



**EMPLOYMENT EQUALITY (AGE)
REGULATIONS 2006**

Notes on Regulations

MARCH 2006

Employment Equality (Age) Regulations 2006

Notes on Regulations

INTRODUCTION

1. These regulations implement the age strand of Directive 2000/78 EC establishing a general framework for equal treatment in employment and vocational training.
2. The Directive also applies to discrimination on grounds of sexual orientation, religion or belief and disability. Separate Regulations made in respect of the sexual orientation, religion or belief and disability ‘strands’ are the Employment Equality (Sexual Orientation) Regulations 2003 (S.I. 2003/1661) (“SO”) and the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003/1660) (“RB”) which came into force on 1st and 2nd December 2003 respectively, and the Disability Discrimination Act (Amendment) Regulations 2003 (S.I. 2003/1673) which came fully into effect on 1st October 2004. SO/RB have been amended on a number of occasions; the material amending instruments are respectively the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 (S.I. 2003/2827) and the Employment Equality (Religion or Belief) (Amendment) Regulations 2003 (S.I. 2003/2828).
3. The Regulations are broadly similar in structure and form to the SO/RB regulations. Text dealing with provisions which are new, or materially different from those are highlighted in italics.

PART 1 GENERAL

Regulation 1

Citation, commencement and extent

3. Regulation 1 provides for the Regulations to come into force on 1 October 2006. The deadline for implementation laid down in the Directive is 2 December 2006. This gives employers and others six months in which to prepare for the coming into force of the Regulations.
4. It also provides that the Regulations do not extend to Northern Ireland save in the case of those amendments to legislation which itself extends to Northern Ireland. The Regulations may, nevertheless, apply in some situations occurring outside Great Britain: see regulation 10. Separate provision will be made for Northern Ireland.

Regulation 2

Interpretation

5. Regulation 2 defines various terms that are used throughout the Regulations. In particular –
 - Discrimination is to be construed in accordance with regulation 3 (discrimination on the grounds of age), regulation 4 (discrimination by way of victimisation) and regulation 5 (instructions to discriminate);
 - “harassment” is to be construed in accordance with regulation 6 (harassment on the grounds of age);
 - “employment” is defined in the same way as SO/RB save for the purposes of regulation 30 (exception for retirement) and Schedules 6, 7 and 8.;
 - “worker” is defined for the purposes of regulations 32 and 34 and Schedule 2, because these provisions contain exemptions the application of which turns on the meaning of “worker”.

Regulation 3

Discrimination on grounds of age

6. Regulation 3 defines direct and indirect discrimination on grounds of age for the purposes of the Regulations.
7. Direct discrimination occurs where, because of B’s age, A treats B less favourably than he treats or would treat other persons unless A can objectively justify that treatment.
8. Although the core definition is similar to that used in the Sex Discrimination Act (“SDA”) 1975 (“on the ground of her sex”), but slightly narrower than the Race Relations Act (“RRA”) 1976 (“on racial grounds”) the significant difference between these regulations and all other strands of discrimination legislation is that direct discrimination is capable of objective justification. This derives from article 6.1 of the Directive and will be dealt with in more detail later.
9. RRA case law has established that direct discrimination on racial grounds covers discrimination against a person by reason of the race of someone with whom the person associates and discrimination based on A’s perception of B’s race. It also covers discrimination against a person by reason of a refusal to follow an instruction to discriminate on grounds of race. The narrower definition has been used in the age regulations to avoid covering discrimination on grounds of association with persons of a particular age in order not to create confusion with “family friendly” legislation. This however

necessitates the specific provision for perception which occurs in regulation 3 and the provision for instructions to discriminate in regulation 5.

10. Direct discrimination “on grounds of age” includes discrimination based on B’s apparent age, whether or not it is in fact B’s age. This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their age. Nor will they be required to disclose their age in bringing a claim – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their age. A will not be able to raise the defence that B was in fact older or younger than he appeared to be or than A or another person inferred that he was.

11. Indirect discrimination is taken to occur where –

- A applies to B a provision, criterion or practice which A applies equally to other persons; and
- that provision, criterion or practice puts persons of B’s age group at a particular disadvantage; and
- B suffers that disadvantage.

If B can show that he suffers in this way, then the provision, criterion or practice is indirectly discriminatory unless A can show that it is a proportionate means of achieving a legitimate aim.

12. The reference to an “age group” means that to belong to such a group, not all of the members of the group have to be of the same age – they may have a range of ages.

13. The definition of discrimination in regulation 3 does not copy out the references in Articles 2.2(b) and 6.1 of the Directive to the difference of treatment, provision, criterion or practice being “objectively justified” by the legitimate aim. The addition of those words would not add anything to the requirement in regulation 3(1) for the discriminator to demonstrate the existence of a legitimate aim (to which he must then show the provision, criterion or practice to be proportionate).

14. The definitions of direct and indirect discrimination also require the means to be “proportionate” rather than “appropriate and necessary”, the term used in Articles 2.2(b) and 6.1 of the Directive. The Directive appears to use the two terms “proportionate” and “appropriate and necessary” interchangeably – compare Articles 2.2(b) and 6.1 with Article 4.1. Similarly, the European Court of Justice (ECJ) has used the two terms interchangeably, explaining that proportionality requires that the means used to achieve an aim must not exceed the limits of what is appropriate and necessary to achieve that aim - (see, for example, C-157/96 R v MAFF, ex parte NFU [1998] ECR I-1211 and C-222/84 Johnston v. RUC [1986] ECR 1651). The same formula has been used most recently in Case C-144/04 Mangold v. Helm (see paragraph 65). Since the two terms have the same meaning in light of the case law, the Regulations use the same term (“proportionate”) for the sake of consistency throughout.

15. The term “proportionate” is considered to be clearer than “appropriate and necessary” in implementing the Directive in that it sets the requirement of necessity in its proper context. Were the Directive's formulation to be simply copied out, there might be a risk that this would be interpreted as a very strict requirement (for example, that the legitimate aim pursued was essential to the employer's business), in accordance with the usual English law approach to the concept of necessity. But, as the ECJ case-law set out above demonstrates, the term “appropriate and necessary” in the European context does not set out an absolute test but, rather, one of proportionality involving balancing between the discriminatory effects of a measure and the importance of the aim pursued.

Regulation 4

Discrimination by way of victimisation

16. Regulation 4 makes it clear that A discriminates against B for the purposes of the Regulations if he treats B less favourably than he treats or would treat other persons by virtue of something done by B under or in connection with the Regulations. This is discrimination by way of victimisation. Thus, A ‘victimises’ B if he treats him less favourably than others because B has brought or given evidence in proceedings under the Regulations, or because B has alleged that A or another person has contravened the Regulations. So, for example, A victimises B if he sacks him because he gave evidence on behalf of C in proceedings in which C alleged that A had discriminated against her because she was of a particular age.
17. Regulation 4 does not apply, however, if B makes allegations or gives evidence which he knows are false. In those circumstances he is not ‘victimised’ if, for example, A takes disciplinary proceedings against him.
18. This regulation is identical to SO/RB regulation 4 which in turn is based upon s.4 of the SDA and s.2 of the RRA.

Regulation 5

Instructions to discriminate

19. No separate provision was required in the sexual orientation and religion or belief regulations to cover discrimination against a person by reason of a refusal to follow an instruction to discriminate. This was because the wider definition of discrimination, derived from the RRA, used there had been recognised by the Court of Appeal to cover instructions: see Weathersfield Ltd. v. Sargent [1999] IRLR 94. However the narrower definition of direct discrimination used in these Regulations requires separate provision in order to implement Article 2.4.
20. Regulation 5 provides that where B is subjected to less favourable treatment by A either because he has failed to carry out instructions to discriminate against a third person, or because he has complained that he has been given those instructions (whether or not he has carried them out), then that less

favourable treatment of B will itself constitute discrimination on the grounds of age. It is not relevant for the purposes of regulation 5 whether the instruction to discriminate was given by A or by another person, or whether B complains to A or to a third party about the giving of that instruction.

21. The drafting of regulation 5 is modelled on regulation 4, discrimination by way of victimisation. The comparison for instructions in regulation 5 requires reference to a person “in the same circumstances” whereas the comparison for discrimination under regulation 3(2) is in circumstances which “are the same or not materially different”. There is no other significance in the distinction than that the statement in regulation 3(2) is unnecessary because the two sets of circumstances set out in regulation 5 make clear how the comparison is to be made. Regulation 5 repeats the formula used in the victimisation provision, which was drafted in this particular way in order to be consistent with the corresponding provisions in the SDA and RRA.

Regulation 6

Harassment on grounds of age

22. Regulation 6 defines harassment for the purposes of the Regulations as an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms using the wording of the Directive. It takes place if A’s conduct has the purpose or effect of either violating B’s dignity or creating an offensive (etc) environment for him. The same definition is used across the regulations regarding discrimination on grounds of sexual orientation, religion or belief, race and disability.
23. Regulation 6 does not copy out the Directive’s definition completely, in that Article 2.3 of the Directive defines harassment as conduct which violates a person’s dignity and creates an offensive (etc) environment. However, it is difficult to see how the two concepts differ in practice. Conduct which violates a person’s dignity almost invariably also creates an offensive (etc) environment for that person, and vice versa; it is difficult to envisage a practical example of harassment which involves one but not the other, because each element has such a broad definition. The Code of Practice on measures to combat sexual harassment (Commission Recommendation 92/131/EEC), on which existing domestic case law on harassment has been modelled, takes a similar approach, in that the creation of an intimidating, hostile or humiliating working environment is specified as a way in which conduct may affect a person’s dignity. Since the Directive refers expressly to environment, as well as dignity (in a similar way to the Code of Practice), both concepts are referred to in the Regulations. But since there is such a considerable overlap between the two, “or” is used instead of “and” in regulation 6 both to implement the Directive and to maintain consistency with the other discrimination regulations. To the extent that the definition in regulation 6 goes further than the Directive’s obligations (if it does at all), it is closely related to them.
24. Under regulation 6(2) harassment is only to be considered to have the effect of violating dignity or creating an offensive (etc) environment if, taking into

account all the circumstances, A's conduct "should reasonably be considered" as having violated B's dignity or created an offensive environment for him. This includes a requirement to take into account B's perception of the conduct. This reflects the judgment of the Employment Appeal Tribunal in the case of Driskel v Peninsula Business Services Ltd [2000] IRLR 151 (which concerned the approach to be followed by tribunals when considering whether alleged harassment amounted to sex discrimination). Therefore, an over-sensitive complainant who takes offence unreasonably at a perfectly innocent comment would probably not be considered as having been harassed.

PART 2

DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

Regulation 7

Applicants and employees

25. Regulation 7 makes it unlawful for employers, at an establishment in Great Britain, to discriminate against, or harass, job applicants and employees in a wide variety of circumstances, starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal. With the exception of paragraph (4), regulation 7 is the same as S0/RB regulation 6 which is based upon s.6 of the SDA, s.4 of the RRA and s.4 of the DDA.
26. The effect of regulation 7(4) is that it is not unlawful for an employer to discriminate against a person in deciding to whom he should offer employment, or by refusing to offer employment to a person where, at the time of the person's application to the employer he is over the employer's normal retirement age or he is over the age of 65 if the employer has no normal retirement age.
27. Such discrimination is also not unlawful where the applicant will reach the employer's normal retirement age or the age of 65 (if the employer has no normal retirement age) within six months of the application to the employer.
28. For these purposes, the employer's normal retirement age must be over the age of 65 and has the same meaning as is given in section 98ZH of the Employment Rights Act 1996 (as inserted by Schedule 8 to these Regulations).
29. The employees to which regulation 7(4) applies are the same group of employees to which regulation 30 (exception for retirement) applies. That is to say, employees within the meaning of s.230(1) of the Employment Rights Act 1996, Crown employees, House of Lords staff and House of Commons staff.
30. The rationale for this exclusion from the requirement not to discriminate flows from the rationale for regulation 30 (exception for retirement). There is little

point in requiring an employer not to discriminate at the point of receiving an application from a prospective employee when, if he were to employ the person, that person could be retired (without it amounting to discrimination to do so) within six months of their appointment.

Regulation 8

Exception for genuine occupational requirement

31. Regulation 8 allows an employer, when recruiting for a post, to treat job applicants differently on grounds of their age if possessing a characteristic related to age is a genuine occupational requirement (“GOR”) for that post. An employer may also rely on this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post.
32. Regulation 8(1) and (2) follows the wording of Article 4.1 of the Directive. However, regulation 8(2) does not copy out the reference in Article 4.1 to “the objective [being] legitimate”. This is because if an occupational requirement is established as a genuine one in order to carry out the job in question, then it also pursues a legitimate objective; a requirement which pursues an illegitimate objective would not constitute a genuine occupational requirement. This analysis has been upheld by the High Court in the judicial review of the SO Regulations (R (on the application of Amicus and others) v. the Secretary of State for Trade and Industry at paragraph 70).
33. This regulation is similar to regulation 7 of SO/RB.

