement. Both the Green Paper and the associated consultation – *Simplifying the Taxation of Pensions: Increasing Choice and Flexibility for All* – outlined Government proposals to change tax rules which currently hinder flexible retirement by preventing people from drawing an occupational pension whilst working for the employer paying the pension. This is intended to encourage those who can to work longer – allowing the economy to benefit from the skills and experience of older workers.¹¹ In response to those consultations this proposal received strong support from employers, industry representation groups, individuals, and voluntary and consumer groups, all of whom acknowledged the real flexibility this would open up for employers and individuals.
- 4.4 This chapter discusses options for retirement ages under the Directive. It is clear from consultation and from continuing discussion with our stakeholders that retirement age is one of the most important issues.
- 4.5 The clear and unambiguous message that we want to send is that age discrimination is not acceptable. One powerful way of doing so would be to abolish employers' mandatory retirement ages since retirement is usually a straightforward matter of agreement between employer and employee.
- 4.6 Mandatory retirement is only permissible under the Directive when it can be objectively justified. From our discussions with businesses it is clear that employers tend to adopt one of two approaches. Some see retirement ages as a way to manage their workforce sensitively and with the minimum of bureaucratic burdens. That reflects concern that some of them have about appraisal systems and the potential indignity of dismissing older workers on competence grounds at the end of their careers. Other employers see mandatory retirement ages as anachronistic and are moving away from using them. They prefer more flexible approaches to work and retirement to help retain valuable skills and expertise for longer – recognising the indignity of requiring people to retire simply because they have reached a particular age.

¹¹ Paragraph 1.10 of *Taxation of Pensions: Increasing Choice and Flexibility for All*.

- 4.7 Whilst many individuals want to retire when their unreduced pensions become payable, others want to be able to work longer to continue saving towards their retirement or simply because they enjoy working and remain competent to do so.
- 4.8 Our approach aims – through genuine consultation – to explore the issues in more detail than was possible during *Towards Equality and Diversity*. We want to send a positive signal that employees must be allowed to pursue options for continuing in work beyond the traditional age for retirement. In that context, we want to consider further the extent to which employers might justify requiring their employees to retire. We are also seeking views on whether it is suitable for the Government to provide a default retirement age at 70 or above.

Background

- 4.9 The UK does not have a national mandatory retirement age. However, 65 is commonly taken to be the national retirement age. This is because 65 is the age from which the State Pension becomes payable (see also paragraph 4.13). The Employment Rights Act 1996 also limits employees' rights in respect of unfair dismissal to the employer's normal retirement age or 65 if the employer does not have a normal retirement age.

Mandatory retirement ages

- 4.10 Many employers have established their own individual mandatory retirement ages – typically 60 or 65, but there are variations. Retirement ages can be enforced currently because of the age limit for bringing unfair dismissal claims, and because there is no legislation prohibiting age discrimination.
- 4.11 Article 6 of the Directive allows Member States' implementing legislation to provide for exceptions to the general principle of non-discrimination on grounds of age if they are:
- a. objectively justified by reference to specific aims; and
 - b. appropriate and necessary.

4.12 A mandatory retirement age – that is, the age that an employer has set for the retirement of employees – amounts to direct discrimination on the grounds of age. It will be unlawful under the Directive, unless it can be objectively justified.

Pension scheme ages

4.13 The UK has a fixed age for eligibility to State Pension (currently 60 for women and 65 for men, although to be equalised at 65 for both sexes from 2020). This is not the same as a national mandatory retirement age. People can carry on working and either draw their State Pension or defer it.

4.14 We shall take advantage of the Directive's provisions¹² that allow occupational pension schemes to set ages for admission or entitlement to retirement benefits. A normal pension age – that is, the date from which full scheme benefits are payable without actuarial reduction or enhancement¹³ – is necessary for the operation of defined benefit schemes. It is not the same as a mandatory retirement age. Indeed, the Government has separately announced its proposal to allow people to draw their occupational pension while continuing to work for the same employer.¹⁴

Other countries' approach

4.15 Some countries with existing laws against age discrimination at work have banned entirely the use of compulsory retirement ages. In contrast, other countries have made retirement age an exception to the general prohibition of age discrimination in employment. As for other Member States, France and the Netherlands have draft legislation that set a default age of 65. The Dutch legislation does so directly; the French indirectly by asserting that it is justifiable to retire staff when they are eligible for a state pension. However, the retirement and pensions provisions of these Member States differ from our own. They are not, therefore, strictly comparable.

¹² Article 6.2.

¹³ The minimum age from which benefits can be taken is 50 currently. From 2010 this will increase to 55 for all schemes that qualify for tax relief. Pension benefits must be taken by age 75.

¹⁴ *Simplicity, Security and Choice: Working and Saving for Retirement.*

- 4.16 We have looked at the approach taken by other countries that have outlawed retirement ages to see whether we could draw on their experiences.
- 4.17 Australia has outlawed retirement ages and does not have a default age. The implementation of their legislation appears to have progressed successfully but it is too recent to gauge the impact.
- 4.18 The context in the USA differs from our own in the UK:
- a. age discrimination legislation in USA only covers employees above the age of 40. Employers can offer financial incentives to older employees to encourage them to retire. This practice would be difficult to justify under our legislation, which will cover all people in or seeking employment, as it discriminates against younger people;
 - b. for many years US trade unions have pursued a campaign to secure full occupational pensions after 30 years service. Accrual rates beyond 30 years are very low, so there are strong financial incentives to retire from a career at this point.
- 4.19 The experiences of other countries are clearly of interest to us but we need to implement an approach that is most appropriate to our own context.

What you said in consultation

- 4.20 In answer to the question of whether employers should be able to require people to retire at a certain age the majority, 57%, were against and 43% of respondents were in favour.
- 4.21 Of those who thought that employers should be able to require people to retire at a certain age, 68% of respondents thought that legal limits should be placed on their right to do so.

- 4.22 On the whole, the majority of organisations, whether businesses, their representative organisations, unions, not-for-profit organisations or charities were clear that people want the flexibility to choose when they retire, or to retire gradually.
- 4.23 There was a majority in favour of abolishing employers' mandatory retirement ages, although a significant minority disagreed. And, of course, *Towards Equality and Diversity* was only seeking general views on a number of broad issues; there were no specific proposals for age legislation. Subsequent discussions with businesses large and small, and with trade unions, have however revealed some concern and uncertainty about the implications of doing away with mandatory retirement ages or employers having to justify them.

