

Response to

EQUALITY AND DIVERSITY: Coming of Age

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INTRODUCTION

1. The Discrimination Law Association (“the DLA”) is a company limited by guarantee. It was formed in 1995.
2. It is the only national organisation for those who are concerned with discrimination law. Its members include individual lawyers, law firms, race equality councils, community organisations, and others. It has over 400 members.
3. The DLA has produced more than 300 legal briefings on current developments in discrimination law, written for lawyers and non-lawyers and sent free to members three times a year.
4. The functions of the DLA are varied and include publishing Briefings three times a year, supporting its members with regular email news on matters

relating to discrimination and equality law, holding practitioner's groups on topical matters, holding an annual conference, liaising with similar groups on related topics, and responding to Governmental communications such as this.

5. The DLA supported the legal seminar organised by Age Concern to discuss Age Matters on the 11th September 2003¹. Representatives from Government attended that seminar.
6. The DLA supports the government's commitment to the extension of rights in the discrimination field and the proper implementation of the two key Directives made under Article 13 EC.
7. Accordingly the DLA welcomes the implementation of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Directive) in respect of age discrimination.
8. The DLA is most concerned to see that the Directive is properly implemented in a way which enhances equality, is consistent with existing anti discrimination law, and is easy to understand and therefore accessible to the public.
9. The DLA would wish to emphasise that age discrimination and inequality on grounds of disability, and sex discrimination are very closely related. Accordingly it is essential that the approach taken to the implementation of the Directive in respect of age does not inadvertently create distortions in existing protections.
10. For instance legislating to permit justifications in relation to direct age discrimination may be used in the future by employers and others to seek to justify discrimination on grounds of sex or disability. Not only would this be contrary to the Directive, which permits no derogation from existing rights, but also it would be a certain recipe for lengthy litigation. Although it may be less likely to occur, it is possible that the same overlap and risk could occur with protections against race discrimination.
11. As appropriate the response form has been filled out and attached as Appendix 1.

IMPLEMENTATION

12. The DLA remains disappointed that the government has chosen to implement this part of the Directive by regulation under the European Communities Act 1972 rather than by primary legislation.
13. The legislation to protect against age discrimination is novel and its scope is not at all well understood. It involves a very different social model. Accordingly it will be very important that the new legislation is supported by a

¹ The seminar received papers from DLA members Michael Rubinstein, and Rachel Crasnow, and oral contributions from other DLA members.

Code of Practice which must be taken into account by the Employment Tribunals and county/sheriff court. The only way to make such provision is through primary legislation.

14. Further the DLA can see no reason for limiting protection to the employment sphere. This will only add to the already over complex state of equality law in the UK. Protection against discrimination in relation to goods facilities and services, including transport, and housing, etc. and functions of public authorities should also be included..

THE CONCEPT OF DISCRIMINATION ON THE GROUND OF AGE

15. A major fact that needs to be considered is that age is not a simple static concept. To say that someone has discriminated on grounds of age begs a number of questions: what age or what age group have been disadvantaged? The idea of direct or indirect discrimination on the ground of race or gender or disability etc does not immediately translate into discrimination on the ground of age.

CHAPTER 3 – SCOPE – VOLUNTEERS, OCCUPATION, SELF-EMPLOYMENT

16. The DLA notes that unpaid volunteers will not be covered by the Age Regulations. The DLA disagrees with this decision. The DLA would remind the government of the Performance and Innovation Unit Report: “Winning the Generation Game Improving Opportunities for People Aged 50 – 65 in Work and Community Activity”. One of the Report’s four recommendations for Action was “Helping older people to make use of their skills and experience for the benefit of the wider community by improving access to, motivation towards and availability of volunteering opportunities”.
17. The DLA believes the decision not to include unpaid volunteers is inconsistent with the Directive. Article 1a of the Directive defines its scope as extending to ‘conditions for access to employment, to self employment or to occupation...’. The inclusion of ‘occupation’ by the European Council after the word ‘employment’ is intentional and reflects other legislative provisions. From the wording of both Article 1 and Article 3(a) it is clear that the Directive is intended to have a wider ambit than simple employment relationships.
18. Although no definition of the word occupation is contained in the Directive itself., there can be little doubt that it derives originally from the International Labour Organisation Convention No. 111 concerning discrimination (Employment and Occupation), which is mentioned in the preamble at recital (4), and which states in Article 1 that:
“For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.”
19. Further the Explanatory Memorandum to the original proposal (OJ C 177 E 27/6/00 p. 42-46) stated that the areas to be covered by the proposal were

“employment and occupation, promotion, vocational training, employment and working conditions and membership of certain bodies”. Although the original wording of the application of the Directive in Article 1 has been somewhat altered, it is clear from Article 3, that these areas are nevertheless covered by the amended Directive which was finally passed.