Regulation 9

Contract workers

34. Regulation 9 covers contract workers whose employer contracts to supply their services to another person or business (“the principal”) at an establishment in Great Britain. It is unlawful for the principal to discriminate against, or harass, a contract worker.
35. However, this regulation does allow a principal to treat contract workers differently on grounds of age if they are required to do work for which possession of a particular age-related characteristic is a GOR.
36. Regulation 9 is materially the same as regulation 8 of SO/RB which is in turn similar to s.9 of the SDA and s.7 of the RRA.

Regulation 10

Meaning of employment and contract work at establishment in Great Britain

37. Regulation 10 sets out the circumstances in which employment or contract work is to be considered as being “at an establishment in Great Britain” for the purposes of regulations 7 and 9. If the employee’s work is undertaken wholly

or partly in Great Britain, it is treated as being at such an establishment. If the employee works wholly outside Great Britain, the work will only be caught if it is undertaken for the purposes of the employer's establishment in Great Britain, and the employee is (or was) ordinarily resident in Great Britain at the time of recruitment or at some time during the employment or contract work.

38. Specific provisions are made in relation to employment on ships, aircraft, hovercraft, and oil and gas rigs. This includes oil and gas rigs on the UK sector of the continental shelf, and also extends to the part of the Norwegian sector of the continental shelf specified in Schedule 1 which makes up the Frigg Gas Field. This is because the Frigg field lies partly in the UK and partly in the Norwegian sector of the continental shelf. By Article 24(3) of the Frigg Gas Field Reservoir Agreement (Cmnd. 6491), the UK and Norwegian governments agreed that "legislation for the protection and welfare of employees should be applied consistently with the exploitation of the Frigg field as a single unit" (see Daintith and Willoughby, UK Oil & Gas Law at 5-044). By virtue of regulation 9(5), the Regulations apply to an employee on a gas rig in the Norwegian part of the Frigg field if the employer is a company registered in Great Britain, or is a company or other person who has established a place of business in Great Britain from which the gas rig operations are directed. To the extent that this goes further than the Directive requires (if it does at all, given the requirement for the employer's establishment to be in Great Britain), it arises out of and is closely related to the Directive's obligations.
39. Regulation 10 and Schedule 1 are identical to SO/RB regulation 9 and Schedule 1 which in turn are similar to s.10 of the SDA, s.8 of the RRA, and the secondary legislation made under each of those provisions (e.g. Sex Discrimination and Equal Pay (Offshore Employment) Order 1987, SI 1987/930).

Regulation 11 **Pension Schemes**

40. Regulation 11 makes it unlawful for the trustees and managers of an occupational pension scheme to discriminate against a member or a prospective member of the scheme, or to harass such a member. It also gives effect to Schedule 2 (Pension Schemes).

Regulation 12 **Office-holders etc**

41. Regulation 12 prohibits discrimination against and harassment of workers who are not technically in employment (as defined in regulation 2(2)) or treated as if in employment by virtue of regulation 44(2) (Crown servants), but whose position may be similar to that of employees. Some of these types of workers can be described as "office-holders" and can include (for example) company directors (where they have no contract of employment), the chairs/members of some non-departmental public bodies, judges and members of tribunals, members of the clergy and other ministers of religion.

42. Regulation 12 is similar to s.76 of the RRA in its application to appointments made or recommended by a Minister or government department. It also goes further, in that it applies to any other appointment to an office or post, provided the worker is paid and is subject to the direction of another person as to when and where he performs his functions.
43. Regulation 12 does not apply to elected posts, or to appointments to political offices (such as Ministerial posts or posts held by local councillors within a local council). This is because those holding political office are not covered by the Directive, as they are not engaged in economic activity amounting to employment or self-employment within the meaning of the Directive. A person holding political office is not an ‘employee’ in EC law terms because he does not satisfy the criterion set out in ECJ case-law of providing a service of economic value under another’s direction: see C-66/85 Lawrie-Blum [1986] ECR 2121. Neither can such a person properly be described as being self-employed, particularly given the absence of a service of economic value: see C-55/94 Gebhard [1995] ECR I-4165. See also by analogy the case of Triesman v Ali [2002] EWCA 93 where the Court of Appeal expressed strong doubts that being a local councillor was a “profession or occupation” within the meaning of section 12 of the RRA.
44. Regulation 12 is in all material respects identical to regulation 10 of SO/RB.

Regulation 13

Police

45. Regulation 13 ensures that all police constables enjoy the same protection from discrimination and harassment as employees under regulation 7. The person with direction and control of the force to which they belong – usually the chief officer or chief constable of that force – is treated as their employer (except in relation to acts done by the police authority, in which case the authority itself is treated as the employer).
46. This regulation omits the references in SO/RB to the National Criminal Intelligence Service (“NCIS”) and to the National Crime Squad (“NCS”) which will be replaced by the Serious Organised Crime Agency (“SOCA”) before these regulations come into force. The SO/RB regulations will be amended accordingly.

Regulation 14

Serious Organised Crime Agency

47. Regulation 14 ensures that any person who is seconded to work for SOCA, whether they are a police constable or a civilian worker, will enjoy the same protection from discrimination and harassment as they would if they were employed by SOCA. SOCA, which is established under section 1 of, and Schedule 1 to the Serious Organised Crime and Police Act 2005, replaces

NCIS and NCS from 1st April 2006 and this slight change to the regulations from SO/RB reflects that change.

Regulation 15

Barristers

48. Regulation 15 makes it unlawful for barristers and their clerks to discriminate against, or harass, pupils and tenants (and applicants for pupillages and tenancies) in a wide variety of circumstances. The circumstances that are covered range from the arrangements that barristers and their clerks make for determining to whom they should offer pupillages and tenancies, to the circumstances in which they bring a pupillage or tenancy to an end.
49. In addition, regulation 15 makes it unlawful for a person instructing a barrister to discriminate against any person or to subject him to harassment.
50. This regulation, which does not apply in Scotland, is identical to SO/RB regulation 12 and similar to s.35A of the SDA and s.26A of the RRA.

Regulation 16

Advocates

51. Regulation 16 prohibits discrimination against and harassment of pupils and would-be pupils by advocates in Scotland in the same way as regulation 15 does in respect of barristers in England and Wales. It also prohibits discrimination or harassment in the instruction of advocates. It only applies in Scotland, and is identical to SO/RB regulation 13 and similar to s.35B of the SDA and s.26B of the RRA.

Regulation 17

Partnerships

52. Regulation 17 makes it unlawful for a firm to discriminate against, or harass, a partner or an applicant for a partnership in the firm in a wide variety of circumstances. The circumstances that are covered range from the arrangements that firms make for determining to whom they should offer a partnership, to the circumstances in which a partnership is brought to an end.
53. However, this regulation does allow a firm to refuse to offer a partnership to a person on grounds of their age where the position in question is one for which a particular characteristic relating to age is a GOR.
54. This regulation applies to limited liability partnerships and their members in the same way as it applies to firms and their partners. It is identical to SO/RB regulation 14 and similar to s.10 of the RRA.

Regulation 18

Trade organisations

55. Regulation 18 makes it unlawful for a trade organisation (such as a trades union or a professional body) to discriminate against, or harass, a member (or an applicant for membership) of that organisation in a variety of circumstances. The circumstances that are covered range from a refusal to admit an applicant to membership to the circumstances in which a member may be deprived of membership.
56. This regulation is identical to SO/RB regulation 15 and similar to s.12 of the SDA, s.11 of the RRA.

Regulation 19

Qualifications bodies

57. Regulation 19 makes it unlawful for a body which confers (conferring includes renewing or extending) professional or trade qualifications on people to discriminate against a person by refusing to confer, or in the terms on which it confers, such a qualification on him, or by deliberately not granting an application by him for such a qualification, or by withdrawing (or varying the terms of) such a qualification which he holds. This regulation also makes it unlawful for such a body to harass the holder of, or an applicant for, a professional or trade qualification conferred by it.
58. This is required by the Directive because the acts of such bodies in conferring professional or trade qualifications (or refusing to do so) can affect a person's access to employment, self-employment or vocational training within the meaning of Article 3.1 of the Directive.
59. There is a small technical change from the SO/RB regulations amending the definition of "qualifications body" in respect of those not included. They are now defined as the "governing body" of an educational establishment and "a proprietor" of a school. The SO/RB regulations are to be amended by the DfES in line with this.
60. Apart from those small changes, regulation 19 is identical to the original SO/RB regulation 16 and similar to s.13 of the SDA and s.12 of the RRA.

Regulation 20

The provision of vocational training

61. Regulation 20 makes it unlawful for a person who provides training that helps fit people for employment to discriminate against them in relation to such training, access to it or in connection with the arrangements he makes for deciding to whom to offer training. It also makes it unlawful for the person who provides training to discriminate by terminating the training, or subjecting a person to any detriment during the training. Training is defined as all types and levels of training that would help fit a person for any employment, vocational guidance, facilities for training, practical work

experience and assessment related to the award of any professional or trade qualification. This regulation also makes it unlawful for such a training provider to harass a person to whom he is providing such training or who has applied to him for such training.

62. However, it does allow a training provider to refuse to offer training to a person where the employment for which the training is to be undertaken is employment for which possession of a characteristic related to age is a GOR.
63. Regulation 20 does not apply to anything done that is already covered by regulation 7 (applicants and employees) or regulation 23 (institutions of further and higher education).
64. Regulation 20 applies not only to refusals to offer a person vocational training, but also to any discriminatory act which takes place during the course of training which is provided. This is required because Article 3.1(b) of the Directive indicates that it applies to “access to all types and to all levels of ...vocational training”. It is expected that the European Court of Justice will interpret this to include discrimination during the course of training, because such discrimination could deter a person from continuing his access to training, or from seeking access to further training in the future.
65. Again, there are some technical differences from the current SO/RB regulation 17 to accord with DfES policy and we understand that DfES are shortly to amend SO/RB so that it will be identical to this version.

Regulation 21

Employment agencies, careers guidance etc

66. Regulation 21 makes it unlawful for an employment agency to discriminate against a person in the way it provides, offers to provide, or refuses to provide its services. It also makes it unlawful for such an agency to harass a person to whom it is providing, or who has requested, its services.
67. However, the prohibition on discrimination does not apply if the employment in relation to which the agency’s services are provided is employment for which a characteristic relating to age is a GOR. Moreover, an agency can defend a claim under this regulation by showing that it relied, and that it was reasonable for it to rely, on a statement from an employer that possession of a particular age-related characteristic was a GOR for a particular employment. It is, however, a criminal offence for employers to provide an employment agency with a statement which they know to be false or misleading.
68. Apart from a minor technical amendment in 21(6)(a)(ii), regulation 21 is identical to SO/RB regulation 18 which is based on s.15 of the SDA and s.14 of the RRA.

Regulation 22

Assisting persons to obtain employment etc

69. Regulation 22 makes it unlawful for the Secretary of State to discriminate against, or harass, a person in the provision of facilities or services under s.2 of the Employment and Training Act 1973 (“ETA”).

70. Section 2 of the ETA requires the Secretary of State –

“to make such arrangements as he considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees.”

Under this section the Secretary of State may make arrangements for providing temporary employment for the unemployed, and may make grants or loans to persons who provide facilities in pursuance of such arrangements.

71. Regulation 22 also makes it unlawful for Scottish Enterprise and Highlands and Islands Enterprise to discriminate against, or harass, a person in the provision of facilities or services to him under such arrangements as are mentioned in s.2(3) of the Enterprise and New Towns (Scotland) Act 1990. These arrangements are analogous to those which the Secretary of State is required to make under s.2 of the ETA.

72. Regulation 22 does not apply in a case where regulation 20 (the provision of vocational training) applies, or where the Secretary of State is acting as an employment agency under regulation 21 (employment agencies, careers guidance etc).

73. Regulation 22 is identical to SO/RB regulation 19.

Regulation 23

Institutions of further and higher education

74. Regulation 23 makes it unlawful for institutions (including universities) which provide further or higher education to discriminate against, or harass, their students or persons who have applied to be students. Regulation 23(3) provides an exception so that an education institution can restrict access to a course if it relates to employment to which a GOR would apply under regulation 8, and the student would not meet that requirement.

75. Regulation 23 implements Article 3.1(b) of the Directive. Article 3.1(b) indicates that the Directive extends to vocational training, and the case law of the ECJ (relating to Articles 12 and 150 EC on vocational training and discrimination on grounds of nationality) suggests that the meaning of “vocational training” includes most higher education and many further education courses. It covers:

“any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment” (Case C-293/83 Gravier v. City of Liège [1985] ECR 606).

76. The court has also indicated that, in general, university studies are likely to be considered as vocational training, including:

“...not only where the final examination directly provided the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment” (Case C-24/86 Blaizot v. University of Liège [1988] ECR 355).

77. Accordingly, most university studies and many further education courses will fall within the scope of the Directive. Courses of study which, because of their general nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation, do not fall within the scope of the Directive. Regulation 23 applies to all acts by further and higher education institutions in Great Britain, so as to establish a uniform regime in this regard. This includes those acts which relate to courses of study which fall outside of the Directive’s scope, as it can be said that those acts arise out of or are related to the Directive’s obligations in relation to vocational training.