Our proposed approach

- 4.24 We believe, therefore, that a final decision on how to tackle this in the implementing legislation should not be made until we have analysed responses to, and information obtained from, this consultation. However, on the information we have at present we tend towards the view that the legislation should:
- make compulsory retirement ages unlawful; but also
 - provide for employers, exceptionally, to be able to justify mandatory retirement ages by reference to certain aims set out in the implementing legislation, and according to their own circumstances.
- 4.25 We are also seeking views on whether:
- employers should be able to retire their employees compulsorily at or after age 70 without having to justify their decision (we refer to this as the default age).

With such a default age employers would, of course, still be free to continue employing people beyond the age of 70 or indeed to set a retirement age higher than 70. A default age could also be higher than 70.

- 4.26 Either approach might help us move towards the culture change already begun by employers themselves and reinforced by the Age Positive campaign to focus on ability and not age. The outright abolition of non-justified mandatory retirement ages would send a stronger signal. On the other hand, some businesses have said that allowing the default option of a retirement age of 70 might allow them to manage their workforces effectively and operate productively – providing them with more certainty when it comes to workforce planning.
- 4.27 Some businesses have argued that staff appraisal systems may not be sufficiently sensitive or objective to be able to tackle effectively the declining performance and productivity of some older workers. There may be implications for business and the resources they would have to deploy to manage an ageing workforce, and it might also raise health, welfare, and safety issues – for employees, and the general public if they are put at risk. But others have argued that age is not a reliable indicator of ability or of risk, and that inclusion of a default age could help to perpetuate age discriminatory beliefs.
- 4.28 Most workers are likely to choose to retire at a point which meets their personal needs and while they are still competent in their work. A default retirement age of 70 would kick in at the point when most workers will have alternative sources of income from the State Pension and from occupational pensions.
- 4.29 A number of private sector employers are already seeking to remove their mandatory retirement ages completely. Others are moving their mandatory retirement age towards 70 or higher and giving more choice and flexibility to their employees in the preceding years. Both options are compatible with contemporary business practice.
- 4.30 Consultation will help us to evaluate those points further, and the implications for effective business.
- 4.31 Employers who, exceptionally, believe they need an earlier retirement age for their employees would have to justify it by reference to the specific aims listed in paragraph 3.15, and in relation to their specific circumstances, as supported by evidence.

Unfair dismissal, and the statutory redundancy payments scheme

- 4.32 Section 109 of the Employment Rights Act 1996 imposes an upper age limit on the right to claim unfair dismissal in most cases. Employees over the normal retirement age for their organisation (or if there is no such age, 65) are not entitled to claim unfair dismissal.
- 4.33 Section 156 of the Employment Rights Act 1996 applies a similar age limit in respect of the statutory redundancy payments scheme. Employees cannot claim redundancy payments, if at the date of their redundancy they have reached their employer's normal retiring age (or in the absence of an earlier normal retiring age, the age of 65).
- 4.34 Chapters 5 and 6 discuss these provisions in the light of this chapter's discussion of retirement age.

What this means in practice

A large commercial airline requires cabin crew to retire at 60. Some cabin crew want to continue working for longer.

If we were to proceed with either of our proposals on retirement age, the employer in this example who chose to set a mandatory retirement age would have to show why it was justified. They would have to do so by reference to the aims set out in paragraph 3.15.

The company in this example might argue that the use of a mandatory retirement age was justified on grounds, for example, of health, welfare, and safety. It would have to provide evidence – from training exercises perhaps – to show, for example, that most, if not all cabin crew over the company's desired retirement age would not be able to meet the requirements of the post.

The company would also have to show that the use of a retirement age was an appropriate and necessary means of achieving the health, welfare, and safety aim. It would have to show that the regular competence tests and emergency procedure rehearsals that cabin crew and others in safety-critical roles have to undergo to ensure competence for the role were not more appropriate ways of dealing with the deficiencies in performance than the use of a retirement age.

In this example we believe that it would be very difficult for the company to justify the use of a mandatory retirement age as the means of achieving the health, welfare, and safety aim. It is difficult to see why the use of a retirement age is necessary given that the company already has competence testing mechanisms in place that would reveal the deficiencies in performance of staff, whatever their age.

Indeed the evidence that we have currently suggests that the health, welfare, and safety aim would only very rarely justify the use of a mandatory retirement age by employers.

Questions

Retirement age

- How powerful a signal do you think abolition of mandatory retirement age would send?
- If the legislation made mandatory retirement ages unlawful, to what extent do you think employers and employees would be unable to agree on when an employee would retire?
- Employers would only be able exceptionally to justify retiring employees on age grounds, or dismiss them for other fair reasons such as on failing competence grounds or as part of a non-age based redundancy measure. What do you think would be the implications and effect of this?
- Do you think that the aims set out in paragraph 3.15 are sufficient for employers to justify their particular retirement age?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think there are other reasons that might justify requiring someone to retire at a set age?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Should the Government specify a default retirement age at which employers would be able to require employees to retire?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

(continued)

Retirement age (*continued*)

- Should the Government specify 70 as the default retirement age?

Yes, or no, or no strong feeling either way.

If yes or no, please say what age and why.

- If you are an employer do you think you would:

- rely on the default age of 70:

Yes, or no, or don't know

If yes or no, please say why

- set a higher retirement age?

Yes, or no, or don't know

If yes or no, please say why.

We propose changing provisions relating to unfair dismissal so that:

- employees can seek redress at any age, but retirement at a justifiable retirement age will be a fair reason for dismissal;
- the calculation of the component of compensation known as the basic award is not based on age.

Background

- 5.1 Employees have the right not to be unfairly dismissed. The Employment Rights Act 1996 gives them that right. However, the Act generally prevents employees from complaining that they have been unfairly dismissed if:
- a. they have reached the normal retirement age for their job at the time of their dismissal, provided that the normal retirement age is the same for men and women; or
 - b. in the absence of a normal retirement age for their job, or if a normal retirement age discriminates between men and women, they have reached the age of 65.
- 5.2 An employee cannot complain after the relevant age (except in limited circumstances) even if the reason for dismissal is not related to his or her age but is on other grounds, such as conduct or capability, which a younger employee would be able to challenge.
- 5.3 These rules are incompatible with the Directive.