20. It is also appropriate to look for the proper construction of “employment and occupation” in paragraph 4 of the Explanatory Memorandum which deals with the legal basis for the proposed Directive. It is there stated that the material scope of the provisions planned covers “not only salaried employment but also self-employment and the liberal professions”. The “liberal professions” have been defined by the ECJ as:

“activities which, inter alia, are of a marked intellectual character, require a high- level qualification and are usually subject to clear and strict professional regulation. In the exercise of such an activity, the personal element is of special importance and such exercise always involves a large measure of independence in the accomplishment of the professional activities.” (Christiane Adam, épouse Urbing v Administration de L’Enregistrement et Les Domaines, Case C-267/99, [2001] ECR.)

21. In other EC Directives, where the provisions are intended only to apply to paid employment, the exclusion of other activities from the Directive is explicit. In Article 1 of Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, it is clearly stated that the Directive shall apply to every paid employee having a contract or employment relationship. Thus if the definition of “occupation” were to be limited to paid roles, the Directive would have said so, as has been done in at least one other instance.

SELF-EMPLOYMENT

22. The proposed regulations also fall short of the Directive in their failure fully to provide protection in “access to self-employment”. Self-employed people are covered by the regulations only when they have entered into a contract personally to carry out work; a person who seeks to be self-employed but intends to carry out particular work by the employment of even one other person would not be protected.

DEFINITION OF INDIRECT DISCRIMINATION (CHAPTER 3)

23. The framing of the indirect discrimination provisions are lacking in clarity. It is helpful to have age group defined in regulation 3(4) but this could cover a wide variety of situations – for example, if B is 55, a claimant may have to show that other 55 year olds are at a particular disadvantage or that other 45 - 55 year olds are at a particular disadvantage. It is not clear what approach tribunals will take to this, and guidance will be invaluable.

24. We have some concerns regarding the justification of indirect discrimination which are addressed under “justifying age discrimination” below.

HARASSMENT

25. The DLA notes that the proposed definition of harassment in regulation 6 is in line with that for other discrimination legislation. This gives rise to the same potential failure of implementation.
26. The proposed reg 6(1) of the Age Regulations requires that the unwanted conduct be “on grounds of age”. However, article 2(3) of the Directive requires that protection be given to unwanted conduct “related to” age (as well as religion or belief, disability or sexual orientation). The latter provides wider protection.
27. The Directive clearly intends the “related to” formulation to be wider than the “on grounds of” formulation. This can be seen in article 2, which describes less favourable treatment as “on any of the (prohibited) grounds”, whereas it describes harassment as conduct “related to any of the (prohibited) grounds”. The EU Directives are consistent on this distinction. The Race Discrimination Directive (2000/43/EC) and the Equal Treatment Amendment Directive (2002/73/EC) use the same wording in these respects.
28. Therefore in order to ensure the Regulations adequately implement the Directive and leave nothing to uncertainty or to expensive litigation, the DLA recommends that reg 6 is amended to refer to unwanted conduct “related to” age.

JUSTIFYING AGE DISCRIMINATION (Chapter 4)

29. It is DLA’s view that it is inappropriate and contrary to the principle of non-discrimination for direct discrimination to be capable of justification on the same basis as indirect discrimination i.e. a proportionate means of achieving a legitimate aim. Whilst Article 6 of the directive permits this, it is permissive, and not mandatory, in nature. It is DLA’s view that there will rarely if ever be justification for direct discrimination on the grounds of age, and that such justification can be dealt with by means of a genuine occupational requirement exception. We are particularly disappointed that the decision to adopt this approach appears to have been taken on the basis that compared to 42% of respondents who said that the previously proposed closed list of legitimate aims should not be expanded, 40% said that the list was too restrictive and mentioned a number of other potentially legitimate aims (paragraph 4.1.4)
30. The consultation document goes on to state at paragraph 4.1.7 that the regulations will include a number of examples of situations where direct age discrimination may pursue a legitimate aim. However, the draft regulations state at 3(2)(a) to (c) that they are examples of “treatment which, depending on the circumstances of the case, an employment tribunal or as the case may be, a county or sheriff court, may find to be **a proportionate means** of achieving a legitimate aim” (our emphasis). We are concerned that placing such examples in the regulations is not appropriate. In particular, we believe that:
 31. Employers may forget that these are merely examples, and that they will still need to demonstrate that this is a proportionate means of achieving a