78. The JCSI asked the DTI for further information on this question in relation to the SO/RB regulations and the memoranda submitted by the DTI are at Appendices 2 and 3 of its 21st Report of Session 2002-3. In particular the further memorandum of 30th May 2002 set out in detail the ECJ case law on the scope of vocational training and the approach in this regulation. As a result, the JCSI did not raise the issue in its oral questions, or in its report on those Regulations.

79. Regulation 23 is identical to SO/RB regulation 20.

Regulation 24

Relationships which have come to an end

80. Regulation 24 makes it unlawful for a person covered by Part 2 (e.g. an employer) to discriminate against or harass another person (e.g. a former employee) after the working relationship between them has ended. But an act of discrimination or harassment is only unlawful if it is closely linked to the former relationship. For example, an employer who refuses, on grounds of that employee’s age to provide a reference to a former employee would be acting unlawfully under regulation 24.

81. This regulation does not itself lay down any time limit for bringing a complaint under it, but by virtue of regulation 42 any complaint must normally be presented to an employment tribunal within 3 months of the alleged act. The further removed the alleged act of discrimination is from the former working relationship, in both time and context, the less likely it is that a person will be able to establish the necessary close connection to the former relationship.

82. Regulation 24 is identical to SO/RB regulation 21.

PART 3 OTHER UNLAWFUL ACTS

Regulation 25

Liability of employers and principals

83. Regulation 25 provides that an employer is vicariously liable for the acts of his employees, whether or not he knew or approved of them. However, the employer may argue, as a defence under regulation 25(3), that he took reasonable steps to prevent his employee's act.
84. This regulation also makes a person such as an employer liable for acts done by any other person on his behalf (i.e. acting as his agent).
85. Regulation 25 is identical to SO/RB regulation 22 which is in turn based upon s.41 of the SDA and s.32 of the RRA.

Regulation 26

Aiding unlawful acts

86. By virtue of regulation 26, a person who knowingly helps someone to do an act that is unlawful under the Regulations is himself treated as having done an equivalent act.
87. Regulation 26(2) applies this rule to employees and agents. So, a person who discriminates against or harasses someone contrary to the Regulations is treated as aiding his employer, or the person for whom he acts as agent (i.e. his principal), to do such an act if the employer or principal would be liable for his acts under regulation 25. In other words, the person doing the act, as well as his employer or principal, acts unlawfully.
88. By virtue of regulation 26(3), a person does not knowingly aid another to do an unlawful act of discrimination if he reasonably relies on a statement by that other person that the act is lawful under the Regulations. Under regulation 26(4) a person who knowingly or recklessly makes a misleading statement in this regard, commits a criminal offence punishable by a fine.
89. Regulation 26 is identical to SO/RB regulation 23 which is in turn based upon s.42 of the SDA and s.33 of the RRA.

PART 4 GENERAL EXCEPTIONS FROM PARTS 2 AND 3

Regulation 27

Exception for Statutory Authority

90. Regulation 27 provides that the Regulations do not render unlawful any act which is done in order to comply with the requirement of any other statutory provision. This gives an absolute defence to an employer who is forced to discriminate against an individual in order to comply with age limits required by legislation. The exception would apply only to acts required by the statutory provision. If a provision gives a permission or discretion to act, this provision will not protect the exercise of that discretion in a discriminatory way. In any event, the UK courts have construed such an exception (in the RRA – now amended) restrictively, so as to cover only statutory requirements, because to do otherwise would “render nugatory other provisions of the Act” (Hampson v Department of Education and Science [1991] 1 AC 171).
91. A trawl of primary and secondary legislation was undertaken and any provision which could not be objectively justified in terms of Article 6.1 was repealed or revoked, or amended if appropriate. Those amendments which were not undertaken by other government departments are effected in Schedules 8 and 9 to these Regulations.
92. Regulation 27 is tightly drafted in order to exempt only legislation which emanates from central government at Westminster or in Edinburgh.

Regulation 28

Exception for national security

93. Regulation 24 provides that the Regulations do not render unlawful any act which is done to safeguard national security, if it is justified. It is identical to SO/RB regulation 24 and similar to s.42 of the RRA.

Regulation 29

Exceptions for positive action

94. Regulation 29 permits positive action in certain circumstances, and is similar to ss.37 and 38 RRA (and SO/RB regulation 25). In contrast to the RRA, however, regulation 29 can be relied upon in the absence of evidence showing that a particular age group is under-represented in jobs or trade organisations. Rather, the positive action should “prevent or compensate for disadvantages linked to age” among the relevant section of people to whom the positive action relates. This follows the wording of Article 7.1 of the Directive. The disadvantage may be that persons of a particular age are under-represented in jobs or trade organisations, or it may be that there is evidence of widespread harassment of such persons in jobs or trade organisations, for example.

Regulation 30

Exception for Retirement

95. The aim of this regulation is to allow employers to dismiss on the grounds of retirement employees who are over the age of 65 without this being regarded

as age discrimination. However where an employee has a normal retirement age which is applicable to him which exceeds the age of 65, if the employee is dismissed on the grounds of retirement before he has reached that normal retirement age, this is capable of amounting to age discrimination.

96. This regulation needs to be read closely with the amendments to the unfair dismissals provisions of the Employment Rights Act 1996, which are amended by Schedule 8 to these Regulations. The notes on those provisions set out in detail the circumstances when a dismissal may be regarded as being for reasons of retirement. Where the dismissal is regarded as a retirement under those provisions and the employee is over the age of 65, the dismissal will not amount to age discrimination.
97. This regulation does not apply to all persons within the wide meaning of “employee” which is used in the Regulations generally (which comes from the definition of “employment” in regulation 2). The exception only applies to employees within the meaning of s.230(1) of the Employment Rights Act 1996, those in Crown employment, House of Lords and House of Commons staff.
98. Compulsory retirement ages are a form of direct age discrimination. Where the retirement age is below the age of 65 it will need to be objectively justified in accordance with regulation 3(1).
99. This exception for retirement ages of 65 and over is considered to be within the exemption contained in article 6(1) of the Directive as being justified by reference to a legitimate aim of social policy in accordance with the test in R v Secretary of State for Employment ex parte Seymour-Smith & Perez¹. The legitimate aim of social policy has two main elements – they are to meet the concerns of employers in relation to:
 - a) workforce planning; and
 - b) avoiding an adverse impact on the provision of occupational pensions and other work-related benefits.
100. What is meant by workforce planning in this context can be summarised as including the following:
 - workforce planning means that a retirement age is a target age against which employers can plan their work and employees can plan their careers and retirement;
 - for employers, being able to rely on a set retirement age allows the recruitment, training and development of employees, and the planning of wage structures and occupational pensions, against a known attrition profile. This is indirectly recognised in the Directive itself, where Article 6.1(c) lists as a justifiable difference of treatment: “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”. While

¹ [2000] 1 WLR 435.

other events may give rise to employees leaving the workforce, the age of retirement is nevertheless a significant element in employers' workforce planning;

- for both employers and employees, being able to rely on a set retirement age avoids the blocking of jobs (and often the more senior jobs) from younger workers;
- for employees, knowing there is a set retirement age means they cannot be certain that they will be in work after that time. This will encourage employees to save now and make provision for their retirement, and avoid them putting off career and pension planning on the assumption that they will be able to continue working indefinitely. This ties in with the Government's policy of encouraging employees to save more for retirement.

101. The need to avoid an adverse impact on the provision of occupational pensions and other work-related benefits stems from concern that if all employers only had the option of individually objectively justified retirement ages, this could risk adverse consequences for occupational pension schemes and other work related benefits. Some employers would instead simply reduce or remove benefits to offset the cost of providing them to all employees, including those over 65.

Regulation 31

Exception for national minimum wage

102. The basic aim of regulation 31 is to permit employers to base their pay structures on the national minimum wage legislation contained in the National Minimum Wage Act 1998 ("the 1998 Act") and the National Minimum Wage Regulations 1999 ("the 1999 Regulations").

103. The Directive itself countenances such legislation—

“...Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy..., and if the means of achieving the aim are appropriate and necessary. Such differences of treatment may include...: (a) the setting of special conditions on access to employment..., including dismissal and remuneration conditions, for young people...in order to promote their vocational integration”: see Article 6.1(a).

104. The 1998 Act and the 1999 Regulations mean that the minimum hourly rate of pay prescribed for 16 and 17 year old employees is less than that prescribed for those aged over 17; and the hourly rate prescribed for 18 to 21 year old employees is less than that prescribed for those aged 22 and over i.e. adults. (Other Member States e.g. Belgium, Ireland and the Netherlands, have

in place wages legislation which differentiates the minimum wage by age too.)

105. In their report for 2005 ('National Minimum Wage' ISBN 0-10-164752-2) the Low Pay Commission ("LPC") noted that: "Evidence suggests that the application of the adult rate to younger people would have adverse employment consequences, given the distinctive features of the labour market for young people". They went on to say that their recommendation for the adult rate "depends on the assumption that the implementation of anti-age discrimination legislation will continue to allow the straightforward use by employers of the flexibility which the existence of the lower rates for younger people is intended to allow" (see paragraphs 7.39 and 7.40 of their Report).
106. Regulation 31 is intended to address the concerns of the LPC.
107. By virtue of paragraph (1), employers may pay 16 and 17 year old employees less than those aged over 17; and 18 to 21 year old employees less than those aged over 21. This will allow employers to use the development bands of the minimum wage without the threat of legal challenge on the grounds of age discrimination. Employers cannot rely on this exemption, however, if they do not base their pay structure on the national minimum wage legislation. Hence the reason for the limitation in paragraph (1)(b).
108. Paragraph (2) deals with apprentices. This enables an employer to pay an apprentice who is not entitled to the national minimum wage (i.e. any apprentice who is under 19 or in the first year of his apprenticeship) less than an apprentice who is entitled to the national minimum wage (i.e. any apprentice who is 19 or over and not in the first year of his apprenticeship).
109. The treatment of apprentices in the 1999 Regulations is designed to encourage employers to offer apprenticeships to young workers in particular, and paragraph (2) is intended to ensure that this design is not defeated because employers fear the threat of legal challenge on the grounds of age discrimination.
110. Paragraph (3) defines terms used in the regulation.

Regulation 32

Exception for provision of certain benefits based on length of service

111. The basic aim of this exemption is to enable employers to continue to award benefits to employees using the criterion of length of service.
112. The primary rationale for regulation 32 derives from article 6.1 of the Directive
"...Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy..., and if the means of achieving the aim are appropriate and necessary. Such differences of treatment may

include...:...(b) the fixing of minimum conditions of...seniority in service for access...to certain advantages linked to employment”: see Article 6.1(b).

113. The legitimate aim justifying the retention of service related benefits is employment planning, in the sense of being able to attract, retain and reward experienced staff. They help maintain workforce stability by rewarding loyalty as distinct from performance and by responding to employees’ reasonable expectation that their salary should not remain static. The exact formulation of the exempting provisions ensures that the actual award remains proportionate.

114. Service related benefits have been considered by the ECJ in the context of sex discrimination. This is significant because the Commission in proposing the Directive (see Explanatory Memorandum COM (1999) 565 final at 10), suggested that the objective justification of direct age discrimination would work similarly to the objective justification of indirect sex discrimination. Although service related benefits are potentially indirect age discrimination this is the only key we have as to how the Court will interpret objective justification under the age strand.

115. It is important however to bear in mind that service related benefits are not identical in the two contexts, not least because they are defined by the passing of time. Age is a continuum defined by the passing of time, so the two are inextricably linked. The connection between sex discrimination and the passing of time is less direct, and far more easily distinguished and therefore separated from it.

116. However, the jurisprudence of the ECJ appears to countenance the proposed provision.

117. In case C-109/88 Danfoss [1989] ECR 3199, in which an employer was alleged to have indirectly discriminated against women by awarding pay based (in part) on length of service, the ECJ observed –

“24....since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward him without having to establish the importance it has in the performance of specific tasks entrusted to the employee.

25....the Equal Pay Directive must [therefore] be interpreted as meaning that where it appears that the application of criteria, such as the employee’s mobility, training or length of service, for the award of pay... systematically works to the disadvantage of female employees:

.... the employer does not have to provide special justification for recourse to the criterion of length of service”.

118. The ECJ’s decision in Danfoss has been doubted by some commentators as a result of a line of cases which appear to make inroads into

the principle. It is however significant that those cases deal with other variables such as employers who failed to take fairly into account the service of part time workers, or discontinuous work patterns. The drafting of regulation 32 takes account of that - see paragraph (4). Danfoss was followed by the Employment Appeal Tribunal in October 2003 in an equal pay case, Health & Safety Executive v Cadman (Appeal No. EAT/0947/02 TM).