- 5.4 Employees who successfully claim unfair dismissal can be awarded financial compensation. The Act places age-related limits on one component of the compensation, known as the basic award. The basic award is calculated as follows:
- a. half a week's pay per year of service up to the age of 21;
 - b. one week's pay per year of service between ages 22 and 40; and
 - c. one and a half weeks' pay per year of service between ages 41 and 65;
- up to a statutory maximum of £260 per week.
- 5.5 The award is progressively reduced, eventually to nothing, if dismissal takes place between the ages of 64 and 65. The length of service on which the award is calculated is limited to 20 years.
- 5.6 More information about unfair dismissal is available from www.dti.gov.uk/er/individual.htm
- 5.7 We believe that the Employment Rights Act 1996 should be amended to allow employees to complain of unfair dismissal at any age. However, changes must also be consistent with:
- a. a default retirement age of 70, if we decide to proceed with it; and
 - b. employers' ability to specify a different retirement age if justified.

Our proposed approach

Retirement

- 5.8 We propose that an employer who dismisses employees on grounds of retirement if they have reached or exceeded:
- a. the employer's normal retirement age, which would have to be justified if under 70; or

b. in the absence of a normal retirement age, the age of 70

should be able to defend the dismissal as fair.

- 5.9 Employees could still bring a successful claim if they were dismissed after the relevant age for a reason other than retirement – for example, a false allegation of misconduct, or where the *procedure* for dismissal on the grounds of retirement was not fair.

Basic award

5.10 We also propose that the age-related aspects of the basic award should be removed. This would involve:

- a. making the number of weeks pay per year of service the same regardless of age; and
- b. removing the provision by which the level of award is tapered, eventually to nothing, between the ages of 64 and 65.

5.11 We believe that awarding one week's pay per year of service would be the fairest approach, rather than depressing the level of award to half a week's pay for all employees or increasing it to one and half weeks.

Length of service limit

5.12 However, we believe that the limit of 20 years on the length of service that counts towards the basic award should be retained. Although older employees are more likely than younger ones to have accumulated more than 20 years service, removing the limit – and thus increasing the cost which employers risk incurring if they dismiss older employees and are found to have done so unfairly – would have the disadvantage of putting younger employees at greater risk of dismissal.

What this means in practice

Susan is required to retire at 70. She is disappointed that she has to retire at that age and makes an unfair dismissal complaint to an employment tribunal.

Although Susan will be free to make a complaint to the tribunal, her company will be able to defend it successfully if it can show that her dismissal was on grounds of retirement and that it followed fair procedures.

Jim is 72. There is no normal retirement age for his job. His employer tells him that he suspects him of running a private business during working hours and sacks him. When Jim protests his innocence, the manager tells him that he is too old to be able to challenge the dismissal before a tribunal.

Jim will be able to challenge his dismissal if he thinks it is unfair. His employer will have to point to a fair reason to defend the claim. Despite the fact that Jim is over 70 it will be difficult, in the circumstances, for Jim's manager to show that he dismissed him on retirement grounds. The real reason for the dismissal is misconduct. While misconduct can also be a fair reason the employer would also have to show that, in the circumstances, the manager had acted reasonably in sacking Jim, including carrying out a proper investigation.

Questions

Unfair dismissal

- Do you think that an employer who dismisses employees on grounds of retirement should be able to defend the dismissal as fair (see paragraph 5.8)?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think that the age-related aspects of the basic award should be removed (see paragraph 5.10)?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think that the limit of 20 years on the length of service that counts towards the basic award should be retained (see paragraph 5.12)?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

Chapter 6

Statutory Redundancy Payments

We propose to make a number of changes to age-related aspects of the statutory redundancy payments scheme.

Background

6.1 The statutory redundancy payments scheme, introduced in 1965, has a number of age-related aspects. In particular, the scheme:

- discounts service below the age of 18, both for the purposes of meeting the two year qualifying period for entitlement and for the purposes of calculating the payment due;
- uses age as a factor in the payment calculation, so that half a week's pay is due for each year of service between ages 18 and 21, one week's pay for each year of service between ages 22 and 40, and one-and-a-half week's pay for each year of service between ages 41 and 65 (the amount of a week's pay being subject, for all these purposes, to a statutory maximum limit);
- has an upper age limit of:
 - the normal retirement age for the job, if that is lower than 65; or
 - if there is no lower normal retirement age, a default of 65, with the amount of payment due being reduced by one twelfth for each month elapsed of the year prior to that age;
- uses length of service as a factor in the calculation, which tends to benefit older workers; and
- has a cap of 20 years on the length of service that can be taken into account, which tends to disadvantage older workers.

6.2 Under the Redundancy Payments Pensions Regulations 1965, employers may also offset pensions or lump sums that are paid immediately on redundancy or within a short time after and that meet certain specified conditions. The statutory redundancy payment due

may be reduced or extinguished completely, according to the amount of the pension or lump sum payable. The potential impact is clearly confined to employees over pensionable age.

Our proposed approach

Service below the age of 18

- 6.3 The original rationale for discounting service below the age of 18 was that employees should not stand to benefit until they were “established in the workforce”. However, the impact of the provision is not confined to young people – for instance, an employee made redundant at age 36 after 20 years of service is entitled to a payment based on only 18 years (the period between ages 16 and 18 being discounted). A colleague made redundant at age 38 with the same service is entitled to a payment based on the full 20 years.
- 6.4 We believe that there is no longer any valid rationale for this provision. We therefore propose to amend the legislation so that service below the age of 18 is no longer discounted for statutory redundancy payments purposes.

Use of age as a factor in the payment calculation

- 6.5 The weighting of payments in favour of older workers was motivated by a perception, at the time, that the adverse effects of being made redundant generally increased with age. However, younger workers can also be seriously affected by redundancy: they more commonly have young families, large mortgages and consequently heavy financial commitments. To the extent that older employees experience greater difficulty in finding alternative work, then this may be due, at least in part, to existing age discrimination.
- 6.6 It is no longer appropriate for age to be used as a factor in the payment calculation. We therefore propose that, in future, payments should be calculated on the basis of one week’s pay (subject, as now, to the statutory upper limit) for each year of service, irrespective of age.