legitimate aim

32. It may encourage employers to routinely look to such examples as a means of justifying potential discrimination
33. Paragraph 4.1.16 of the consultation states that economic factors may be a legitimate aim but that discrimination will not be justified merely because it may be more expensive not to discriminate. It is far from clear that this will be the approach adopted by the courts, and we would urge the government to make this explicit in the regulations.
34. DLA is particularly concerned that customer preference may arise frequently in potential age discrimination and we do not share the view expressed in the consultation paper in the example at 4.1.8 that a tribunal or court would hold that such customer preference would not amount to a legitimate aim “because it has an age-discriminatory aspect”. We would urge that customer preference be specifically excluded as a legitimate aim, along with purely economic factors, specifically in the case of direct discrimination.
35. The possible legitimate aims listed at 4.1.17 appeared in the previous consultation document and DLA has commented already, in our previous response, on the inappropriate nature of these justifications. Our views on them are as follows:
 36. Health and safety: The DLA considers that appropriate and proportionate action to protect health and safety is necessary. All steps which are proportionate and necessary to that end will normally be justifiable.
 37. However the DLA considers that restrictions whose aim is health and safety but which operate by applying age bars are inappropriate, not necessary and cannot be justified. Age should not be used as a short cut to avoid proper health and safety assessments of the individual’s capability. Age is not substitute for a proper health and safety assessment.
 38. Indeed there are real dangers in assuming that because someone is above or under a given age they are “safe” or not at risk. As consciousness grows of the extent to which there is age discrimination such assumptions will be increasingly challenged.
 39. Employment planning: The DLA recognises that an employer may feel more vulnerable if the entire workforce or a significant sector is all in the same age range. However the significance of this will only be apparent if rules which currently encourage specific and fixed retirement ages within firms are maintained.
 40. If such rules are removed then the risk that the firm will lose its entire staff in a particular sector at the same time will go. Moreover the firm will be able to avoid or minimise the risk by a suitable pay policy aimed at retention of staff so that skills can be transferred. Accordingly the DLA does not consider that employment planning is an appropriate ground for a specific exemption from the protections that must otherwise be granted.

41. Particular Training Requirements of the Post in Question : The DLA recognises the need, in some circumstances, to link training requirements to the need for a reasonable subsequent period of employment, whether until retirement, or as is perhaps more common, before someone moves on to another job.
42. However, the DLA consider that this can be achieved in an age-neutral way. There are a number of ways in which this would be possible.
43. If an employer provides on the job training, or subsidises training, the DLA can see no reason why the employer cannot set a minimum period for which he or she will expect the employee in receipt of that training to continue to work for the employer and to impose requirements to secure that result.
44. Many employers operate back loaded payment schemes to ensure that employees stay with them. Thus a worker may be required to stay in a particular job for given period of time before being entitled to a particular payment. The period is set at sufficient length to enable the employer to get a minimum benefit from the training which the employer has conferred on the employee. If the employee decides to leave, or to retire, before the given time, he or she is not eligible for the bonus or other similar payment.
45. The DLA therefore does not accept that 'the need for a reasonable period of employment before retirement' should be a statutory justification for age discrimination.
46. Encouraging and rewarding loyalty: Schemes based on length of service are very common. Such schemes can give rise to prima facie indirect age discrimination but they may be easily justified on grounds of securing employee loyalty.
47. The DLA also accepts that such schemes can be very useful in encouraging staff retention. However, the DLA considers that all the circumstances need to be carefully scrutinised. It is a fact that women and disabled persons have very different experience of employment from able-bodied men. Loyalty schemes may be inaccessible to them. Expressly permitting such schemes in age regulations should not provide any basis for complaints that such schemes are not equally available to women or disabled persons (see our comments below on service related pay and benefits).
48. Need for a reasonable period of employment before retirement: the DLA does not support a default retirement age or any power for an employer to impose such an age so as to minimise or eliminate the duty to treat an employee fairly.
49. Where there is no such power and the issue is whether an employer will stay for long enough to justify recruitment costs similar controls could be imposed as those described above. However we should add that there is always a risk that a newly recruited employee of any age will leave before the costs of

recruitment are justified. Accordingly the DLA does not see this as ever being a proportionate aim. It cannot matter whether the employee retires altogether or leaves the employer to go to another job.

50. In any event any recognised justifications must be narrowly construed bearing in mind the Directive's criteria that they should be 'objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary.'
51. Finally, we would take issue with the wording which has been used in the justification for both direct and indirect discrimination. The regulations refer at paragraph 3(1) to treatment being "a proportionate means of achieving a legitimate aim". The directive, however, refers to treatment being objectively justified by a legitimate aim and the means of achieving that aim being "appropriate and necessary" (Article 2(2)(b)). We do not believe that the directive will be correctly transposed in this respect.

GENUINE OCCUPATIONAL REQUIREMENTS

52. It is DLA's view that having genuine occupational requirement in addition to a general "proportionate and legitimate aim" defence is excessive. It is our view that this should be the only defence retained for direct discrimination.
53. We also have concerns regarding the drafting of the proposed GOR. In particular, regulation 8 specifies that the GOR applies where "possessing a characteristic related to age is a genuine and determining occupational requirement". In other anti-discrimination provisions, however (such as the sexual orientation regulations), "**being of a particular sexual orientation**" must be a genuine and determining occupational requirement. In the age regulations, the scope for GOR is considerably broader, despite the comments in the consultation as to GOR being used in few cases; it also incorporates some elements of indirect discrimination – which may lead to considerable confusion amongst employers and those seeking to enforce their rights. We would urge redrafting of the GOR.