119. Cadman concerned a female HSE inspector who claimed equal pay with four male comparators. It was accepted that the applicant and her comparators were employed on 'like work'; that the pay differentials that existed between them came about from a previous pay system, in which the male comparators had moved further up the pay band because of their longer service; and that using the criterion of length of service in this way had a disproportionate impact on women. The issue in dispute was whether the HSE had to objectively justify the use of length of service in these circumstances. The EAT said no, ruling that, by virtue of Danfoss, the HSE was entitled to reward seniority without needing to show its actual importance for the performance of the specific duties entrusted to the employee. In reaching its decision, the EAT rejected an argument that, in the light of subsequent ECJ rulings, in particular in Case C-184/89 Nimz [1991] ECR I-297, the Danfoss decision was no longer good law.² The EAT's decision has now been referred to the ECJ for a definitive ruling by the Court of Appeal (see [2004] EWCA (Civ) 1317). The case is listed for hearing before the ECJ on 8th March 2006. The UK has made observations to the ECJ concerning the distinction between service related benefits in the context of sex discrimination on the one hand and age discrimination on the other.

120. Turning to the specific provisions in regulation 32, paragraph (1) entitles employers to continue to award benefits to employees using the criterion of length of service.

121. The operation of paragraph (1) is, however, qualified by paragraph (2). Without paragraph (2), an employer could award benefits by reference to workers' length of service, however long that service might be. What paragraph (2) does is to impose a requirement on the employer if the length of service of the worker who is disadvantaged exceeds 5 years. In such a case, if the employer is to rely on this regulation, it must reasonably appear to him that his use of length of service "fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers)".

² In Nimz the ECJ held that, where the effect of applying seniority is to indirectly discriminate against women, the application of the criterion has to be objectively justified by reference to the experience gained in the job in question. But in Cadman the EAT found that the crucial feature of Nimz, which was concerned with part-time employment, did not lie in the length of service of employees but in the different hours worked by different groups of employees – part-timers and full-timers – to which the applicant and her comparators belonged. Accordingly, in Nimz, unlike in Danfoss, length of service was calculated according to the hours worked by employees, with the result that part-timers took longer to progress up the pay scales. Danfoss was thus distinguishable from Nimz.

122. Paragraph (3) explains how an employer must calculate length of service if he wishes to avail himself of this exemption. Either he must calculate the length of time workers have been working for him doing work at or above a particular level (assessed by reference to the demands made on the worker). Or he must calculate the length of time they have been working for him in total. On each occasion that he uses the criterion of length of service to award benefits, it is up to him which methodology he adopts.
123. Paragraphs (4) and (5) amplify paragraph (3). Paragraph (4)(a) makes it clear that, in calculating a worker's length of service under paragraph (3), the employer must calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him: see paragraph (4)(a). This ensures that length of service is not calculated according to the number of hours worked by employees, thereby disadvantaging part-time workers.
124. Paragraph (4)(b) enables an employer, in calculating a worker's length of service, to discount the worker's absences from work unless it would be unreasonable for him to do so.
125. Paragraph (4)(c) enables an employer to discount periods when a worker was actually at work if those periods preceded a time when the worker was absent and, in all the circumstances, it would be reasonable for the employer to discount those periods.
126. Paragraph (5) makes it clear that, in calculating his length of service under paragraph (3), a worker is to be treated as working for his employer (even though, at the time, he was working for another) in the circumstances set out in sub-paragraphs (a) and (b). Paragraph (6) explains certain references used in paragraph (5), while paragraph (7) makes it clear that, for the purposes of the regulation, the term "benefit" does not include benefits awarded to a worker when he ceases his employment. So, for example, regulation 32 does not cover 'enhanced redundancy payments' within the meaning of regulation 33.

Regulation 33

Exception for provision of enhanced redundancy payments

127. The statutory redundancy scheme at Part 11 of the Employment Rights Act 1996 ("ERA 1996") requires an employer to make a payment upon redundancy, the amount of which is dependant upon the employee's age, length of service, and weekly pay (subject to a cap: see s227 ERA 1996). The statutory redundancy scheme is lawful under the Directive as it is objectively justified under Article 6.1 of the Directive.
128. An employer who makes a redundancy payment to an employee in accordance with Part 11 ERA 1996 does not have to justify himself. Both the statutory authority exemption (in regulation 27) and this regulation make it

clear that he is acting lawfully, even though he calculates the payment using age related criteria.

129. But this regulation is not aimed at such employers. The principal object of this provision is to assist those employers who base their redundancy schemes on the statutory scheme but who are more generous than the statutory scheme requires them to be. It would be ironic if employers who did the minimum necessary did not run the risk of a successful challenge under these Regulations, yet a more generous employer – because he was doing more than he was required to do – could be challenged. If this were the position, there is a real risk that more generous employers would simply ‘level down’. This would benefit no-one.

130. Thus, an employer may make “enhanced redundancy payments” to “qualifying employees”: see paragraph (1). Qualifying employees are defined in paragraph (2). They are employees who are entitled to redundancy payments in accordance with the statutory redundancy scheme, employees who would be entitled to such a payment but for the operation of s155 ERA 1996 (which requires an employee to have been continuously employed for a period of two years before his redundancy) and employees who, with or without two years’ continuous employment, were not “dismissed” in accordance with Part 11 but agreed to the termination of their employment in circumstances where, had they been dismissed, the dismissal would have been by reason of redundancy.

131. The term “enhanced redundancy payment” is also defined in paragraph (2). To be an enhanced redundancy payment, the employer must calculate it in accordance with s162(1) to (3) ERA 1996³: see paragraphs (3) and (4)(a).

³ Section 162(1) to (3) provides as follows –

“(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week’s pay for each year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.” .

Once he has done so, the employer may pay the resultant amount to a qualifying employee who (for example) does not qualify for a redundancy payment under the statutory scheme.

132. Alternatively, the employer might 'enhance' the resultant amount by multiplying it by a figure in excess of one: see paragraph (4)(c).
133. Or he might enhance that amount by following one or both of the methods set out in paragraph (4)(b) (after which he may multiply the resultant amount by a figure in excess of one: again, see paragraph (4)(c)). The methods set out in paragraph (4)(b) are as follows.
134. The calculation at s162(1) to (3) ERA 1996 uses the concept of a week's pay, which is limited to the amount specified in s227 ERA 1996. The employer may remove or raise that maximum amount: see paragraph (4)(b)(i). It also uses the concept of "the appropriate amount", which is a figure of one and a half weeks', one week's, or half a week's pay (depending on the age of the employee during his employment). The employer may multiply this amount by a figure in excess of one: see paragraph (4)(b)(ii).
135. Regulation 33(5) 'glosses' the term "relevant date", which is used in s162(1) ERA 1996 and is defined in s153 ERA 1996. Paragraph (5) provides that, in relation to qualifying employees who have not been dismissed but have agreed to the termination of their employment, "the relevant date" shall be taken to mean the date on which the termination takes effect.

Regulation 34

136. Exception for provision of life assurance cover to retired workers

137. Regulation 34 provides an exception for employers who provide life assurance cover to workers who have had to retire early on grounds of ill health. Life assurance cover is usually provided in respect of people below the age of 65 (or the employer's normal retirement age if different). Such cover is not provided in respect of older people because, as the probability of death increases, it becomes more and more expensive to provide. If employers were no longer able to impose - or had to objectively justify - a 'cut off' for the provision of such cover to those who have retired early, there is a real risk they would simply 'level down' i.e. they would cease to offer it to anyone. This exemption is intended to avoid that happening.

PART 5 ENFORCEMENT

Regulation 35

Restriction of proceedings for breach of Regulations

138. Regulation 35 ensures that if a person wishes to complain of discrimination or harassment under the Regulations, they may only do so in the employment tribunal or the county or sheriff court, as appropriate (see

regulations 36 and 39). This does not, however, prevent the making of an application for judicial review in an appropriate case. Regulation 35 is based on similar provisions in SO/RB (regulation 27) which are similar to s.62 of the SDA and s.53 of the RRA. There are however additional words making clear that 35(1) is not intended to oust the jurisdiction of the Pensions Ombudsman.

Regulation 36

Jurisdiction of employment tribunals

139. Regulation 36 provides that complaints under Part 2 of the Regulations (except regulation 23 – institutions of further and higher education) should be brought in employment tribunals. The usual tribunal rules of procedure apply to a complaint brought under these Regulations. Regulation 36 does not apply to qualifications bodies covered by regulation 19, if there is a statutory appeal already available against that body's decision.
140. Regulation 36 is identical to SO/RB regulation 28 which in turn was based upon s.63 of the SDA and s.54 of the RRA.

Regulation 37

Burden of proof: employment tribunals

141. Regulation 37 makes provision concerning the burden of proof which applies to complaints brought in employment tribunals. Once the person making the complaint has made out a prima facie case – in other words, where the tribunal could consider that discrimination or harassment has taken place – it is for the respondent to the complaint (e.g. the employer) to prove that he did not commit the act of discrimination or harassment. This regulation is the same as SO/RB regulation 29 which in turn was based upon s.63A of the SDA.

Regulation 38

Remedies on complaints in employment tribunals

142. Regulation 38 sets out the remedies which are available for a complaint brought in an employment tribunal. The tribunal may make a declaration or recommendation, or may order compensation to be paid. No limit is set on the amount of compensation, and interest on the sum may also be ordered.
143. Under regulation 38(2), in cases of unintentional indirect discrimination, the tribunal can only award compensation if (a) it has made a declaration or recommendation (or both) and (b) it considers it just and equitable to award compensation. In any case where a recommendation is made but not complied with, the tribunal can award compensation, or increase any award already made.

144. Regulation 38 is the same as SO/RB regulation 30 which is similar to s.65 of the SDA and s.56 of the RRA.

Regulation 39

Jurisdiction of county and sheriff courts

145. Regulation 39 provides that complaints under regulation 23 (institutions of further and higher education) should be brought in a county court, in England and Wales, or a sheriff court in Scotland. The usual court rules of procedure apply to such complaints, in the same way as any other claim in tort (in England and Wales) or in reparation (in Scotland) for breach of statutory duty.
146. Regulation 39 is the same as SO/RB regulation 31 which in turn is similar to s.66 of the SDA and s.57 of the RRA.

Regulation 40

Burden of proof: county and sheriff courts

147. Regulation 40 makes provision concerning the burden of proof which applies to complaints brought in a county or sheriff court. It operates in the same way as regulation 37 does in relation to complaints in employment tribunals. It is the same as SO/RB regulation 32 which in turn is similar to s.66A of the SDA.

Regulation 41

Help for persons in obtaining information etc

148. Regulation 41 permits a complainant or potential complainant, if they wish, to serve a questionnaire on the (potential) respondent (e.g. their employer) in order to obtain information relating to their complaint. The complainant may serve the questionnaire before presenting a complaint to a court or tribunal, and in more limited circumstances once a complaint has been presented to a court or tribunal. Paragraphs (3) and (4) of the regulation set out the time limits which apply.
149. Suggested forms for questions and replies are set out in Schedules 3 and 4 to the Regulations, but complainants and respondents are not required to follow these. If the respondent does not reply within 8 weeks, or if their replies are inadequate in the view of the court or tribunal, the court or tribunal may draw adverse inferences, including an inference that discrimination did take place, if appropriate.
150. Regulation 41 is the same as SO/RB regulation 33 which in turn is similar to s.74 of the SDA and the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048).

Regulation 42

Period within which proceedings to be brought

151. Regulation 42 lays down the time limits for bringing a complaint under the Regulations. A complaint to an employment tribunal must be presented within 3 months of the alleged act, and a complaint to a county or sheriff court within 6 months, though a court or tribunal has a discretion to accept a late complaint if it would be “just and equitable” to do so.
152. Paragraph (4) of regulation 42 sets out how these time limits operate in relation to contracts, acts extending over a period and omissions.
153. This regulation is the same as SO/RB regulation 34 save for the omission of the provision in respect of members of the armed forces to whom the age regulations do not apply. SO/RB regulation 34 is similar to s.76 of the SDA and s.68 of the RRA.

**PART 6
SUPPLEMENTAL**

Regulation 43

Validity of contracts, collective agreements and rules of undertakings

154. Regulation 43 gives effect to Schedule 5, which makes provision concerning contracts, collective agreements and rules of undertakings (see below). It is the same as SO/RB regulation 35.

Regulation 44

Application to the Crown etc

155. Regulation 44(1) provides that the Regulations apply to acts by government Ministers and departments, and to acts of other Crown bodies. Regulation 44(2) applies the employment provisions of regulation 7 to staff working for such departments and bodies.
156. Paragraph (4) provides that the Regulations do not apply to members of the armed forces. Article 3.4 of the Directive contains a derogation permitting Member States to exempt their armed forces from the application of the Directive in so far as it relates to discrimination on the grounds of age, and this derogation has been used in order to maintain combat effectiveness.
157. This covers all service personnel who may be required to deploy on demand: regular naval military and air forces, and reservists. It extends to all terms and conditions of service of members of the Armed Forces, including benefits under the Armed Forces Pension Scheme.