Upper age limit

- 6.7 The primary purpose of the statutory redundancy payments scheme is to ensure that employers compensate qualifying redundant employees for the loss of expected continued employment in the job. The main justification for the upper age limit has been that, once over the age of 65, or any lower normal retirement age for the job, employees' expectation of continued employment should cease or significantly diminish. Employees over the age of 64 receive a reduced amount for the same reason.
- 6.8 Such a rationale is inconsistent with the approach to retirement age we outline in chapters 3 and 4 of this document. However, removing the upper age limit altogether would not be appropriate:
- a. it would run contrary to the primary purpose of the scheme; and
 - b. it could have the unwelcome effect of acting as a disincentive for employers to keep employees on beyond retirement age.
- 6.9 The upper age limit for entitlement to a statutory redundancy payment will depend on the decision we make about retirement ages. Entitlement would either:
- end at the employer's normal retirement age for the job, which would have to be justified if under the default retirement age, if we decided to have one; or
 - end at the default age if one was set out in legislation and if the employer had no normal retirement age for the job, or
 - continue for as long as the person remained in employment – if the employer had no normal retirement age for the job and if we decided not to set out a default age in legislation.
- 6.10 We consider it would be valid to regard employees' legitimate expectation of continued employment as ceasing at these ages. If, in the light of this consultation, we decide against introducing a default retirement age, we envisage that statutory redundancy payment

entitlement would continue indefinitely in the absence of a normal retirement age for the job.

- 6.11 To simplify the arrangements, we also propose to repeal the provision under which the amount of payment due is tapered by one twelfth for each month elapsed during the year prior to the default upper age limit.

Use of length of service as a factor in the payment calculation

- 6.12 Paragraph 6.7 explains that the primary purpose of the scheme is to ensure that employers compensate qualifying redundant employees for the loss of expected continued employment in the job. It does not compensate for “loss of rights in the job”. However, the weighting of payments in favour of more senior employees appears to be a widely supported aspect of the scheme.
- 6.13 We have, therefore, taken this opportunity to review the rationale for the scheme itself. We have concluded that it should henceforth have the supplementary purpose of ensuring that employers recognise, in the amount of any payment to which a redundant employee is entitled, the extent of that employee’s past commitment to the business. We believe that, by reference to this supplementary purpose, the use of length of service as a factor in the payment calculation remains justified and appropriate. We propose, therefore, to retain this provision. Other changes to the scheme will take place at the same time as the legislation implementing the age strand of the Directive.

20-year cap on the length of service that can be taken into account

- 6.14 The cap of 20 years on reckonable service is another well-established and accepted feature of the scheme. It is fair, and justified by the need to minimise:

- burdens on business (by limiting the amount an employer has to pay in a case where a long-serving employee becomes redundant); and
- any incentive on employers to select younger employees for redundancy in preference to older ones (by virtue of the fact that length of service is a factor in the payment calculation).

We propose, therefore, to retain this aspect of the scheme.

Pensions offset

- 6.15 The original justification for the Redundancy Payments Pensions Regulations 1965 appears to have been to avoid a situation whereby employers who had already contributed toward financial provision for their employees above pensionable age were then required to make redundancy payments to them as well. However, the existence of an upper age limit (which would remain, in modified form, under the proposals set out above) means that few employees over pensionable age are entitled to a statutory redundancy payment in any event. This may perhaps explain why the Regulations have essentially fallen into disuse: within the last decade, the Secretary of State has received only one request from an employer to confirm that the relevant conditions for offsetting have been met, as is a prerequisite under the Regulations.
- 6.16 These Regulations now serve little or no useful purpose, and we propose to revoke them.

What this means in practice

An employee aged 66 who has completed 10 years' continuous service in a job with a normal retirement age of 70 has to be made redundant owing to a downturn in business orders.

The employee is entitled to a statutory redundancy payment, as he is below the normal retirement age for the job and therefore below the upper age limit on entitlement. His payment is one week's pay (subject to the statutory upper limit) for each of his ten years of service. There is no provision for offsetting this payment against his pension entitlement.

Questions

Statutory redundancy payments

- Should the statutory redundancy payments scheme be amended so that service below the age of 18 counts for qualification purposes and is included in the calculation?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Should payments be calculated on the basis of one week's pay (subject, as now, to the statutory maximum) for each year of service, irrespective of age?
Yes, or no, or no strong feeling either way?
If yes or no, please say why.
- The upper age limit for entitlement to a statutory redundancy payment will depend on the decision we make about retirement ages (see chapter 4). Should the upper age limit be amended to:
 - the employer's normal retirement age for the job, which would have to be justified if under the default retirement age, if we decided to have one; or
 - where there is no normal retirement age for the job, the default retirement age, if we decided to have one?Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Should we repeal the provision under which the amount of payment due decreases by one twelfth for each month elapsed of the year prior to the default upper age limit?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.

(continued)

Statutory redundancy payments *(continued)*

- Should the statutory redundancy payments scheme retain the use of length of service as a factor in the payment calculation?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Should the scheme retain the cap of 20 years on the length of service to be taken into account in the payment calculation?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Should we revoke the Redundancy Payments Pension Regulations 1965?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.

Recruitment, Selection, and Promotion

Decisions about recruitment, selection, and promotion should not normally be based on age. We propose that employers should be able to apply an upper age limit to recruitment but only if they can justify doing so.

- 7.1 The Directive provides for the possibility of justifying “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”¹⁵
- 7.2 There is a widespread acknowledgement that there is no room for age-based recruitment practices. They simply perpetuate inaccurate stereotypes – for example, the 30 year old whose best is in the past as far as IT work is concerned; or the older worker who cannot get to grips with new techniques. Neither should promotion depend on age: the crucial factor is the person’s ability to do the job at the higher level.
- 7.3 However, there are circumstances – usually to do with the return on investment in training and development – when the length of time a potential recruit would have with a company would not make business sense.
- 7.4 In those exceptional situations an upper age limit on recruitment might be justified.

What you said in consultation

- 7.5 We asked about recruitment in *Towards Equality and Diversity*. Responses were mixed – with 41% in favour of age-based recruitment and 59% against. The main arguments in favour were:

¹⁵ Article 6.1(c).