RECRUITMENT

54. The regulations prohibit those who are 65 or over from claiming age discrimination in recruitment. This stems from the decision taken by the government to impose a default retirement age, which DLA opposes (see below for details).
55. Nevertheless, even if this is being done in pursuit of a legitimate aim, whilst Article 6 clearly permits member states to provide that differences of treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary, it is our view that the exemption as currently framed is not "appropriate and necessary" to achieve the policy aim. To exclude those over 65 from bringing any claims in relation to recruitment, as opposed to limiting the exemption to any employment from which they have

just been retired, would seem to be far too broad to be necessary. DLA would urge the government to reconsider this.

EXEMPTIONS – CHAPTER 5

SERVICE RELATED PAY AND BENEFITS (CHAPTER 5)

56. Service related benefits – extra day's holiday, incremental pay etc are frequently found, and concern has been expressed about the extent to which these are indirectly discriminatory on grounds of age. There are costs incurred in every recruitment exercise (the DTI has estimated these as averaging £3,500 per job) and it is understandable that employers may wish to give staff some incentive to stay in their employment.
57. The DLA believes that whilst certainty of exemption for certain age related benefits is desirable (such as the length of service requirement of 5 years or less), to ensure that employers do not remove such benefits for fear of legal action, an additional general exemption provision is unnecessary, given the general exemption in relation to both direct and indirect discrimination.
58. This is particularly because the DLA considers that all these circumstances need to be carefully scrutinised as traditionally such schemes have sometimes been used to mask discrimination whether against women, ethnic minorities or people with disabilities (See for example *Crossley v ACAS*, Case no 1304744/98).
59. The DLA believe that this is an area where a clear statutory Code of Practice, with examples of good practice, which must be taken into consideration by courts and tribunals, could be extremely useful and would help to clarify the limits of the legislation and thereby minimise litigation.

NATIONAL MINIMUM WAGE

60. The DLA notes that the government did not consult on whether the age bands in the national minimum wage are consistent with the Directive. The DLA believes they are not.
61. The government puts forward two justifications for maintaining the lower age bands. The first is that it makes it easier for young workers to find employment. The second is that it encourages young people to stay in full-time education. Regarding the second justification, the DLA has seen no evidence that this is in fact the case.
62. The first justification is contrary to the evidence put forward in the Low Pay Commission Report 2005. The Report supports a youth development rate for 18 – 20 year olds, not for 18 – 21 year olds as at present. The Commission clearly rejects the application of the youth rate to 21 year olds.. Further, the Commission's conclusion that there should be a youth rate at all (18-20) is not supported by the evidence in its own report (see below).

Removing the 18 – 21 year old rate altogether

63. The DLA believes that the youth rate for 18 – 21 year olds should be removed altogether, notwithstanding the Low Pay Commission's support for a rate at least up to age 19. This is because
- (i) the government's justification is one tainted by age discrimination, i.e. that young people will be preferred for work over older people because they are cheaper.
 - (ii) this justification is not in fact supported by the evidence cited in the Commission's Report.
64. It seems that employers were naturally moving away from age-related pay prior to the introduction of the national minimum wage. This means paying younger people less cannot be an employment incentive. The Report clearly states that introduction of the minimum wage affected the previous general move away from age-related pay. The Commission says "Commissioned research and consultation responses provide no indication that firms are responding to the minimum wage by seeking to substitute employment either towards or away from young people."
65. The Low Pay Commission's support for a youth rate at least for 18 – 19 year olds appears to be based on statistics showing that unemployment rates are significantly higher for 18 – 19 year olds. However, this does not constitute evidence that equalising pay rates would further damage their employment prospects. Indeed the lower rates exist in the context of a youth rate. The Commission says the reasons for the worsening labour market position in 2001 – 2003 of 18 – 19 year olds were unclear, but it was more a question of a proportion of young people failing to look for work because of wider social factors, than due to any deficiency of demand because of too high a minimum wage.
66. A final concern arises in respect of reg 31(1)(b) of the draft Age Regulations. It appears that it will not be discrimination to pay a worker aged 18 – 21 less than an adult worker, as long as the young worker is paid less than the adult minimum wage. Once the young worker is paid more than the adult minimum wage, he or she must be paid the same as any adult worker. The problem with this is that it provides an incentive for an employer, who wishes to pay a young worker less than an adult worker, to pay the young worker less than the adult minimum wage.