158. However the exemption does not extend to civilians working for the Ministry of Defence, nor to the MoD Police and Guarding Agency or to the MoD Fire Service.
159. Paragraph (4) is similar to section 64(7) of the DDA.
160. Paragraphs (6) and (7) of regulation 44 make provision regarding the Crown Proceedings Act 1947, which concerns proceedings to which the Crown is a party.
161. Save for the Armed Forces' exemption, regulation 44 is similar to SO/RB regulation 36 which is based upon s.85 of the SDA and s.75 of the RRA.

Regulation 45

Application to House of Commons staff

162. Regulation 45 provides that the Regulations apply to House of Commons staff in the same way as they apply to an employee. It is not materially different from SO/RB regulation 37.

Regulation 46

Application to House of Lords staff

163. Regulation 46 provides that the Regulations apply to House of Lords staff in the same way as they apply to any other employee. It is not materially different from SO/RB regulation 38.

Regulation 47

Duty to consider working beyond retirement

164. Regulation 47 gives effect to Schedule 6 which makes provision concerning the duty to consider working beyond retirement. Regulation 30, as noted above, sets out the circumstances in which a person may be retired without it amounting to age discrimination.

Regulation 48

Duty to consider working beyond retirement - transitional provisions

165. Regulation 48 gives effect to the transitional provisions set out in Schedule 7.

Regulation 49

Amendments to legislation and related transitional provisions

166. Paragraph (1) gives effect to Schedule 8 which makes various amendments to legislation in consequence of the Regulations.

167. Paragraph (2) gives effect to Schedule 9 which repeals or revokes legislation in consequence of the Regulations.

SCHEDULES

Schedule 1

Norwegian part of the Frigg Gas Field

168. Schedule 1 specifies the Norwegian part of the Frigg Gas Field for the purposes of employment on oil and gas rigs as provided for in regulation 10. It is identical in all material respects to the Schedule to the Sex Discrimination and Equal Pay (Offshore Employment) Order 1987 (SI 1987/930) and the equivalent order made under the RRA and to Schedule 1 to SO/RB.

Schedule 2

Pension schemes

169. Paragraph 1 defines the terms used in Schedule 2 and in regulation 11.
170. Sub-paragraph 1(1) defines the term “occupational pension scheme” as having the meaning given by section 1(1) of the Pension Schemes Act 1993. Occupational pension schemes are referred to in this Schedule (and in this memorandum) as “schemes” (see paragraph 1(4)).
171. Sub-paragraph (2) further limits the definition of “occupational pension scheme” for the purposes of the exception at paragraph 7(a).
172. Sub-paragraph (3) provides that, for the purposes of the exceptions at paragraphs 12, 13 and 30, the definition of “occupational pension scheme” is extended to include both the Pension Schemes Act definition and the definition given at section 150(5) of the Finance Act 2004. The extended definition is used to ensure that the exemptions at paragraphs 12, 13 and 30, which relate to or are of relevance to tax rules for registered pension schemes, cover all those registered pension schemes which fall within the scope of the directive. Registered pension schemes are defined under the Finance Act 2004 by reference to occupational pension schemes as defined under the Finance Act, rather than as defined under the Pension Schemes Act 1993.
173. Sub-paragraph (5) defines various terms used in relation to schemes.
174. Sub-paragraph (6) provides that where a scheme has separate sections, the provisions of the Schedule apply as if each section were a separate scheme.
175. Sub-paragraph (7) defines “personal pension scheme” and “registered pension scheme”.
176. Sub-paragraph (8) provides that the terms used in Regulation 11 (which brings this Schedule into effect) have the same meaning as in this Schedule.

Non-discrimination rule

177. By virtue of paragraph 2(1) of Schedule 2, every scheme is treated as including a non-discrimination rule. The non-discrimination rule is a rule requiring the trustees or managers of a scheme not to act contrary to regulation 11.
178. Paragraph 2(2) provides that all provisions of every scheme shall be subject to the non-discrimination rule. This means that, where there is a conflict between the non-discrimination rule and a rule of the scheme, which would otherwise require the trustees/managers to act in a discriminatory way, the non-discrimination rule prevails.
179. Paragraph 2(3)(a) provides that, if they do not otherwise have such a power, the trustees/managers shall have the power to alter schemes by resolution to ensure that the scheme complies with the non-discrimination rule.
180. Paragraph 2(3)(b) provides that the trustees or managers may make such alterations as are necessary by resolution, when, even though the trustees or managers have the requisite power to change the scheme, the procedure for exercising it is likely to be unduly complicated or protracted, or it involves gaining consent which cannot be obtained, or can only be obtained with undue delay or difficulty.
181. Paragraph 2(4)(a) provides that any resolution made under subparagraph (3) may be made so as to have retrospective effect, but shall have no retrospective effect before the date of the coming into force of these Regulations.
182. Paragraph 2(4)(b) provides that any resolution made under subparagraph (3) shall also be subject to the consent of any scheme employer, whose consent would have been required if the change to the scheme had been made under the scheme rules.

Exception for rules, practices, actions and decisions relating to occupational pension schemes

183. Paragraph 3 provides, in relation to a scheme, that the rules, practices, actions and decisions listed at Part 2 of this schedule do not constitute age discrimination.

Exception for rules, practices, actions and decisions relating to contributions by employers to personal pension schemes

184. Paragraph 4 provides that, in relation to contributions paid on behalf of a worker by an employer to a personal pension scheme, the rules, practices, actions and decisions listed at Part 3 of this Schedule do not constitute age discrimination.

Procedure in employment tribunals

185. Paragraph 5 provides that where a member or prospective member of a scheme brings a complaint against the trustees or managers of the scheme in an employment tribunal:

- that the trustees or managers of the scheme have committed an act that is unlawful under Regulation 11 (trustees or managers of occupational pension schemes) or Regulation 24 (relationships which have come to an end), or
- that where other parties by virtue of Regulation 25 (liability of employers and principals) or Regulation 26 (aiding unlawful acts) are to be treated as having committed such an act,

the employer (who is the employer in relation to the scheme) shall be treated as a party to the complaint and be entitled to appear and be heard in relation to that complaint. When a complainant has brought a complaint in the employment tribunal against the trustees or managers of a scheme, this gives an employer, who may be liable to meet the costs of any award made in favour of the complainant, the right to be a party to the complaint.

Remedies in Employment Tribunals

186. Paragraph 6(1) provides for the situation where a complainant, (who is a member or prospective member, but not a pensioner member, of a scheme) makes a complaint which relates to the terms on which a person may become a member of the scheme or the terms on which a member of the scheme is treated, and the employment tribunal finds the complaint to be well founded.

187. Paragraph 6(2) provides that in this situation, the employment tribunal may make an order giving the complainant a right either to be admitted to the scheme (if the complaint related to the terms on which people can become members) or to be granted membership without discrimination (if the complaint related to the terms on which members of the scheme are treated).

188. Paragraph 6(3)(a) provides that the employment tribunal may specify in any order it makes under sub-paragraph (2), the date from which the order is to have effect, but that this date may not be before the coming into force of these Regulations.

189. Paragraph 6(3)(b) provides that when an employment tribunal makes an order that a complainant is to enjoy admission or membership, it may make such provision as it considers appropriate as to the terms or capacity of that membership.

190. Paragraph 6(4) provides that an employment tribunal cannot make an order for compensation under regulation 38(1)(b) (remedies on complaints in employment tribunals) where this paragraph applies, unless the compensation

is for injury to feelings or if the compensation is under regulation 38(3), where a respondent fails to comply with a recommendation made by an employment tribunal.

Part 2

191. Part 2 lists rules, practices, actions and decisions relating to schemes which will not constitute age discrimination under these regulations (either because they are objectively justified under Article 6.1 or because they are exempted under Article 6.2 of the Directive).

Admission to schemes

192. Paragraph 7(a) provides that it shall not be unlawful under these Regulations for a scheme to set minimum or maximum age limits for a person's admission to a scheme, and that different ages can be set for different groups or categories of worker. This exception does not apply to all schemes. To rely on this exception, schemes must only carry out retirement benefit activities as set out in section 255 Pensions Act 2004. This is to ensure that the exception is not wider than Article 6(2) of the Directive permits.

193. Paragraph 7(b) provides that it shall not be unlawful under these Regulations for a scheme to set a minimum level of pensionable pay that a person must receive in order to gain admission to the scheme. The minimum level of earnings must not be above the lower earnings limit which is referred to at section 5(1) of the Social Security Contributions and Benefits Act 1992. Such a rule may be necessary for the efficient functioning of a scheme.

The use of age criteria in actuarial calculations

194. Paragraph 8 provides that it is not unlawful under these Regulations to use age criteria in making actuarial calculations in relation to a scheme. This exemption is based on Article 6(2) of the directive. Sub-paragraphs (a), (b) and (c) give examples of when age criteria may be used in such calculations, although the exemption is not limited to these examples. The examples cover age criteria used for:

- actuarial reduction of benefits paid to a member who has not reached a scheme's early retirement pivot age, or actuarial enhancement of benefits paid to a member who continued to work after late retirement pivot age.
- the calculation of member or employer contributions
- the calculation of pension commuted in exchange for a lump sum.

Early and late retirement pivot age are defined at paragraph 1(5) and explained at paragraph 35 of this memorandum.

Contributions

195. Paragraph 9 provides that it is not unlawful under these Regulations for a scheme to set different rates of contributions for different members if that difference is due to the level of pensionable pay of those members. Thus a scheme may set different percentage contributions for workers who earn different amounts of money. This practice is reasonable. The exemption prevents claims that unfavourable rates of contribution for members with a particular level of pensionable pay disproportionately affect a particular age group and constitute age discrimination.

Contributions under money purchase arrangements

196. Paragraph 10 provides exemptions for age related contributions under money purchase arrangements. Money purchase arrangements are defined in paragraph 1(5). Under money purchase arrangements, contributions are invested on a member's behalf and the member's pension benefit is the result of that investment. The exemption applies to money purchase arrangements under which members or employers make age related contributions where the aim is for the arrangement to yield more equal emerging benefits than would follow from equal contributions at all ages. Such arrangements are reasonable because it costs a scheme more to provide the same rate of pension for an older member compared to a younger one.

197. Paragraph 10(b) provides an exemption for equal rates of contribution irrespective of the age of members. It could be claimed that the setting of equal rates was discriminatory. For example, if two members, comparable except for their ages, both retired aged 65, under money purchase arrangements the older worker would receive much lower pension benefits, than the younger worker at age 65, since the younger member's fund would have enjoyed extra years of growth. The older worker could claim to have suffered a disadvantage even though both were treated equally with regard to the rate of employer/member contributions

Contributions under defined benefits arrangements

198. Paragraph 11 provides that it is not unlawful under these Regulations, under defined benefits arrangements, to set the rate of employer or member contributions according to a member's age, if the aim in setting different rates of contributions is to meet the cost of the benefits defined by the scheme. Defined benefits arrangements are defined at paragraph 1(5) and involve a member being guaranteed a particular level of benefit. This exemption reflects the fact that it costs a scheme more to provide the same rate of pension for an older member than for a younger member.

Age related rules, practices, actions and decisions relating to benefit

199. Paragraph 12 provides an exemption for schemes which fix a minimum age below which members are not entitled to receive age related benefits. In order to obtain tax advantages available to registered pension schemes under Part 4 of the Finance Act 2004, schemes may set a rule that such benefits are not payable to members before age 50. Benefits provided to members under

defined benefits arrangements before early retirement pivot age must not be “enhanced”. Thus such benefits must be subject to actuarial reduction and must be calculated without crediting the member with additional years of service.

200. Early retirement pivot age is defined at paragraph 1(5) and explained at paragraph 202 of this memorandum. Age related benefits are defined at paragraph 1(5) and comprise benefits provided to a member on retirement, on a member reaching a particular age, or on the termination of a member’s service.
201. Paragraph 13 provides a further exemption for schemes which fix a minimum age below which members are not entitled to receive age related benefits. This exemption goes wider than the exemption at paragraph 12. This exemption allows a scheme to stipulate a minimum age for existing or prospective members to become entitled to any age related benefits without making an actuarial reduction for early receipt, and also allows schemes to credit existing and prospective members with additional periods of pensionable service. This exemption is included because although the government does not consider that it can justify including an exemption for “enhanced early retirement benefit” in relation to all members of schemes, it does consider that it is justifiable to allow such an exemption for existing and prospective members of a scheme (who have an expectation or a contractual entitlement to such benefits, and who might well be unable to remedy any shortfall in any early retirement pension at this stage in their working lives).
202. Paragraph 14 provides an exemption for early and late retirement pivot ages, including different ages for different groups or categories of member. An early retirement pivot age is an age specified in a scheme’s rules as the earliest age at which benefit becomes payable without actuarial reduction (disregarding any special provision as to early payment on grounds of ill health or otherwise). A late retirement pivot age is an age specified in a scheme’s rules above which benefit becomes payable with actuarial enhancement. It will be reasonable for schemes to actuarially reduce benefits for early receipt to reflect the fact that benefits received early will generally be paid for longer (i.e. until the member dies) and that contributions will have less time to increase in value through investment before payment to the member. By setting different early and late retirement pivot ages schemes are able to provide that members who retire between particular ages receive pensions which are neither actuarially reduced nor enhanced. This reflects common practice and may be necessary for the viability of a scheme.
203. Paragraph 15 provides an exemption for rules whereby schemes enhance any age related pension benefit paid to a member who retires early on ill health grounds by reference to the number of years which the member would have completed had he continued working in pensionable service up to an age specified in scheme rules. Without this exemption schemes might face claims by an older ill health retiree complaining that he had not received as much enhancement as a younger ill health retiree with the same length of service. The rule is reasonable because otherwise schemes might be expected

to make pension provision to ill health retirees in respect of periods before a member joined a scheme.