- a. that it should be justifiable not to recruit someone near to retirement age who on the completion of training would have reached the company's retirement age. This tended to reflect concern about high training costs in relation to the length of time the person would work before retirement; and
 - b. that health and safety reasons were an acceptable reason not to recruit and/or train people.
- 7.6 Those who thought that age-based recruitment schemes could be justifiable were asked for their views on graduate training schemes. 32% of respondents said that graduate recruitment schemes help employers plan their intake and focus the recruitment process. 17% thought that it was justifiable to employ a graduate if specific knowledge or level of learning was required. However, 31% of respondents remarked that graduates could be of any age, not necessarily in their early twenties, and that this should be taken into consideration.

Our proposed approach

- 7.7 We propose to make specific provision for employers to be able to justify an upper age limit to recruitment by reference to the aims set out in paragraph 3.15.

Questions

Recruitment, selection, and promotion

- Should the Government make provision for employers to apply an upper age limit to recruitment if they can justify doing so by reference to aims set out in legislation?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think that the aims set out in paragraph 3.15 are sufficient for employers to justify their particular approach?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think there are other aims that might justify setting an upper age limit on recruitment?

Yes, or no, or no strong feeling either way.

If yes, please specify.

Employment related insurance

- 7.8 Most insurance schemes, such as employers' liability insurance, do not use age as a requirement. However, there could be a small number of occupations whose insurance provision might be based on age. We believe that where compulsory insurance is not available because of the applicant's age, employers would be justified in not recruiting him or her. Equally, employers would be justified in dismissing employees when they reach the age where such insurance is unavailable, if suitable alternative employment is either unavailable or rejected by the employee.

- 7.9 This is likely to involve indirect rather than direct discrimination since the requirement for insurance applies to all employees regardless of age. However, it may particularly disadvantage those over a certain age. If insurance were available but more expensive for older or younger employees then employers would have to refer to a real business need before they could justify discrimination on the basis of increased cost.

Questions

Employment related insurance

- Do you agree with our approach?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Do you know of any types of employment-related insurance where age will be an issue?
Yes or no.
If yes, please specify.
- Do you think that the cost of employment-related insurance where age will be an issue should be a factor in recruitment or dismissal decisions?
Yes, or no, or no strong feeling either way.
If yes or no, please say why.
- Are you aware of any types of employment-related insurance where premiums are significantly increased as a result of an employee's age?
Yes, or no, or don't know.
If yes, please specify.

We propose that legislation should allow employers to provide pay and non-pay benefits based on length of service or experience, which might otherwise amount to unlawful direct or indirect discrimination, if they can justify doing so.

- 8.1 Differences of treatment based on length of service or experience (or seniority in service) might amount to indirect discrimination.
- 8.2 Pay or non-pay benefits based wholly or partly on chronological age are relatively rare. However, determining pay and benefits on the basis of length of service or experience – for example, extra annual leave after so many years' service – is quite common.
- 8.3 Employers and employees alike want to retain such practices. Unions and lobby organisations also generally support them. The Directive itself provides for the possibility of justifying “ the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.”

What you said in consultation

- 8.4 The 269 responses to *Towards Equality and Diversity* identified a number of practices that might be based on seniority, length of service or experience. These included additional annual leave, long service awards, trainee pay, incremental pay, and redundancy pay. Such arrangements:
 - are accepted ways of recognising loyalty. Employers feel that that has nothing to do with age and should not be outlawed – all employees are potentially eligible if they remain in service;
 - provide incentives for staff;
 - particularly incremental pay, reward experience.

Our proposed approach

- 8.5 The benefits of many seniority provisions are widely accepted. The Directive clearly envisages that where such arrangements amount to direct discrimination they can be justifiable. Therefore, we propose to make specific provision for employers to be able to justify seniority conditions by reference to the aims set out in paragraph 3.15 – specifically, encouraging and rewarding loyalty.
- 8.6 Seniority practices which are indirectly discriminatory will also be able to be justified – see paragraph 3.18.

What this means in practice

A small voluntary organisation awards employees 5 days additional annual leave after 10 years' service. Younger employees are less likely to get the additional leave. They believe this discriminates against them.

This involves indirect discrimination, since it is unlikely that younger staff could have built up 10 years' service.

If challenged, the voluntary organisation would have to show that awarding extra leave serves a legitimate aim, and that it is appropriate and necessary to achieve that aim. For example, the aim could be encouraging and rewarding loyalty; and the organisation might produce evidence to show that, with limited financial resources, this is an effective way of rewarding staff for loyal service.

Questions

Pay and non-pay benefits

- Where pay and non-pay benefits based on length of service, and/or experience amount to direct discrimination should the Government provide for employers to be able to justify them by reference to aims set out in legislation?

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

- Do you think there are reasons or aims other than those set out in paragraph 3.15 that might justify pay and non-pay benefits based on experience or length of service.

Yes, or no, or no strong feeling either way.

If yes or no, please say why.

Chapter 9

Cross-cutting Issues

- 9.1 There are a number of issues that are common to all strands of discrimination in employment – race, gender, sexual orientation, religion or belief, disability, and age. They were discussed in the consultation document *Equality and Diversity – The Way Ahead*. We made it clear that our approach is to be as coherent and consistent as possible across all those strands of equality legislation, including age. Who will be affected by the legislation is discussed in Chapter 3 of this document.
- 9.2 The paragraphs that follow summarise the approach we plan to take. It is the same approach as set out for the other discrimination strands in *The Way Ahead* (pages 18 – 30).
- 9.3 That consultation ended on 24 January 2003. You can download copies of *The Way Ahead* from www.dti.gov.uk/er/equality/age. You can order printed copies from 0800 389 5865. Please see paragraph 6 of Annex A for more details about how to get copies.

Who will be covered?

- 9.4 Chapter 3 explains who will be protected under the legislation and who will have new obligations. We have aimed to be consistent with the approach we have taken in the new regulations prohibiting discrimination on the grounds of sexual orientation and religion or belief.

Indirect discrimination

- 9.5 A coherent approach to indirect discrimination – where the same definitions are set for other equality areas – will make it easier for employers, for example, to identify and change unfair practices. It will also make the law more straightforward for people who believe they are treated unfairly on two or more grounds.
- 9.6 For age we will follow the test for indirect discrimination as set out in the Employment Directive. This will be the same approach used in sexual orientation, religion or belief, and gender legislation. Paragraph 3.18 discusses indirect discrimination in more detail.