Ages covered by the youth development rate

67. The Commission's Report states: "It is, however, important that the youth Development Rate should only apply to those age groups where the dangers of adverse employment effects exist ... There is therefore a very strong case for a lower youth rate for 18 and 19 year olds. Above that level, the precise optimal cut-off point can be debated... Our judgment is that the 21st birthday is the most appropriate and that the employment prospects of 21 year olds do not need to be protected by the youth Development Rate ... Firms' wage-

setting behaviour shows that paying the adult rate from the age of 21 would have limited impact on business...We therefore again recommend that 21 year olds should receive the adult rate of the National Minimum Wage.”

68. The DLA therefore contends that paying a lower rate to 21 year olds is patently unjustifiable and liable to clear challenge as in breach of the Directive.

69. Moreover, although the Low Pay Commission suggests 21 should be the cut off, there is no clear evidential based reason in its report why it should have chosen 21 rather than 20, The Commission itself says that “any concerns should be primarily focused on 18 and 19 year olds”. There is therefore a strong case that including 20 year olds in the youth rate is also unjustifiable.

Statutory Authority

70. The DLA is concerned regarding the exemption for acts done to comply with a statutory provision. Article 6 permits justification, but not exemption, of age discrimination in certain circumstances. Article 16 requires laws contrary to the principle of equal treatment to be abolished, whilst Article 2.5 provides that the directive is without prejudice to “national laws necessary for protection of health and safety (which would cover minimum ages for driving, working in licensed premises etc). It is not in our view appropriate to have an absolute exemption for anything done under statutory authority – either something will fall within the justifications for discrimination outlined or it should be unlawful.

RETIREMENT (CHAPTER 6) COMPULSORY RETIREMENT AGE

A default retirement age

71. As made clear in the earlier consultation, the DLA is completely opposed to a national default retirement age. Article 6 of the Directive allows age discrimination only if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The government has not provided any substantial justification for its decision to institute a default retirement age.

72. It is DLA's view that a default retirement age can operate as a de facto license for poor management. A person nearing the age when they can be sacked for “retirement” will be unlikely to be offered anything to enhance or improve their performance if they are performing poorly – which can have a detrimental effect upon all staff.

73. The DTI's partial regulatory impact assessment on retirement ages of July 2005 states that option “a” (no default retirement age) shows higher benefits overall to individuals, employees, employers, the Exchequer and GDP, than any other option. Yet in the face of all the evidence in the impact assessment, the government states that it will set a default retirement age. The only justification given is that “many” businesses “have traditionally relied on retirement ages as an important means of human resource planning”. There is no analysis of what proportion of businesses use this method, nor whether it is

an appropriate or necessary measure in any instance, as opposed to a habitual way of doing things. The very fact that not all businesses use this method indicate that it is not automatically justifiable in every case. The DLA believes each employment is different and a national default cannot be justified.

Setting the default at 65

74. The government initially proposed that any default retirement age would be set at 70. The reason given for choosing 65 rather than 70 appears to be that in the response to Age Matters, 24% were in favour of 70 and 65% were against. (See paragraph 6.1.8 of the consultation paper and paragraph 108 of the partial regulatory impact assessment on retirement ages.)
75. However, this is not in our view based on accurate consultation. Question 6(f) in Age Matters asked whether the government should specify a default retirement age. A separate question 6(g) asked “Should the Government specify 70 as the default retirement age?”. The DLA assumes the government’s decision was based on the answer to question 6(g). But question 6(g) could have three different and opposing meanings, i.e.
- (i) “If you are in favour of a default retirement age, should the government specify 65 or 70?”
 - (ii) “Whether or not you are in favour of a default retirement age, if the government decides to set one, should it be 65 or 70?”
 - (iii) “Do you think there should be a default retirement age of 70 or none at all?”
76. As a self-standing question, it more naturally reads as option (iii). The 65% who said no, therefore almost certainly included the 43% who were completely against a default retirement age. Indeed those who opposed a default age altogether would logically be more likely to favour age 70 than age 65 if there must be a default. Moreover, many would be unlikely to vote in favour of age 70 as opposed to no default age because that may seem to weaken their position that there should be no age.
77. It is therefore very possible that, if there must be a national default retirement age of either 65 or 70, there is a true majority of 67% who prefer age 70 as opposed to age 65 (i.e. 43% + 24%).
78. The DLA believes setting a national default retirement age at 70 carries many of the same objections as setting it at 65. Nevertheless, if the government is insistent on setting such an age, it should have been set at 70.

The five year review

79. The DLA does not believe that the proposal to review the default retirement age is a satisfactory solution to its objections for the following reasons:
- (1) The government states the review will be based on evidence. However, there was a lead in of several years to the implementation of the Age Regulations, and the government did not use that period to acquire any firm

evidence that a default retirement age was necessary.

(2) The government states that even if it is decided at the review that a default retirement age is no longer needed, employers will be given a further lead in before it is abolished. This means it may be 8 – 10 years before the default retirement age is abolished. In the meantime, the economy and a large number of individuals will have suffered adverse consequences.

(3) There is no guarantee that the present government will be in power in 5 or 8 years time or that a different government will hold such a review.