204. Paragraph 16 provides an exemption for schemes which provide male members with a bridging pension. A bridging pension is an additional amount of pension which may be paid by a scheme to retired men aged 60-65 to compensate for the fact that such men do not qualify for the basic state pension whereas women of the same age do qualify for such a pension. The exemption means that male pensioners over 65 cannot bring age discrimination claims complaining that they are not longer paid the bridging pension which is paid to men aged 60-65. This is reasonable because men over 65 receive a state pension.
205. Paragraph 17 provides an exemption for any rule whereby a scheme reduces the amount of benefit paid on the death of a member to any dependant who is more than a specified number of years younger than the member. The exemption protects schemes against a claim by a member that he and others in a particular age group are disadvantaged by this rule because members in a particular age group are more likely to have younger partners than members in another age group. The rule is reasonable because a younger partner may receive pension for longer than a partner closer in age to the deceased member, causing costs, which, if not limited, could lead to schemes withdrawing the provision of survivors' benefits.
206. Paragraph 18 operates in relation to schemes in the same way as regulation 34 does in relation to employers who provide life assurance to workers outside a scheme. Schemes which provide life assurance cover for retired members usually do so only up to the age of 65 (or up to the age at which a worker normally retires if different). Such cover is not provided in respect of older people because, as the probability of death increases, it becomes more expensive to provide. If schemes had to objectively justify a 'cut off' age for the provision of such cover to people who had retired early on ill health grounds, there is a risk they would simply 'level down' i.e. they would cease provide the cover to any ill health retirees. This exemption is intended to avoid such "leveling down".

Other rules, practices, actions and decisions relating to benefit

207. Paragraph 19 provides an exemption for rules which stipulate that members' (or survivors') entitlement to benefits under a defined benefits arrangement may be calculated by reference to the number of years of pensionable service a member has completed, provided that, for each year of pensionable service, members in a comparable position are entitled to accrue benefits based on the same fraction of pensionable pay. Thus if two workers had different pensions due to their differing lengths of service, and the worker with shorter service was a younger worker than the worker with longer service, the younger worker could not bring a claim alleging that he and other younger workers were disadvantaged by being provided with less benefit than older members who had accumulated more pensionable service. The rule reflects the way in which defined benefit schemes work. It is reasonable to

expect the level of pension benefits to be commensurate with a member's length of pensionable service.

208. Paragraph 20 provides an exemption for rules whereby schemes may provide different amounts of pension benefit to different members to the extent that the difference is due to differences over time in the pensionable pay of those members. Under both defined benefits and money purchase arrangements the level of eventual benefits will depend on a member's pensionable pay. It is reasonable for higher paid members to receive higher pensions than lower paid members. This exemption prevents claims brought by younger workers claiming that they tend to be lower paid than older workers and are therefore disadvantaged as regards the provision of pension benefits.
209. Paragraph 21 provides an exemption for rules whereby a scheme imposes a limit on the number of years of pensionable service by reference to which benefits may be calculated. A limit on the number of years which are taken into account in calculating pensionable service may be necessary as otherwise the provision of pensions could become so expensive that employers could be discouraged from providing occupational pensions. The exemption prevents older members whose length of pensionable service exceeds the limit set by the scheme from complaining that the limit disadvantages them
210. Paragraph 22 provides an exemption for rules which stipulate that pension benefits are only provided to members who have completed more than a minimum period of pensionable service, provided that the period is not longer than two years. Although such a requirement may disadvantage younger members, limiting provision of benefits to those who have completed a minimum period of pensionable service may be necessary for the efficient functioning of a scheme.
211. Paragraph 23 provides an exemption for rules stipulating that members (or survivors) are only entitled to benefits if a member's pensionable pay is above a specified amount. Such an amount must not be more than the lower earnings limit, referred to in section 5(1) of the Social Security Contributions and Benefits Act. Such a rule may be necessary for the efficient functioning of the scheme.
212. Paragraph 24 provides an exemption for schemes that impose an upper limit on the level of pensionable pay used to calculate benefits. Older workers who have a higher level of pensionable pay may be disadvantaged compared to younger workers with lower pensionable pay, as less of their salary will be pensionable. However, an upper limit on the amount of pension that a scheme is liable to fund, may be necessary for the viability of a scheme.

Closure of schemes

213. Paragraph 25 protects schemes from age discrimination claims if they close to new members. Thus a defined benefit scheme may remain open to existing members but not to new joiners. Without this exemption employers

might feel compelled to close defined benefit schemes altogether to achieve equality of treatment for all workers.

Other rules, practices, actions and decisions

214. Paragraph 26 exempts any rule whereby increases of pensions in payment are only made to pensioner members aged 55 and over. This is reasonable and fits with the recent statutory requirement of indexation of pensions for pensioners aged 55 and over (see section 52 Pensions Act 1995). The statutory requirement does not apply, in most circumstances, to members below 55.
215. Paragraph 27 exempts rules which provide that pensions in payment increase by different rates according to the age of the pensioner member, if the aim is to maintain the value of the pensions of older members compared with younger members. Such rules have the same objective as the statutory indexation requirements under section 52 Pensions Act 1995 but protect older members whose benefits relate to periods of pensionable service which are not protected by section 52 Pensions Act 1995.
216. Paragraph 28 exempts rules which provide that pensions in payment increase by different rates according to the length of time that a pension has been in payment, where the aim is to maintain the relative value of members' pensions. The justification is the same as that given for the rules set out at paragraphs 26 and 27 of the Schedule.
217. Paragraph 29 provides that it is not unlawful under these Regulations for a scheme to apply an age limit above which members' accrued rights may not be transferred in or out of the scheme. The age limit must not be more than one year before the scheme's normal pension age. It is common for schemes to fix a maximum age for transfers in or out of the scheme, for reasons of administrative efficiency.

Registered Pension Schemes

218. Paragraph 30(1) provides an exemption for rules which registered pension schemes must comply with in order to secure tax advantages available under Part 4 of the Finance Act 2004. HMRC have reviewed Part 4 of the Finance Act to ensure that their rules relating to pensions are compatible with the age discrimination legislation.
219. Sub-paragraph (2) provides that the exemption at paragraph 30(1) does not apply to the setting of a minimum age for payment of age related benefits. However Paragraphs 12 and 13 of the Schedule provide exemptions, subject to certain conditions, for schemes which set such minimum ages.

Excepted rules, practices, actions and decisions relating to contributions by employers to personal pension schemes

Contributions by employers

220. The provisions of the Directive do not extend to personal pensions except in relation to contributions by an employer. Contributions by an employer are pay and therefore subject to the Directive's provisions. The rules, practices, actions and decisions at paragraphs 31 and 32 relating to contributions by employers to personal pension schemes are objectively justified under Article 6.1 of the Directive.
221. Paragraph 31 provides an exemption to allow age related contributions by a worker or an employer where the aim is to yield more equal emerging benefits than would follow from equal contributions at all ages.
222. Paragraph 32 provides that, in relation to a worker's personal pension scheme, it is not unlawful under these Regulations for an employer to make contributions which differ according to workers' remuneration. The justification for this is the same as that given for the exemption set out at paragraph 20 of the Schedule.

Schedule 3

Questionnaire of person aggrieved

223. Schedule 3 sets out a suggested format for the questionnaire which may be used under regulation 41. This includes a warning to the respondent that a court or tribunal may draw adverse inferences from a failure to reply or an inadequate reply. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA and to SO/RB Schedule 2.

Schedule 4

Reply by respondent

224. Schedule 4 sets out a suggested format for the reply to a questionnaire under regulation 41. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA and to SO/RB Schedule 3.

Schedule 5

Validity of contracts, collective agreements and rules of undertakings

225. Schedule 5 contains detailed provisions relating to terms of contracts, collective agreements, and rules of undertakings which are discriminatory. The provisions are similar to s.77 SDA and s.6 of the Sex Discrimination Act 1986 and to SO/RB Schedule 4.

226. Part 1 of the Schedule deals with terms in contracts. Under paragraph 1(1), a term of a contract is void in certain circumstances. Paragraph 1(2) makes clear that paragraph 1(1) does not apply where the term provides for discrimination against or harassment of a party to the contract. The term is merely unenforceable against that party, and he or she may choose to rely on it if it also has some benefits for them. Paragraph 1(3) provides that a term which tries to exclude or limit the operation of the Regulations is unenforceable by the person in whose favour the term operates. Paragraph 1(4) specifies that these provisions apply whether the contract was entered into before or after the coming into force of the Regulations. Under paragraph 3(1) and (2), a county or sheriff court has the power to modify or remove a discriminatory term which is void or unenforceable.
227. Paragraph 2(1) to (8) contains special provisions relating to compromise agreements to settle complaints brought under the Regulations, and the safeguards which they must meet to be valid. Paragraph 1(3) does not apply in relation to such agreements.
228. Part 2 of the Schedule deals with terms of collective agreements, and rules made by employers, trade organisations or qualifications bodies, as specified in paragraph 4(1). Paragraphs 5 to 7 set out the circumstances in which an individual may bring a complaint about such an agreement or rule (e.g. if he or she believes the rule may affect them in the future). Under paragraphs 8 and 9 a tribunal may declare a discriminatory term or rule to be void, but the rights of certain persons under the agreement or rule may also be preserved.

Schedule 6

Duty to consider working beyond retirement

229. Schedule 6 sets out the procedures that need to be followed by an employer in dismissing an employee in order for the reason for the dismissal to be retirement under the sections inserted into Part 10 of the Employment Rights Act 1996 by Schedule 8, and in order for the dismissal to be fair. Paragraph 1(1) defines the terms used in the Schedule. In particular it defines “operative date of termination” as being the date on which notice given by the employer expires or, if no notice is given, the date on which termination of the contract of employment takes effect.
230. Paragraph 1(2) defines the term “intended date of retirement”. Normally this is the date stated by the employer as the date on which the employer intends the employee to retire in the notification that the employer is required to give the employee of his right to request not to be retired. However, special provision is made for the case where the employer does not give the employee such a notification and in some circumstances a different date supersedes the original intended date of retirement.
231. Paragraph 2 requires the employer to notify the employee of the employee’s right to request not to be retired and of the date on which the

employer intends the employee to retire. The notification is required to be given at least six months but not more than a year before that date.

232. Paragraph 3 provides for the case where the employer and employee agree, when following the procedure required by the Schedule, or the employer decides under the procedure, that the retirement will take place on a later date than the original intended retirement date, and for the case where the employer and employee agree that the retirement will take place on an earlier date. In that event the earlier or later date supersedes the original intended date of retirement provided, in the case of a later date, that it falls not more than six months after the original date.
233. Paragraph 4 has the effect that if an employer fails to notify the employee in accordance with paragraph 2 within the time limits allowed by that paragraph the employer remains under a continuing duty to notify the same information to the employee until the fourteenth day before the operative date of termination.
234. Paragraph 5 gives the employee the right to request not to be retired on the intended date of retirement. The request must say whether the employee wishes his employment to continue indefinitely, for a stated period or until a stated date. If the employer has notified in accordance with paragraph 2, the request must be made at least three months but not more than six months before the intended date of retirement. If the employer has failed to notify in accordance with paragraph 2 the request can be made at any time within the six month period before the intended date of retirement.
235. Paragraph 6 provides that an employer to whom a request is made has a duty to consider it in accordance with paragraphs 7 to 9 of the Schedule.
236. Paragraph 7 sets out the procedure to be followed when considering a request. The employer must hold a meeting with the employee within a reasonable period after receiving the request unless, during that period, the employer and employee agree that the employee is to retire later or it is not practicable to hold a meeting within the period. If it is not practicable to hold a meeting within the period the employer must still consider the request. After the meeting or the employer's consideration of the request, the employer must give a notice to the employee saying, if the request is accepted, whether the employment will continue indefinitely or for a stated period. If the request is refused the notice must confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.
237. Paragraph 8 gives the employee a right of appeal from the decision reached by the employer under paragraph 7. The right can be exercised either if the employer refuses the request entirely or if the employer accepts it but has decided to continue employing the employee for a shorter period than the employee asked for in the request. The procedure to be followed on an appeal is the same as that to be followed when considering a request under paragraph 7.