Harassment

- 9.7 We will make it clear that harassment will be unlawful.
- 9.8 We propose to provide that anyone making a complaint of 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.
- 9.9 An employer could be liable at a Tribunal for taking inadequate action to prevent harassment, as well as the person whose behaviour is the subject of the complaint.
- 9.10 Many agreed in consultation that tribunals should be guided by what is “reasonable” in deciding whether behaviour amounted to harassment. However, concerns were raised about a “reasonable person test” reinforcing, rather than challenging, prejudice. We will ensure, therefore, that Tribunals take into account the perception of the complainant as well as all the other relevant circumstances.

Victimisation

- 9.11 Victimisation happens when a person is treated unfairly because they have been involved in making a complaint about discrimination. This would apply, for example, if an employer treats an employee less favourably because that employee makes an allegation of discrimination, or initiates proceedings against the employer, or supports another person’s case. Protection will not be extended to people who knowingly make false allegations or statements or who knowingly give false information.
- 9.12 This approach to tackling victimisation will make it easier for employers, for example, to identify and change unfair practices. It will also make the law more straightforward for people who feel that they

have been victimised. They will be protected in the same way, whatever the basis for discrimination – whether it is age, or religion or belief, or sexual orientation.

Occupational requirements

- 9.13 In most jobs, personal characteristics – such as someone’s age – will be immaterial. But people work in a wide variety of circumstances and, in some rare cases, having a particular characteristic will be a genuine requirement. As with legislation on race, gender, sexual orientation, religion or belief, and disability, age legislation will have the flexibility to recognise this. However, we expect there to be very few cases where age is genuinely a requirement.
- 9.14 Consultation to date has only identified acting as an occupation where this flexibility is needed. But there might be others – for example, modelling clothes aimed at specific age groups.
- 9.15 Employers will be able to specify that a particular characteristic, including age, is genuinely required by a job. These provisions will be narrowly drawn. Legislation will make it clear that occupational requirements must be genuine. Employers will not be able to use these provisions to get round the law – by discriminating on other grounds, for example. If potential candidates believe that by referring to a particular characteristic a job description is discriminatory, they will be able to complain as usual. It will then be for the employer to demonstrate to an Employment Tribunal that the characteristic is genuinely needed for the particular job.

Positive action

- 9.16 There is evidence to suggest that people in certain age groups can be at a disadvantage in the workplace. We believe that positive action can help to change this culture. Employers will have the flexibility to encourage people from groups at a disadvantage in the workplace to apply for posts or to benefit from dedicated training.

- 9.17 We shall, therefore, extend the concept of positive action to cover age, by providing that positive action should prevent or compensate for disadvantages linked to age. This will be consistent with the approach we are adopting in the legislation implementing the sexual orientation and religion or belief strands of the Directive.
- 9.18 A disadvantage linked to age might be that younger people are under-represented in an employer's workforce. The employer might encourage applications from younger people by advertising vacancies in publications aimed at a young age group, as well as in other publications. But the employer must not discriminate on grounds of age at interview and selection.

Discrimination after employment or training

- 9.19 Although discrimination by a former employer or others with obligations under the Directive is relatively unusual, it can have far-reaching consequences, such as preventing people from finding work elsewhere. We will outlaw this form of discrimination on grounds of age, as with other grounds. Cases are most likely to involve discriminatory references or a refusal to provide a reference for discriminatory reasons.
- 9.20 This kind of discrimination is most likely to occur in the months after someone leaves a job. We will make discrimination unlawful where there is a close connection to the former employment.

Making a complaint

- 9.21 People who believe that they have been treated unfairly in employment because of their sex, race, or disability currently have three months in which to lodge a complaint. An Employment Tribunal hears the case in the first instance. It makes good sense that claims of discrimination at work on the new grounds of age should be handled in the same way. Employment Tribunals will hear cases of age discrimination in employment. For students in further and higher education institutions, complaints will be made to the County Court.

Questions

Cross-cutting issues

If you have any comments on the proposals in this chapter please set them out here:

General

If you have any points to make that were not covered by the questions in this document, please set them out here:

- 10.1 The table below presents quantifiable, and the main unquantifiable, costs and benefits associated with implementing the age strand of the Directive.
- 10.2 Overall there will be net economic (not to mention social) benefits from the legislation over time, with potentially large effects on tax and national insurance receipts and the long term potential of the economy. The Cabinet Office study of older workers – *Winning the Generation Game*¹⁶ – estimated that low employment among older people reduced GDP by around £16 billion per annum. We believe it illustrates potential orders of magnitude in this area.
- 10.3 The figures presented in our Regulatory Impact Assessment tend to underestimate potential benefits to the economy of the legislation for two main reasons:
- a. there are large unquantifiable benefits due to increased employment prospects and better matching of jobs to people. There are unquantifiable costs too but we believe they are lower. There are major uncertainties about how the economy would react to increased participation of older workers. Even on conservative assumptions, however, there could be significant benefits in terms of at least tens of thousands of extra workers remaining in the labour market. Uncertainties about what labour force participation will look like in 2006 and beyond in the absence of age discrimination legislation (for example, because of pension reforms and demographics) and how the economy would adjust to such numbers make quantifying difficult;
 - b. costs and benefits accrue over time. Benefits will build up and peak sometime during the first twenty years of the legislation. By contrast, the awareness costs are one-off and concentrated in the first few years of the legislation. The best approach in these circumstances is to look at the present value of these future costs and benefits over a period of time.¹⁷ The costs and benefits presented in Table 1 would produce a net benefit to the economy of around £1 billion in present value terms during the first twenty years

¹⁶ ISBN 0-11-430166-2. Available from the Stationery Office priced £19.50. Also available on the Cabinet Office website www.cabinet-office.gov.uk

¹⁷ Present value is a standard tool in economic appraisals to value future returns.

of the legislation. Net benefits remain positive even under more pessimistic assumptions. Over a shorter period – say ten years – the net benefit to the economy is still positive, at around £600 million. This is without quantifying where the large benefits will be in terms of increased employment rates.