80. The DLA therefore proposes, if the government still insists on maintaining a default retirement age at present, that it is automatically abolished with effect from October 2011.

THE DUTY TO CONSIDER (Sched 6)

The trigger for the procedure

81. Under Schedule 7 rule 2(1), the employer's duty to notify the employee of his or her proposed retirement date and the right to request continued working is triggered when the employer "intends to dismiss an employee" for retirement. The DLA is concerned regarding the potential for an employee to lose this entitlement where an employer mistakenly contends the employee has already agreed to retire and therefore the employer does not intend to "dismiss". Paragraph 6.1.17 of the consultation paper underlines this danger by stating there is no need to follow the procedure where employer and employee agree about retirement.

82. Paragraph 6.1.18 states that an employer should not just assume the employee will consent to retirement and should establish this clearly and early on. It does not state how this should be done or what happens if there is a subsequent dispute about whether there was in fact an agreement. The DLA therefore recommends that the duty to notify exists not only when the employer intends to dismiss, but also when the employer believes that retirement and a retirement date have been agreed.

The procedural model

83. The government states in the consultation document that it wishes to drive a culture change regarding working beyond retirement age by encouraging employers and employees to enter into a dialogue on the issue of retirement. The way in which the government proposes to do this is via the new duty-to-consider procedure. The DLA believes that the government will fail in its policy objective due to flaws in the way in which the duty-to-consider procedure is designed.

84. The consultation document says that the new procedure will be modelled on the existing right to request flexible working which applies to parents of young children. It says this has proved a successful and light-touch way of encouraging employers to think about the issues. However, the DLA firmly believes the right to request flexible working has achieved a measure of success due to three elements, all of which are not present in the Age

Regulations as currently designed, i.e.

(1) refusal of the request can be made only on one of the specified grounds and must be accompanied by a written explanation

(2) an employee can claim compensation if refusal is based on inaccurate facts

(3) there is a substantive remedy for unjustifiable refusal of a request, i.e. a claim under the SDA 1975 for indirect sex discrimination.

85. The DLA recommends drafting the duty-to-consider procedure more closely to resemble the flexible working procedure in respects (1) and (2). The advantage of these requirements is that an employer is forced to think through his or her reasons for not allowing an employee to work beyond retirement age, and has to ensure he or she is properly in possession of the facts. Without such requirements, there is nothing to prevent an employer sitting through a meeting with a closed mind and not questioning his or her own assumptions. It is also a matter of natural justice that an employee should know the reasons for any refusal to allow him or her to work beyond retirement age.

86. Regarding a substantive remedy for unfair refusal to allow someone to work beyond retirement age, the DLA fears that without such remedy, culture change will be extremely hard to achieve.

THE RIGHT TO REQUEST CONTINUED WORKING (Sched 7) Notification 6 – 12 months before

87. The DLA recommends that the employer is required to notify the employee of the intended retirement date and right to request continued working 12 months before the intended retirement date. 6 months is insufficient notice for an employee to make arrangements which may be quite significant in terms of his or her future life and economic position.

Automatic unfair dismissal: 2 weeks before

88. As currently drafted, an employer who fails to inform an employee of the right to request continued working 6 – 12 months before the intended retirement date may have to pay 8 weeks compensation. If an employer fails to inform the employee of this sooner than 2 weeks before dismissal, the dismissal will be automatically unfair.

89. The DLA fails to understand why there is a distinction between the 6 month minimum and the 2 weeks minimum. Presumably the 6 month minimum was chosen because it was thought to give sufficient time for each party to plan ahead or change their plans. The ostensible purpose of the notification is to set in motion a procedure whereby an employer genuinely considers whether the employee can be retained. Giving an employer little incentive to notify the employee much more than 2 weeks ahead of the retirement date defeats that purpose. By that time, the employer will already have made arrangements for the replacement of the employee and may well have recruited someone new. In turn, the employee will have made plans consequent on retirement and loss

of income. Furthermore, an employee who only now finds out he or she has the right to request continued working, needs more than 2 weeks to decide whether he or she wants to do so.

90. Indeed, paragraph 6.3.15 of the consultation document says “the employer should consider in plenty of time before the expected moment of retirement whether there are business benefits to keeping the employee, and if so, discuss this with the employee”.

91. To be meaningful, notification and consultation must therefore start before either party has settled on fixed plans. This is why at least a 6 month period is required. In terms of incentive for an employer to think ahead and follow the procedure properly, the threat of automatic unfair dismissal is far more persuasive than fear of paying 8 weeks compensation.

Automatic unfair dismissal: the remedy

92. The DLA is concerned that the remedy for automatic unfair dismissal may not be large enough to be meaningful. The basic award will only be a reasonable sum if the employee has worked for the employer for some time. The compensatory award will be hard to quantify and may be limited to loss of earnings for the lost consultation time, especially if the tribunal finds the employer would not have permitted the employee to continue working anyway (as it is bound to find in such situations). The DLA therefore suggests a minimum basic award or some other fixed sum is made available.