238. Paragraph 9 gives an employee who reasonably requests to be accompanied at a meeting held under paragraph 7 or 8 a right to be accompanied by a companion of the employee's choice provided the companion is an employee or worker employed by the same employer. The employer must allow the companion to address the meeting and confer with the employee but need not allow the companion to answer questions on behalf of the employee.
239. Paragraph 10 has the effect that where an employer has received a request from an employee but has not yet given the employee notice of the decision as required by paragraph 7, any dismissal of the employee that would otherwise take effect before that notice is given is ineffective if it is the dismissal envisaged in the request. Instead the employee's contract is continued until the day after the giving of the notice. If paragraph 10 applies, the day after the giving of the notice supersedes the original intended date of retirement as the intended date of retirement.
240. Paragraph 11 has the effect that where an employer fails to notify an employee in accordance with paragraph 2, the employee has the right to complain of that failure to an employment tribunal. If the tribunal finds such a complaint well-founded it is required to order the employer to pay the employee compensation of such amount, not exceeding 8 weeks pay, as it considers just and equitable.
241. Paragraph 12 has the effect that where an employer fails, or threatens to fail, to comply with the right to be accompanied in paragraph 9, the employee has the right to complain of that failure to an employment tribunal. If the tribunal finds such a complaint well-founded it is required to order the employer to pay the employee compensation of an amount not exceeding two weeks pay.
242. Paragraph 13 gives employees who use or try to use the right to be accompanied in paragraph 9 the right not be subjected to a detriment by their employer for doing so. The paragraph also gives employees and workers who accompany or seek to accompany an employee pursuant to a request made under paragraph 9 the right not be subjected to a detriment by their employer for doing so. The paragraph also provides that an employee is to be regarded as unfairly dismissed if the reason, or principal reason, for dismissal is that the employee used or tried to use the right to be accompanied in paragraph 9 or accompanied or sought to accompany another employee pursuant to a request under that paragraph.

Schedule 7

Duty to consider working beyond retirement - transitional provisions

243. As noted above, paragraph 2 of Schedule 6 requires the employer to notify the employee of the employee's right to request not to be retired and of the date on which the employer intends the employee to retire. The notification is required to be given at least six months but not more than a year before that date.

244. Transitional provision is therefore required in order to cater for circumstances where the employer gives notice of termination before the commencement date (1st October 2006) and dismissal is to occur after the commencement date, but before 1st April 2007. Also provision is made for circumstances where notice of termination is given after commencement and dismissal is to take effect before 1st April 2007.
245. This Schedule sets out the circumstances in which the employer will be treated as having complied with either paragraph 2 or 4 of Schedule 6.
246. Paragraph 5 of Schedule 6 gives the employee the right to request not to be retired on the intended date of retirement. If the employer has notified in accordance with paragraph 2 of Schedule 6, the request must be made at least three months but not more than six months before the intended date of retirement. If the employer has failed to notify in accordance with paragraph 2 of Schedule 6 the request can be made at any time within the six month period before the intended date of retirement.
247. Schedule 7 sets out the circumstances in which a request made by an employee is to be treated as a request made under paragraph 5 of Schedule 6 where the dismissal is to occur after commencement but before 1st April 2007.

Schedule 8

Amendments to legislation and related transitional provisions

248. Article 16 of the Directive requires the abolition of legislation contrary to the principle of equal treatment. Schedule 8 amends legislation in order to remove unjustified provisions.
249. Generally, where entire provisions which can be identified by numbers (or numbers and letters) alone are to be omitted, they are listed in tabular form in Schedule 9. However, where words within a provision are to be omitted, they are dealt with here in Schedule 8 alongside amendments. The only exception to this is where a piece of legislation requires both types of amendment, for example the Employment Rights Act 1996, in which case all changes appear sequentially in Schedule 8.
250. Schedule 8 also adds references to the age regulations to various other legislative provisions. These are consistent with references to provisions of the SDA, RRA, DDA and the SO/RB in the relevant legislation.
251. Amendments to primary legislation are listed in Part 1, and to secondary legislation in Part 2. Subject to that, all legislation appears in chronological order.
252. Amendments to primary legislation have been approved by Parliamentary Counsel.

Part 1 Primary Legislation

The Mines and Quarries Act 1954

253. Sections 42(1) (charge of winding and rope haulage apparatus when persons are carried), 43(2) and 44 stipulate lower age limits for the operation of mining equipment. These lower age limits are omitted, but the stipulation that the operator be competent remains.

The Parliamentary Commissioner Act 1967

254. The Parliamentary Commissioner Act 1967 is amended so as to change the appointment from one with a retirement age of 65 to a non-renewable fixed term appointment of no more than seven years. It may be asked why we have done this instead of simply removing the offending words at the end of section 1(3). The explanation is as follows.

255. Under section 1, an appointment to the office of the Parliamentary Commissioner for Administration (“PCA”) is for a finite period. Once the PCA reaches the age of 65 he has to vacate office. If we removed only the words at the end of section 1(3) the appointment would be transformed to one for life. To avoid this we had to ensure that the appointment could be determined. We felt the most obvious and fair way of doing so was to make the appointment a fixed term one in the way proposed. It is against this background that the amendments to the 1967 Act should be viewed.

Amendments to section 1

256. The relevant amendments are set out in paragraph 4. The first and second amendments (paragraph 4(2) and (3)) make the appointment a fixed term one. They also remove the provision on “holding office during good behaviour” from section 1(2). But this requirement is re-instated by the third amendment (paragraph 4(4)), which also retains the provision enabling the PCA to be relieved at his own request.

257. Of course, the third amendment also removes the requirement for the PCA to retire once he reaches the age of 65.

258. The fourth amendment (paragraph 4(5)) makes it clear that the appointment under section 1 is not renewable. We feel it would be inadvisable to replace the existing retirement age provision with a fixed-term appointment without specifying that the appointment is not renewable. The PCA’s remit is quasi-judicial, and if the appointment were renewable, individuals might not be confident that he would not be tempted in his decision-making to favour an administration which would be making recommendations on future appointments.

Effect of amendments overall

259. In our view, the amendments to section 1, taken as a whole, are necessary to avoid an appointment under that section becoming one for life – which is not the

position at present and not something which we consider to be desirable from a policy point of view or required by virtue of the Directive. Given this, we feel it is strongly arguable that these amendments are so inextricably connected one with another (and with the Community obligation to eliminate unjustified age discrimination in the workplace) that they are all – not just that part of the third amendment which removes the requirement for the PCA to retire once he reaches the age of 65 – helping to implement our Community obligations under the Directive. If we are wrong in this view – if the third amendment is the only one which (in part) can be so regarded – nevertheless we are confident that the other amendments are so closely connected to it that they can properly be said to deal with matters arising out of, or related to, our Community obligations.

Amendments to section 3A

260. The relevant amendments are set out in paragraph 5. The first amendment (paragraph 5(2)) inserts new subsections (1A) and (1B) into section 3A.
261. Subsection (1A) provides that having previously held the office of PCA is no bar to holding the office of acting Commissioner (which is renamed as such purely to improve clarity). This amendment avoids the new section 1(2A) having the unwanted effect of preventing PCAs who are appointed on a non-renewable fixed term from serving as a temporary or acting Commissioner subsequently.
262. The new section 3A(1B) provides that having previously held the office of acting Commissioner is no bar to serving in future as the PCA. This avoids a second possible unwanted effect of the new section 1(2A), that a promising candidate for the post of ombudsman would be disqualified by agreeing to stand in as acting ombudsman in the event of an unplanned vacancy.
263. These changes go hand-in-hand with the amendments substituting a fixed-term appointment for appointment until 65.
264. The second amendment (paragraph 5(3)) is aimed only at making the section clearer, and again marches hand-in-hand with the amendments substituting a fixed-term appointment for appointment until 65.
265. The final amendment (paragraph 5(4)) is also necessary because of the amendments made to section 1. The fixed term appointment to be made under section 1 is wholly inconsistent with both the nature of the acting Commissioner post (which is intended as a temporary, stop-gap measure) and the provisions implementing it. The amendment proposed to section 3A(3) to exempt temporary Commissioners from being counted as Commissioners for the purposes of sections 1 and 3A, as well as section 2 as at present, is therefore necessary to give proper effect to the current legislative changes to section 1.

Effect of amendments overall

266. In our view, the proposed amendments of section 3A form part of the package of measures to amend section 1. They are not separate and distinct from those changes. They make a number of minor amendments which are part of the replacement of an appointment curtailed only by retirement age with one that is for a single, non-renewable fixed period. The changes proposed to section 3A are not creating separate rights. They are simply ensuring that the solution to the

problem of requiring the PCA to retire at 65 does not conflict with other provisions in the Act, and in particular they ensure that the new provisions on appointment do not have unintended and undesired effects on the appointment of an acting Commissioner. They are therefore an integral part of the changes proposed. Without the amendments to section 3A, the immediate problem of a discriminatory retirement age might have been solved, but we would not have replaced the existing provisions with a coherent package. We would only have provided half a solution to the problem. In these circumstances we are confident that these changes, at worst, arise out of or are related to our Community obligation to eliminate unjustified age discrimination in the workplace.

267. What is said above in relation to the amendments of the 1967 Act apply equally in relation to the amendments of the Health Service Commissioners Act 1993: see paragraph 278 below.

The Pilotage Act 1987

268. The word “age” is omitted from section 3(2) of the Pilotage Act 1987 which lists the characteristics which a harbour authority may require of a potential pilot. Assessment of the remaining characteristics listed will suffice to establish the competence of the individual concerned.

The Social Security Contributions and Benefits Act 1992

269. The Social Security Contributions and Benefits Act 1992 (“SSCBA”) is amended in order to remove age limits relating to entitlement to sick, maternity, paternity and adoption pay.

270. These amendments have been changed in the past few days by the departments concerned from the version which was approved by Parliamentary Counsel. They are therefore submitted subject to any changes he may require.

271. Section 163 is amended in order to remove the lower limit age limit for entitlement to statutory sick pay. Section 163(1) of the SSCBA defines who is an ‘employee’ for the purposes of entitlement to statutory sick pay. The amendment omits the words “over the age of 16” and so extends this definition and therefore the scheme, to employees under 16 years of age. The definition of ‘employer’ is also amended in order to bring those under 16 within its scope. An employer is a person who pays, or is liable to pay secondary Class 1 National Insurance Contributions in relation to an employee. Because employers are not required to pay contributions on behalf of employees under 16, the amendment extends the definition where employers would have been liable to pay contributions for employees had they not been under the age of 16.

272. The amendment to section 171(1) produces similar effects to the amendments to section 163(1) and removes the lower age limit for entitlement to statutory maternity pay. The amendment also makes provision for this change in entitlement to have effect in a way that is appropriate to statutory maternity pay. For statutory maternity pay the crucial date for determining the employer’s liability is whether a woman was employed by him in the fifteenth week before

her expected week of confinement. The amended provisions therefore apply to women whose expected week of confinement begins on or after the 14th January 2007, that is 15 weeks after 1st October 2006.

273. The amendments to sections 171ZJ and 171ZS amend the definitions of 'employer' and 'employee' in relation to statutory paternity pay and statutory adoption pay respectively and make provision for the application of these amendments.

274. In these sections, the definition of 'employer' refers to section 6 of SSCBA. That section limits the requirement to pay Class 1 national insurance contributions to people aged 16 or over. These amendments continue to keep the reference to section 6 but provide that the definition of employer applies even where the employee is 16 or under .

275. The definition of 'employee' is amended so that the reference to the employee being over the age of 16 is removed .

276. The amended provision applies statutory paternity pay for birth in respect of children whose expected week of birth is the 14th January 2007 or later. This will ensure the amended provisions apply to employees whose eligibility for SPP is to be assessed at any time from the date of coming into force of these regulations onwards. The amended provisions apply in respect of statutory paternity pay in the case of adoptions, and statutory adoption pay in respect of children matched or adopted on or after the commencement of the provision .

277. The upper age limit of 65 for entitlement to statutory sick pay is removed by the repeal of paragraph (2)(a) of Schedule 11 to the SSCBA which prevents a period of incapacity for work arising where a person is over the age of 65. Employees over the age of 65 who have a period of incapacity beginning after commencement (1st October 2006) may therefore be entitled to statutory sick pay. However, because some employees might otherwise have been disallowed on the grounds of their age prior to the coming into force of these provisions if their period of incapacity for work in which a claim is made began before commencement, sub-paragraph (2) ensures entitlement arises from commencement onwards .

The Health Service Commissioners Act 1993

278. Schedule 2 to the Health Service Commissioners Act 1993 is amended so as to bring the appointment of the English Commissioner in line with that of the Parliamentary Commissioner: the two appointments are held by the same person. The appointments of the Welsh and Scottish Commissioners do not require amendment as they are compliant with the Directive.

The Employment Tribunals Act 1996

279. Section 18 of the Employment Tribunals Act 1996 is amended so that its conciliation provisions also apply in relation to complaints brought in employment

tribunals under these Regulations. Accordingly, an ACAS conciliation officer will be able to act in such a case.

280. Section 21 of the Employment Tribunals Act 1996 is amended so that the Employment Appeal Tribunal has jurisdiction to hear appeals relating to complaints under these Regulations.

The Employment Rights Act 1996

281. Section 98 of the Employment Rights Act 1996 is amended to include a new potentially fair reason for dismissal – that of retirement. As with other reasons for dismissal, it remains the case that the employer must “show” the Employment Tribunal what the reason for dismissal is.

