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**EQUALITY AND DIVERSITY:
COMING OF AGE**

Consultation on the draft
Employment Equality (Age)
Regulations 2006

A SUMMARY

JULY 2005

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

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

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

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

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

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

Issued 14 July 2005
Respond by 17 October 2005
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Introduction

1. Until now there has been no legislation dealing with age discrimination in Great Britain. This will change in October 2006, when we will introduce legislation outlawing age discrimination in employment and vocational training.
2. Age discrimination prevents people of all ages from realising their full potential in the workplace. This in turn prevents employers from getting the best performance out of their business and delivering the best service to their customers. We have consulted over a number of years on our plans for legislation outlawing age discrimination. We have said throughout that tackling age discrimination is good for business, good for individuals and good for society.
3. This consultation is the final step in our exchange of views with you. It accompanies the draft Age Regulations.

When will the new legislation come into force?

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

Why are we holding this consultation?

5. This consultation follows our *Age Matters* consultation, in which we asked you about our proposals for the most important policy issues on age discrimination. Taking into account your replies, and subsequent informal consultations with main stakeholders, we have finalised our policy, which is reflected in the draft Employment Equality (Age) Regulations 2006.
6. We are now holding a consultation in order to:
 - let you know what the regulations will require so that employers and providers of vocational training can prepare for them;

- ask you whether the explanation in the full consultation document is unclear on any issues, so that they can be addressed in the guidance Acas will issue next year;
- give you a chance to comment on whether the details of these decisions will give rise to significant practical difficulties; and
- seek your views on whether the draft regulations effectively reflect our policy as set out in the consultation document.

When does this consultation close?

7. This consultation closes on **17 October 2005**.
8. Details of where you can get copies of the consultation documents are at the end of this booklet. All the documents are also available on the DTI website www.dti.gov.uk/er/equality/age.htm

What are the main points of the new legislation?

9. The legislation will give individuals new rights not to be discriminated against because of their age, and new responsibilities to all employers and providers of vocational training.
10. The regulations will apply to all workers and to people who apply for work. They will also cover access to vocational training. The regulations will prohibit direct and indirect age discrimination, harassment and victimisation.

New obligations

11. Those with new obligations include:
 - employers;
 - providers of vocational training (including adult, further and higher education) – this covers both employers who provide vocational training, and private training institutions;
 - trade unions, professional associations and employers' organisations – in relation to their membership as well as in their role as employers; and
 - trustees and managers of occupational pension schemes.

New rights

12. Those with new rights include:
 - employees;
 - self-employed people, including specific provisions for barristers, advocates and partners in a partnership;
 - contract workers;
 - office holders;
 - members of trade organisations; and
 - anyone in vocational training and anyone receiving or holding a professional or trade qualification.
13. The regulations will also apply to job applicants and where people make other applications in the areas covered by the regulations – for example, people applying for a place on a vocational training course or people applying to become members of trade organisations.
14. The rights also apply after the relevant relationship has ended.

Objective justification

15. In most situations, it will be unlawful to treat people differently on the grounds of age. However, employers and others with obligations under the regulations will be able to justify different treatment on the grounds of age, but only if they can show that:
 - it fulfils a legitimate aim; and
 - the particular circumstances make it appropriate and necessary.
16. A wide variety of aims may be considered as legitimate, but must reflect a real need on the part of the employer or other person with obligations under the legislation. An example in the legislation is the fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

17. Objective justification will not be an easy test to satisfy. Employers, and others with obligations under the legislation, will have to be able to produce supporting evidence if challenged: assertions that an age-based approach was necessary will not be enough.
18. The legislation dealing with other forms of discrimination (such as sex and race) provides for only very limited possibilities of justifying direct discrimination. Age legislation will be unique in that the possibility of justification will apply equally to direct and indirect discrimination.
19. Employers will not have to objectively justify age-based decisions they have to make in order to comply with other legislation – for example, legislation prohibiting the employment of people under 18 in a bar open for the sale or consumption of intoxicating liquor.

Genuine occupational requirements

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

Positive action

21. Anything done in connection with:
 - giving people of a particular age access to vocational training; or
 - encouraging people of a particular age to use employment opportunities will be lawful if this is reasonably expected to prevent or compensate for disadvantages suffered by such persons.

Recruitment, selection and promotion

22. Decisions about recruitment, selection and promotion should not normally be based on age, but should be based on the skills and competences required for the job. Different treatment on grounds of age in these areas will only be lawful if the employer can satisfy the strict test of objective justification.