Not automatic unfair dismissal if the employee knows anyway

93. A further point arises with the drafting of s98ZD. At paragraph 8.2.10, the consultation document says retirement dismissal will be automatically unfair “if the employer has not informed the employee” of the right to request continued working at all or has done so less than 14 days before the retirement date. However, s98ZD(4) says that it is not automatic unfair dismissal “if the employee knew” of the retirement date and the right to make a request more than 14 days before.

94. The DLA urges the government to withdraw this qualification. It is not common in employment law to give employers duties to impart information to employees and then to state that there is no remedy if the employee knew the information anyway. It is likely to lead to uncertainty and arguments in the tribunals with difficulties of evidence as to whether the employee did in fact know of the right to request continued working and quite what he or she did know or understand. It is also likely to make employers more casual about whether they properly impart such information to their employees, where they have a vague but mistaken impression that the employee knows anyway.

95. If the government intends this qualification on the employee’s right to claim automatic unfair dismissal to remain, it should be made very clear in any accompanying guidance by ACAS, as otherwise it is misleading.

Qualifying period to claim automatic unfair dismissal

96. The DLA notes there is no qualifying period on the right to request continued working. It is therefore logical that there should be no qualifying period on the right to claim automatic unfair dismissal should the employer fail to notify the employee of this right. This would be analogous to the protection of other employment rights not dependent on one year's service.

OCCUPATIONAL PENSIONS (Chapter 7)

97. The DLA recognises the importance of not undermining or risking the continual provision of occupational pension schemes, and so does not believe that exemption for age of entry to a pension scheme and other exceptions to the non-discrimination principle are objectionable per se.

98. The DLA does have concerns, however, regarding the exception for certain provisions in work-related invalidity benefit schemes. The reasons for fixing an age for admission to such a scheme, or in particular fixing an age for entitlement to invalidity benefits under a scheme (i.e. the government's case for this being a proportionate means of achieving a legitimate aim) is not detailed in the consultation document and the DLA does not believe that it is appropriate in particular to fix an age for entitlement to invalidity benefits under a scheme. Ages at which an individual can obtain retirement benefits need to be set in order to ensure that the scheme is not drawn upon by people who wish of their own accord to take retirement. Those claiming invalidity benefits do so not purely of their own accord but because they have become disabled and can no longer work. The DLA can see little or no justification for this exemption.

INSTRUCTIONS TO DISCRIMINATE

99. The Directive requires that giving an instruction to discriminate is made unlawful in itself and that wronged individuals must be able to bring a claim. This is because article 2(1) of the Directive says the principle of equal treatment means there shall be no direct or indirect discrimination whatsoever on grounds of age. At article 2(4), an instruction to discriminate on grounds of age is deemed to be discrimination within the meaning of article 2(1). Article 9(1) concerns enforcement measures and says that judicial and/or administrative procedures must be available "to all persons who consider themselves wronged by the failure to apply the principle of equal treatment to them".

100. The draft Age Regulations only partially implement the Directive in this respect. Reg 5 of the Age Regulations makes it unlawful to victimise a person ("B") for complaining about or not carrying out an instruction to discriminate. However, the Regulations (unlike the Directive) do not explicitly make it unlawful to issue an instruction to discriminate, as stated in the Directive. Currently, B can claim direct discrimination simply by virtue of having been

issued with the instruction to discriminate on one of the prohibited grounds, on the principle of *Weathersfield Ltd v Sargent* [1999] IRLR 94, CA. However, this depends on B proving that he or she has suffered a detriment, which may not always be the case, especially if B complies with the discriminatory instruction. Reg 5(a) merely gives statutory effect to the principle established in Weathersfield.

101. However, this plainly does not go far enough. The problem with the draft Regulations is that the person giving the instruction to discriminate (“A”), can only be legally challenged if B wishes to do so. Yet B may not be motivated to do so, especially if B has not suffered a detriment him or herself. Indeed, B may have an interest in maintaining good relations with A. Confining ability to take enforcement action to B is in breach of the Directive. As stated above, the Directive requires a remedy to be made available to all persons who consider themselves wronged by such discrimination. This is most likely to consist of a person (“C”) who B discriminates against as a result of A’s instruction.
102. An instruction to discriminate can lead to discrimination against a large number of people, many of whom may not even realise they have been discriminated against. Preventative action is required. This means there needs to be a mechanism by which A’s instruction can be challenged, even if B does not individually want to do so.
103. The DLA recommends that where C is discriminated against by B as a result of A’s instruction to B, C is given the right to bring a case against A as well as or instead of against B.
104. The DLA further recommends that where A instructs B to discriminate against C or a class of people defined by age within whose description C would fit, C is given the right to bring a case against A, regardless of whether B takes action on the basis of A’s instruction and whether C suffers a concrete detriment.
105. , the DLA notes that Clause 27 of the Equality Bill would give the Commission for Equality and Human Rights powers to bring legal proceedings in respect of instructions to discriminate on grounds of sex, race, disability and religion or belief. The Age Regulations should give the Commission parallel powers in relation to instructions on grounds of age. However, as stated above, in order to comply with the Directive, this should not be a power exclusive to the CEHR.