282. The insertions into section 98 set out a number of alternative factual scenarios which may apply to the dismissal. In some cases the provisions say whether the reason for dismissal is or is not retirement. In other cases it is left for the Employment Tribunal to decide whether the reason for dismissal is retirement.

283. If the employer wishes to be able to rely on retirement as a reason for dismissal, the chances of successfully doing so are greatly increased if he follows the procedures set out in paragraph 2 of Schedule 6 to the Regulations. That is to say that at least six months prior to the dismissal (but no more than a year prior to the dismissal) he notifies the employee of the date on which he intends that the employee should retire and he informs the employee that the employee has a right to request to work beyond retirement age.

284. The circumstances where retirement will be the only reason for dismissal are:

- (a) where the employee has no normal retirement age, the employer gives the required notice in accordance with paragraph 2 of Schedule 6, and the dismissal takes effect on or after the employee’s 65 birthday and on the intended date of retirement;
- (b) where the employee has a normal retirement age which is over the age of 65, the employer gives the required notice in accordance with paragraph 2 of Schedule 6, and the dismissal takes effect on or after the employee has reached the normal retirement age and on the intended date of retirement;
- (c) where the employee has a normal retirement age which is below the age of 65, that retirement age does not amount to unlawful age discrimination, the employer has notified the employee in accordance with paragraph 2 of Schedule 6, and the dismissal takes effect on or after the employee has reached the normal retirement age and on the intended date of retirement.

285. In these circumstances the employee will not be able to argue that he was dismissed for a reason other than retirement.

286. The circumstances where retirement cannot be the reason for dismissal (no matter what the employer argues) are as follows:

- (a) where the employee has no normal retirement age, but the dismissal takes effect before the employee reaches the age of 65;
- (b) where the employee has no normal retirement age, the employer gives notice in accordance with paragraph 2 of Schedule 6, but the dismissal takes effect before the intended date of retirement notified to the employee;
- (c) where the employee has a normal retirement age (whether above or below 65), but the dismissal takes effect before the employee reaches that age;
- (d) where the employee has a normal retirement age over the age of 65, the employer gives notice in accordance with paragraph 2 of Schedule 6, but the dismissal takes effect before the intended date of retirement date so notified;
- (e) where the employer does not notify the employee in accordance with paragraph 2 of Schedule 6, but he does notify the employee of an intended date of retirement, but the dismissal takes effect before that intended date of retirement;
- (f) where the employer has a normal retirement age which is below the age of 65, the dismissal takes effect after that age, but it is unlawful age discrimination for the employee to have that retirement age (i.e. the retirement age is not objectively justified);
- (g) where the employer has a normal retirement age which is below the age of 65, that retirement age is objectively justified, the employer has notified the employee in accordance with paragraph 2 of Schedule 6, but the dismissal takes effect before the intended retirement date.

287. The circumstances where it is left to the employment tribunal to decide whether retirement is the reason for dismissal are as follows:

- (a) where the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 – perhaps he notified late or not at all (whether or not the employee has a normal retirement age); or
- (b) where the employer notified the employee in accordance with paragraph 2 of Schedule 6, but the dismissal takes effect after the intended date of retirement.

288. In the circumstances described in (a) above, when deciding what is the reason for dismissal, the tribunal must take into account the matters listed in s.98ZF – these matters are whether the employee was notified of an intended retirement date in accordance with paragraph 4 of Schedule 6, when that notification was given and whether the employer followed the procedures in paragraph 7 of Schedule 6. In the circumstances described in (b), the tribunal may take these matters into account.

289. Where a tribunal has concluded that retirement is the reason for dismissal, whether or not the dismissal is fair is assessed in accordance with s.98ZG. This fairness test ousts the fairness test in s.98(4) ERA (included the statutory dismissals procedure) which applies in relation to dismissals for other reasons. The test amounts to a procedural fairness test – if the employer has not failed to comply with paragraphs 4, 6, 7 and 8 of Schedule 6 (if applicable) then the dismissal will be fair.

290. The Schedule goes on to make other amendments to the unfair dismissals legislation, namely –
- a) removal of the upper age limit on bringing unfair dismissal claims;
 - b) allowing Employment Tribunals to make an order of compensation to the employee of four week's pay where the dismissal is found to be unfair in accordance with s.98ZG (employer's failure to comply with paragraphs 4,6, 7 or 8 of Schedule 6);
 - c) the tapering of the basic award for unfair dismissal after the age of 64 is removed (section 119 (4) and (5));
 - d) where the basic award for unfair dismissal would be less than four week's pay, the Employment Tribunal may increase the amount of compensation to four week's pay where the dismissal is unfair as a result of the employer's failure to comply with paragraphs 4,6,7 or 8 of Schedule 6.
291. The amendment to section 108 of the Employment Rights Act 1996 secures that the normal qualifying period of one year's continuous employment needed to claim unfair dismissal does not apply if the reason or principal reason for dismissal is that the employee used the right to be accompanied at a meeting to consider the employee's request not to be retired held under paragraph 7 or 8 of Schedule 7 to the Regulations or that the employee accompanied or sought to accompany another employee at such a meeting.
292. The repeal of section 109 of the Employment Rights Act 1996 removes the upper age limit on bringing a claim for unfair dismissal.
293. Section 112(5)(a) of the Employment Rights Act 1996 is amended to provide for the payment of a minimum of four weeks compensation where the employee is unfairly dismissed as a result of the employer's non-compliance with the duty to consider procedures in Schedule 6 to the Regulations and where the tribunal orders the employee to be reinstated or re-engaged.
294. Section 119(4) and (5) of the Employment Rights Act 1996 are repealed so as to remove the tapering of compensation for unfair dismissal after the employee's 64th birthday.
295. Section 120(1A) is amended to provide for the payment of minimum of four weeks compensation where an employee is unfairly dismissed as a result of the employer's non-compliance with the duty to consider procedures in Schedule 6.
296. Section 126 of the Employment Rights Act 1996 is amended so that, where an act is both unfair dismissal and discrimination or harassment under these Regulations, compensation cannot be awarded twice for the same loss.
297. The repeal of section 156 of the Employment Rights Act 1996 removes the upper age limit on receiving a redundancy payment.
298. Section 158 of the Employment Rights Act 1996 is repealed. It excludes the right to a redundancy payment in certain circumstances where the employee is also entitled to claim a pension. The Redundancy Payments (Pensions)

Regulations 165 (S.I. 1965/1932), which are treated as being made under this section are also revoked.

299. Subsections (4), (5) and (8) of section 162 of the Employment Rights Act 1996 are repealed so as to remove the tapering of the amount of a redundancy payment after the employee's 64th birthday.
300. Section 211(2) of the Employment Rights Act 1996 is repealed so as to remove the lower age limit in relation to the computing of a period of continuous employment for the purposes of compensation for unfair dismissal and for redundancy payments.
301. Schedule 3 to the Employment Act 2002 is amended so that the adjustment of awards under s.31 of that Act also applies to complaints made under these Regulations. This means that a tribunal may reduce or increase the amount of compensation it awards, in cases where the employer or employee has not followed the statutory procedure for making an internal complaint, as set out in Schedule 2 to the 2002 Act.
302. Schedule 4 to the Employment Act 2002 is amended so that, under s.32 of that Act, an employee wishing to complain under these Regulations must first submit a statement of grievance to their employer. The relevant procedure is set out in Schedule 2 to the 2002 Act.
303. Schedule 5 to the Employment Act 2002 is amended so that the provisions of s.38 of that Act, also apply to cases brought under these Regulations. This means that, where an employer has failed to give a statement of employment particulars to the employee, the tribunal must make an award of compensation to the employee for this, separate from its consideration of the complaint of discrimination.
304. Section 14 of the Equality Act 2006 is amended to enable the Commission for Equality and Human Rights to issue a code of practice in connection with a matter addressed by Parts 2 and 3 of the Age Regulations.
305. Section 27 of the Equality Act 2006 is amended to enable the Commission for Equality and Human Rights to make arrangements for the provision of conciliation services for disputes in respect of which proceedings have been or could be brought under or by virtue of regulation [37] of the Age Regulations.
306. Section 33 of the Equality Act 2006 is amended to add the Age Regulations to the definition of "the equality enactments" in Part 1 of the Act.
307. The Lords are due to consider Commons' amendments to the Equality Bill on 13th February 2006 and Royal Assent is anticipated before these regulations are laid. Proofs of the final version of the Bill are due shortly after Lords' consideration and section numbers will be confirmed then. A chapter number will be inserted as soon as it is available.

Part 2: Other Legislation

308. The majority of those amendments are straightforward. Reference is made only to the more complicated provisions.

Safety Legislation

309. The majority of these amendments remove unjustified age limits from Regulations made under the Mines and Quarries Act 1954 and are straightforward.

310. The “Special” regulations each relate to a specific mine. They do not seem to be available in electronic or other published form but exist only in hard copy held, with a record of repeals and amendments, by the Health and Safety Executive.

Social Security legislation

311. Regulation 16(1) of the Statutory Sick Pay (General Regulations) 1982 is amended to enable people under the age of 16 to be treated in the same way as those aged 16 or over who are subject to the Social Security (Categorisation of Earners) Regulations 1978 which categorise certain workers as being employed earners or not. This determines whether or not a person is treated as an employee for the purposes of SSP.

312. Regulation 17(2) is amended to change the meaning of “earnings” so that the definition applies in the same way to employees under the age of 16 as to those over 16.

313. The provisions amending regulation 17(1) and 20(2) of the Statutory Maternity Pay General Regulations make similar amendments to those made to regulations 16(1) and 17(2) of the Statutory Sick Pay (General Regulations) 1986 to achieve the same effects for the purposes of SMP as for SSP. These amendments apply in relation to women whose expected week of confinement begins on or after 14th January 2007.

314. Regulation 32 of the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002, is amended to allow people aged 16 or younger to be treated in exactly the same way as people aged over 16 under the Social Security (Categorisation of Earners) Regulations 1978.

315. This categorises people as employed earners or not and this categorisation determines whether the individual is to be treated as an employee for the purposes of entitlement to statutory paternity pay or statutory adoption pay .

316. Regulation 39 of those regulations is amended to ensure that the earnings which must be taken into account for the purposes of statutory paternity pay or statutory adoption pay apply to people aged 16 and under in the same way that they apply to those over 16.

Employment and other legislation

317. Regulation 1(2)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 is amended so that those provisions apply to calculating interest on awards of compensation made in relation to complaints brought under these Regulations .
318. The Employment Protection (Continuity of Employment) Regulations 1996 are amended so as to preserve continuity of employment in situations where an employee is reinstated or re-engaged as a result ‘a decision taken arising out of’ Schedule 6 of the Regulations - the duty to consider procedure requests to continue working beyond retirement. This rather broad drafting is intended to catch both decisions which are a formal part of the procedure – such as a decision to reinstate following an appeal meeting, and decisions which are not a formal part of the procedure, but which can be said to ‘arise out of’ use of the procedure. An example of the latter would be a decision to reinstate which resulted from an employee expressing dissatisfaction with an earlier decision to dismiss (as part of the duty to consider procedure), but where there was no formal appeal made by the employee. The effect would be that continuity of employment would be preserved as a result of both types of reinstatement decision.
319. The revocation of regulation 12(2)(a) of the National Minimum Wage Regulations 1999 ensures that apprentices who are within the first twelve months of their apprenticeship do not qualify for the national minimum wage by virtue, simply, of attaining the age of 26. The transitional provision ensures that an apprentice who qualifies for the national minimum wage does not lose that entitlement by virtue of the revocation of regulation 12(2)(a).
320. The revocation of regulation 13(2) to (6) and the amendment of regulation 13(7) ensures that workers currently covered by this provision (i.e. those who have attained the age of 22) are entitled to the single hourly rate for the national minimum wage prescribed by the Secretary of State under section 1(3) of the National Minimum Wage Act 1998, rather than the lower hourly rate currently prescribed for workers aged from 18 to 21."
321. Paragraphs 1(1) and 1(2) of Schedule 1A to each of the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 are amended so that the references to definitions in the Pensions Act 1995 and the Pension Schemes Act 1993 no longer refer to those statutes as at the date of the coming into force of the Employment Equality (Sexual Orientation) Regulations 2003, but to those statutes as amended .
322. Regulation 4(1) of the Employment Act 2002 (Dispute Resolution Regulations) 2004 Regulation 4(1) is amended so that the statutory grievance and the statutory dismissals procedures do not apply in relation to a dismissal for reasons of retirement. Whether or not a dismissal is for reasons of retirement is to be determined in accordance with new sections 98ZA to 98ZF of the Employment Rights Act 1996 (as inserted by Schedule 8 to these Regulations).

Schedule 9

Repeals and revocations

323. Article 16 of the Directive requires the abolition of legislation contrary to the principle of equal treatment. Provisions of primary and secondary legislation which consist of a whole section, subsection, regulation or paragraph setting unjustified age limits are respectively repealed or revoked in this schedule in tabular form.