Service-related pay and benefits

23. Length of service is often used as a criterion for pay, and for non-pay benefits such as staff discounts or extra holiday entitlement. This can amount to indirect discrimination because some age groups are more likely to have the necessary length of service than others. Such benefits are used widely to motivate staff, reward loyalty, and recognise experience. Our aim is as far as possible to ensure their continuation. To that end there will be two exemptions and a general provision covering the use of length of service.

Specific exemptions

24. The specific exemptions are:
- any length-of-service requirement of five years or less (counting both continuous and non-continuous service) is exempted and will be able to continue;
 - length-of-service requirements that mirror a similar requirement in a statutory benefit are exempted and will be able to continue. This will ensure that employers can continue to make enhanced provision for employees – for example, contractual redundancy schemes where service-related provision is more generous than under the statutory scheme.

General provision

25. There will be a provision covering length of service longer than five years. To rely on this exemption the employer must:
- award the benefit to reward loyalty, or to encourage motivation, or to recognise the experience of the employee; and

- conclude that there will be a business benefit resulting from the higher level of experience of staff or from rewarding staff loyalty or increasing or maintaining staff motivation; and
- apply the length-of-service criterion similarly to staff in similar situations.

Retirement

26. There will be a default retirement age of 65. This means that it will not constitute age discrimination if employers retire employees at or above the age of 65 where it is a genuine retirement. Employers will be free to continue employing people beyond the default age. Retirement ages below 65 will, in general, be outlawed (lower retirement will be possible, but only if the employer can satisfy the strict test of objective justification).
27. For many businesses this will require a considerable adjustment. Those that set their retirement age below the default age of 65 will have to justify it or change it. Growing numbers of firms are already successfully planning their workforce without fixed retirement ages, and in the longer term the Government's aim is to move to a position where business does not need to rely on a default retirement age (paragraph 40 sets out our plans for monitoring and reviewing the default retirement age).

The 'duty to consider'

28. **There will be a new procedure for any compulsory retirement of employees at any age** – the 'duty to consider' procedure. This will allow employees to request working beyond a compulsory retirement age. If the employee makes such a request, the employer will have to consider it seriously.
29. Under this procedure an employer who wishes to retire an employee will have a duty to:
- a. notify the employee in writing not more than 12 months and not less than six months beforehand of the intended date of retirement; and
 - b. tell the employee of the right to request working beyond the intended moment of retirement.

30. If the employee makes such a request, the employer will have to consider it seriously. There are a number of steps involved:
 - a. the request can be made between 12 months and six weeks before the notified date of retirement;
 - b. the employer must hold a meeting with the employee to discuss it (unless the employer agrees to the request);
 - c. the employer must notify the employee of the decision within two weeks of the meeting. Employment will continue until this has been done, even if it is after the notified date of retirement;
 - d. the employee will have two weeks to appeal to the employer. If the employee does appeal, the appeal meeting can take place after retirement has taken effect.

31. The existing statutory dismissal procedure (the 'three step' procedure) will not apply to retirement dismissals: only the duty-to-consider procedure will apply.

Unfair dismissal

32. The current upper age limit of 65 for unfair dismissal is to be removed. This means that older workers will get the same rights to claim unfair dismissal as younger workers.

'Planned retirement'

33. However, retirement will not constitute unfair dismissal if:
 - a. it is on or after 65 (or a lower retirement age, if justified);
 - b. the employer has notified the employee of the retirement at least six months in advance;
 - c. the employer has subsequently followed the duty-to-consider procedure; and
 - d. it is a genuine retirement.

34. We call this 'planned retirement', and under it:
 - the employer has to inform the employee in writing of the retirement date – whether the default age, or an earlier objectively justified age – at least six months in advance;

- retirement at that age, or at an extended date agreed as a result of the employee successfully exercising the 'right to request' working longer, will be retirement and an unfair dismissal claim will not succeed unless:
 - i. the employee can prove that the employer would have dismissed him or her for a reason other than retirement; or
 - ii. the employer fails to follow the duty-to-consider procedure.
 This ensures certainty for the employer.

- if the employer announces retirement out of the blue or with less than six months' warning, an unfair dismissal (or a redundancy) claim would be likely to succeed unless the employer can prove that it is a retirement. This will protect the employee.

35. Employers who fail to inform employees properly can be penalised, and in the most serious cases a retirement dismissal will be automatically unfair.

36. Where the employee does not want to continue working, no procedure will be required and the employee will simply leave with the agreement of both sides. This will be the situation in many cases – employees will be happy to retire on the due date. If they have agreed to continue working for a specific period but their health or performance deteriorates unexpectedly, they may also agree it is time to call it a day.