- 10.4 The impact of legislation on retirement is likely to be lower¹⁸ than on the other parts, although still positive. However, we have not been able to quantify the impact of employers monitoring costs of workers, which are likely to be highest where there is no provision in the legislation for a default retirement age nor for employers to have their own mandatory retirement ages.
- 10.5 The legislation will cover all firms. There is likely to be a significant effect on smaller firms. There are about 1.18 million businesses in Great Britain, of which about 1.14 million are small employers. Since small firms (those with fewer than fifty employees) tend to have neither dedicated human resources arrangements, nor formal systems in place, they generally find it harder than medium and larger companies to assimilate the implications of new regulations. The cost per small firm is expected to be between £105 and £122, depending on the decision we make about retirement ages. 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 need to take more actions to comply with the Directive. Very small firms (those employing fewer than 10 people) are also those that are more likely to employ workers over 65. They will, therefore, be proportionally more likely to be taken to an employment tribunal.
- 10.6 We expect implementation costs for small firms to be about £120 million to £140 million overall. However, like all businesses they will benefit from improvements in the functioning of the labour market, and against costs must be offset the considerable, if unquantifiable, benefits we expect to accrue from implementation of age legislation across all areas of business.

¹⁸ The macroeconomic effects are likely to be lower than for the other parts of the legislation. There are no official statistics for the numbers of people retiring. However, we have made estimates using official statistics for workers aged 60 and over. We estimate that in 2007 about 210,000 to 270,000 workers aged 60 and over will be retiring in Great Britain. Up to about 5% of these will be retiring only because they are being asked to by their employers. These figures are used to get an estimate of the order of magnitude of the macroeconomic benefits.

10.7 The costs and benefits are described fully in our Regulatory Impact Assessment, which is available from www.dti.gov.uk/er/equality/age.htm

Summary of costs and benefits of age discrimination legislation			
	Benefits Annual	Costs Annual	Costs One-off
Employers			
Implementation (Awareness and Decision Making)			£141-155million
Enforcement		£16-32million ^b	
Recruitment	£16-32million	£12million	
Recruitment from retirement options	£30-40million ^c		
Training ^d	£29-359million	£26-327million	
Promotion ^d	£43-101million	£36-50million	
Redundancy payments		£2.5million	
Monitoring		Improving internal systems such as appraisal and staff monitoring including keeping records of management decisions. This likely to be highest when choosing the retirement option to have no default age and no mandatory retirement age. We have not quantified this.	
Individuals			
Training ^d	£2-28million		
Promotion ^d	£28-39million		
Redundancy	£2.9million		

(continued)

Summary of costs and benefits of age discrimination legislation (cont)			
	Benefits Annual	Costs Annual	Costs One-off
Exchequer			
Enforcement		£4.3-8.6million	
Redundancy		£0.4million	
General	Improvements in the macro economy will mean higher tax and national insurance receipts. We have not quantified this.		
Macroeconomic	These are likely to be high as we see the better use of those who are currently being discriminated against, with increased employment rates and the better matching of individuals to jobs, training and promotion.		

Notes: a. The lower number represents the costs if the retirement option with no default and no mandatory retirement age is chosen. b. This cost is annual but gradually declines to about £7.5million by 2011. c. This cost is annual but gradually declines to about £6-8million by 2014. d. Many of these costs and benefits are transfer payments from employers to employees. However, there are net economic benefits discussed in Annex F of the full document.

Chapter 11

New Equality Institutions

- 11.1 In October 2002 the Government published *Equality & Diversity – Making it Happen*, a consultation paper setting out options for the future of Great Britain's equality institutions. In particular, it asked for views on three specific structural options for a new body.
- 11.2 The consultation period closed on 21 February 2003 following an intensive programme of events to ensure that the widest possible range of views and experiences were heard. These included Ministerial round table meetings in the English regions, Scotland and Wales, an innovative online consultation with small and medium size businesses, and events targeting specific audiences such as people with learning difficulties and minority ethnic women.
- 11.3 The consultation responses demonstrated significant support for a single body, integrating the existing equality bodies (Commission for Racial Equality, the Equal Opportunities Commission, and the Disability Rights Commission) with responsibilities for supporting the "new strands" of sexual orientation, religion or belief, and age.
- 11.4 There was also strong support for a more holistic approach to equality and diversity issues, and for provision of information and advice at local and regional levels. Respondents to the consultation were keen that any single body be sensitive to, and appropriate, for the social economic and political contexts of Scotland and Wales.
- 11.5 The Government is working towards an announcement on next steps, and publication of the consultation results, in the summer. It is anticipated that a further consultation on detailed aspects of any new institutional arrangements will take place in Autumn 2003.

Annexes

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Annex A

About this Consultation

Scope of consultation

1. This document invites views about new legislation that will apply to England, Scotland, and Wales. We welcome responses from:
 - organisations based in Great Britain;
 - anyone resident or working in Great Britain;
 - businesses overseas employing staff in Great Britain; or
 - anyone else who thinks they may be affected by the new legislation.

Responsibility for implementing the Employment Directive in Northern Ireland rests with the Office of the First Minister and Deputy First Minister.

Questions about the consultation

2. We are happy to answer your questions about issues raised in this document or about the process of consultation itself. Please call the following freephone number 0800 5873596, or email age.enquiries@dti.gov.uk. The textphone number for people with hearing impairments is 020 7215 6740.

Access to information and alternative formats

3. We are committed to open consultation. A complete copy of this document, a shorter summary version, and an on-line response form are available in English and Welsh on www.dti.gov.uk/er/equality/age.

Consultation deadline

4. This consultation exercise closes on 20 October 2003. Please let us have your responses before then.

How to respond

5. A response form is enclosed as part of this pack. Please take time to complete it if you can. It should be returned to the address shown on the form. Alternatively, you might find it easier to complete the form by downloading a copy from the DTI website – www.dti.gov.uk/er/equality/age – and returning it by email to age.consultation@dti.gov.uk. If you have a visual impairment and wish to respond orally, please telephone Sarah Barber on 020 7215 5479.

How to order further copies of this document

6. In addition to internet access, further copies of this, and other documents in this consultation can be obtained from publications order lines as follows:

Printed Format	Reference code
Information Pack containing all five consultation documents (English)	URN 03/919
Information Pack containing all five consultation documents (Welsh)	URN 03/934
Full consultation document (English)	URN 03/920
Full consultation document (Welsh)	URN 03/935
Response Form (English)	URN 03/921
Response Form (Welsh)	URN 03/936
Summary leaflet (English)	URN 03/922
Summary leaflet (Welsh)	URN 03/937
Monitoring Form (English)	URN 03/923
Monitoring Form (Welsh)	URN 03/938
Towards Equality and Diversity: Report of Responses on Age (English)	URN 03/924
Towards Equality and Diversity: Report of Responses on Age (Welsh)	URN 03/939

Annex A About this consultation

To order any of the above documents please contact:

DTI Publications Orderline

Phone: 0870 1502 500

Fax: 0870 1502 333

Mail: publications@dti.gsi.gov.uk

How to order alternative formats of the consultation document

7. If you require any of the following alternative formats, copies can be obtained as follows:

Alternative Formats	Contact
Audio cassette	0800 5873596
Braille	
Full document on 3.5" floppy disc	
Large print	

Government's code of practice on consultation

8. This exercise follows the Government's Code of Practice on consultation. *Your response to this consultation exercise may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in your response which parts you wish us to keep confidential.*

Commenting about the consultation process

9. If you have views about the way in which we have carried out this consultation process, or suggestions for future exercises, please write to: Philip Martin, Better Regulation Team, Department of Trade and Industry, Room 725, 1 Victoria Street, London SW1H 0ET.

Sources of Advice

If you believe you need advice about tackling discrimination or promoting diversity – whether as a manager or an individual – you can already find help from one or more of the following sources.

Service	Description	Contact Details
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 208 1400</p> <p>Wales 029 2076 2636 www.acas.org.uk</p>
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.org.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.	<p>England and Wales 020 7833 2181 www.nacab.org.uk</p> <p>Scotland 0131 550 1000 www.cas.org.uk</p>
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.	<p>England 020 7939 0000</p> <p>Scotland 0131 524 2000</p> <p>Wales 0292 0729 200 www.cre.gov.uk</p>

Annex B Sources of Advice

Service	Description	Contact Details
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.	www.justask.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.	www.lg-employers.gov.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
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 2064 1079 www.eoc.org.uk
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

Service	Description	Contact Details
REAS	The Race and Equality Advisory Service (REAS) is part of the Advisory, Conciliation and Arbitration Service (ACAS). The service provides free and confidential strategic advice to employers and others so that they can develop and implement policies and practices for racial equality among the workforce. It is a national service with a team of regional advisers based throughout the country to ensure local expertise is available to all their clients.	Phone ACAS and ask for REAS adviser
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

THE AGE ADVISORY GROUP

The following organisations are represented on the Age Advisory Group. The Group has given us invaluable help during the development of this document.

Those identified with an asterisk * are willing to give information and advice on age issues.

Name	Organisation	Phone & e-mail	Fax
Carolynne Arfield Steve Billam	Age & Older Workers Employment Strategy Team Dept for Work & Pensions W812 Moorfoot Sheffield S1 4PQ	0114 2677216 carolynne.arfield @dwp.gsi.gov.uk 0114 2677221 steve.billam @dwp.gsi.gov.uk	0114 259 3591
Richard Baker	Age Concern (England) 42, Bath Terrace Gosforth Newcastle upon Tyne NE3 1UH	0191 285 5135 bakerr@ace.org.uk	0191 285 5133
*	For information and advice please contact: the free information line on 0800 009966 Or write to: Age Concern, FREEPOST, Ashburton, Devon, TQ13 7ZZ Or go to: www.ageconcern.org.uk		
*Rob Taylor	Age Concern Cymru 1 Cathedral Road Cardiff CF11 9SD	02920 371566 robert.taylor @accymru.org.uk	02920 399562
Jamie Bell	CBI Centre Point 103 New Oxford Street London WC1A 1DU	020 7395 8156 Jamie_Bell @cbi.org.uk	020 7395 8242

Name	Organisation	Phone & e-mail	Fax
Dianah Worman	Chartered Institute of Personnel and Development Camp Road Wimbledon London SW19 4UX	020 8263 3284 d.worman @cipd.co.uk PA: r.hansen@cipd.co.uk 020 8263 3283	020 8263 3806
Anne Kensall	Chartered Management Institute 2 Savoy Court Strand London WC2R 0EZ	020 7241 2701 policy.development @managers.org.uk	020 7497 0463
*Samantha Mercer	Employers Forum on Age 2nd Floor, The Tower Building, 11 York Road, London SE1 7NX	020 7981 0339 07973 640622 sam.mercer @efa.org.uk	
Mike Palmer Representing British Chambers of Commerce	HSBC Bank plc Level 33 8 Canada Square London E14 5HQ	020 7992 1697 mikepalmer @hsbc.com	020 7992 4655
Keith Handley Representing SOCPO – The Society of Personnel Officers in Local Government	Keith Handley Consulting 11 Scotland Way Horsforth Leeds West Yorkshire LS18 5SQ	01132 580572 keithhandley @ntlworld.com	01132 959040
Sue Baldwin	Scottish Enterprise 150 Broomielaw 5 Atlantic Quay Glasgow G2 8LU	0141 228 2790 sue.baldwin @scotent.co.uk	0141 228 2851
Steve Smith	Small Business Service Room 642 Kingsgate House 66-74 Victoria Street London SW1E 6SW	020 7215 0253 steve.smith @sbs.gsi.gov.uk	020 7215 4524

Annex B Sources of Advice

Name	Organisation	Phone & e-mail	Fax
*Patrick Grattan	Third Age Employment Network York House 207-221 Pentonville Road London N1 9UZ	020 7843 1590 taen @helptheaged.org.uk	020 7843 1599
Lucy Anderson	Trades Union Congress Congress House Great Russell Street London WC1B 3LS	020 7467 1210 landerson@tuc.org.uk	020 7467 1333

The Directive	<p>The European Employment Directive (Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation). A Directive is a legal instrument which is binding on all Member States of the European Union. A directive must be “implemented” into domestic law by regulations or primary legislation.</p>
Default retirement age	<p>This is the term we have used to describe the age, set out in the regulations, from which employers would be able to retire their employees compulsorily without having to justify their decision by reference to specific aims.</p>
Mandatory retirement age	<p>The age that an employer has set for the retirement of employees.</p>
Specific aims	<p>These are the aims which, exceptionally, employers and others with obligations under the Directive might use to justify differences of treatment. The aims will be set out in regulations.</p>
Strand	<p>An item of legislation which 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.</p>