Dismissals for reasons other than retirement

37. Where an employee of any age is dismissed for a reason other than retirement, the normal dismissal procedures will apply and the employer will need to follow the normal statutory dismissal procedures.

38. The employer will not be able to avoid the requirements by applying the retirement procedures where the dismissal is actually a redundancy, or a dismissal on grounds of competence or conduct.

Redundancy

39. Employees who are made redundant at any age will have the same entitlement to a redundancy payment: the upper age limit will be abolished. The basis of the calculation will be changed to remove some of the age-based provisions, but the 20-year service maximum will remain.

Monitoring and review

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

We will abolish it if the evidence shows that we have achieved the expected culture change and the default age ceases to be necessary.

Occupational pensions

41. Many rules in pension schemes are necessarily age-based and required for schemes' proper operation. The regulations will effectively exempt most age-related rules and practices. For instance, it will remain possible for employers to offer new employees a pension scheme which is different from the one held by existing employees.

Enforcement

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

43. If the dispute is an employment matter other than a dismissal, the employee will need to follow the statutory grievance procedure before he or she can take legal action.
44. Age discrimination claims relating to employment and vocational training will be dealt with through the employment tribunals.
45. The main exception to this rule is that claims against providers of further or higher education (as opposed to other vocational training) must be brought in the County Courts (England and Wales) or the Sheriff Courts (Scotland).

Benefits and costs

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

What should you do to prepare for 2006?

48. If you are an employer or provider of vocational training, you should act now to ensure that you are ready when the legislation comes into force.
49. If you are an employer, you should – if you have not already done so – start a review of your employment practices and procedures now. You should identify where changes need to be made to comply with the legislation, and where necessary you should enter into discussions with your employees or any trade unions involved to ensure that you can make those changes before 1 October 2006.

- **You should check your recruitment procedures:** if you use a recruitment agency, make sure you do not ask them to act unlawfully. If you do the recruitment yourself, check that, for instance, your job advertisements are not age-discriminatory.
 - **You should check your application procedures:** ensure that those who conduct interviews and make decisions on job offers do not have any prejudices in relation to age.
 - **You should check your employment rules and procedures:** including the employment contracts you use, the staff handbook and the employment benefits (salary and otherwise) you provide. The consultation document describes more fully the few limited exceptions where difference of treatment on grounds of age will be allowed, but otherwise you should remove any age discrimination, and (where necessary) agree this with your employees, employee representatives and trade unions.
 - **You should check your retirement procedures:** if you use a retirement age for your staff, you should consider whether you need to keep this in place. If so, you will have to make changes to the procedures you use as described earlier in this summary and set out more fully in the consultation document.
 - **You should tackle harassment:** make it clear to all your managers and other employees that harassment on grounds of age will not be tolerated.
 - **You should know your staff:** the legislation will not contain any obligation to collect information on the age profile of your workforce. However, it can be good practice to do so, since this will make it easier for you to check whether age discrimination is occurring. You will, for instance, be able to check whether older workers are receiving significantly less training than younger workers within your business. If you do, make sure that you follow the Code of Practice on data protection in employment (see www.informationcommissioner.gov.uk/eventual.aspx?id=437).
50. If you are a provider of vocational training, you should follow the above steps for you own employees (for instance, your teachers), but in addition you will have to make sure that you are not discriminating on grounds of age against your students and those applying for places on your courses.

51. The full consultation document is a straightforward explanation of how the draft Age Regulations will work. However, the regulations are not yet final, and the consultation document is not guidance. We do not expect the final regulations to be substantially different, but there may be changes as a result of the responses to this consultation.
52. We will publish guidance once the regulations have been approved by Parliament.

Why you should also read the full consultation document

53. If you are an employer or a provider of vocational training, you should also read the full consultation document. This will give you more information to decide what you need to do to ensure that your organisation will be ready for the age discrimination legislation when it comes into force in October 2006.
54. If you are an employee or student who has suffered age discrimination, or if you are generally interested in your rights, the consultation document will give you the most extensive preview so far of your new rights.

Where to get copies of the consultation documents

55. Copies of this and other documents in this consultation can be obtained from the DTI Publications Order Line:
Phone: 0845 015 0010
Fax: 0845 015 0020
Email: publications@dti.gsi.gov.uk

Please quote the following reference numbers:

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

56. You can also obtain the following alternative formats from the DTI Response Centre (phone 020 7215 5000): Braille, floppy disc, CD ROM, or large print.