DISCRIMINATORY ADVERTISEMENTS

106. Advertisements are likely to be a large area of discrimination in practice, but it is probable that an individual cannot take action to challenge such an advertisement unless he or she can show a detriment has been suffered as a result.

107. For the avoidance of doubt, the DLA recommends it is explicitly stated that an individual can bring a case to challenge a discriminatory advertisement, which could potentially adversely affect those of his or her age.
108. The DLA further recommends that the CEHR is given power to take action regarding any advertisement indicating an intention to discriminate on grounds of age, as is currently proposed in the Equality Bill for other grounds. Again the DLA recommends that this should not be a power exclusive to the CEHR.

CHANGES TO OTHER LEGISLATION (CHAPTER 8) STATUTORY REDUNDANCY PAYMENTS

109. The DLA welcomes the proposal to remove the upper and lower age limits on entitlement to statutory redundancy pay and the tapering down rule. The proposal that each redundant employee receives the same amount in respect of each year of employment is also welcomed. However, the DLA is very concerned at the suggestion that the multiplier should be brought down to the level of one week per year of service.
110. For those over 41 years of age, reducing the multiplier from one and a half week's pay is in breach of the non-regression principle contained in Article 8(2) of the Directive. The DLA believes that the only proper and appropriate way to implement the Directive in respect of redundancy pay would be to increase the multiplier, as a minimum, to one and a half week's pay in respect of each year of employment.
111. The DLA further notes that the Republic of Ireland, in implementing the Directive, has increased statutory redundancy payments to two weeks' pay per year served plus one week's pay. Of all other EU countries which have a minimum statutory redundancy payments scheme, only France appears to award less than the UK. In the consultation paper, the government states its objective as ensuring employees who lose their jobs through no fault of their own are protected by a minimum financial "safety net". The current level of statutory redundancy pay, being subject to a low financial cap, does not provide any realistic safety net. To meet this objective, the DLA recommends redundancy pay at two weeks per year served without any statutory cap. So, for example, an employee made redundant after six years service would receive three months actual pay, as a minimum viable cushion while seeking a new job.
112. The DLA proposes a one year qualifying period for statutory redundancy pay, in line with the qualifying period to claim unfair dismissal. An employee who is without a job after one year's service faces the same financial difficulties as one who has acquired two years' service. The DLA also sees no reason to maintain the 20 year cap.

UNFAIR DISMISSAL: CALCULATION OF BASIC AWARD

113. The DLA agrees with removing the tapering down rule and the age bands. For reasons set out in respect of statutory redundancy pay, the DLA opposes any reduction below one and a half week's pay for each year of service. The DLA can see no reason to retain the 20 year cap.

SUPPORT AND LEGAL ACTION (Chapter 9)

REMEDIES: INDIRECT DISCRIMINATION (Reg 41)

114. The DLA fails to understand why an award for non-intentional indirect discrimination should be subject to a just and equitable discretion, whereas an award for intentional indirect discrimination or for other forms of discrimination is not subject to such a discretion. Case law has established that direct discrimination and victimisation are unlawful, whether or not they are conscious or intentional, and there is no distinction in compensation. The ECJ in *Marshall v Southampton and South West Hampshire Area Health Authority (No.2)* [1993] IRLR 445 ECJ said "real equality of opportunity cannot be attained in the absence of measures appropriate to restore such equality when it has not been observed." The measures "must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer." If financial compensation is the measure chosen, it must be adequate. If not, there must be some other effective measure, e.g. re-instatement in a dismissal case.

115. The decision in *Marshall* was founded upon article 6 of the Equal Treatment Directive (76/207/EEC). The equivalent to this in respect of age discrimination is article 9 of Directive 2000/78/EC. The DLA therefore believes there should be full compensation for indirect discrimination, whether or not it was intentional.

QUESTIONNAIRES (Reg 44)

116. The DLA is aware that the 8 weeks given to respondents to answer a Questionnaire is the same as under other discrimination legislation. However, the DLA believes such a time-limit is excessive and should be reduced to 4 weeks. Prior to the amendment of the RRA 1976 to replace the wording of "reasonable time" with 8 weeks, advisers (including the Commission for Racial Equality) would request – and usually obtain - a reply for most Questionnaires within 2 – 3 weeks.

117. The purpose of the Questionnaire procedure is in part to enable a worker to decide whether to start a case at all. Time-limits in discrimination cases are very short, even when extended by the statutory dispute resolution procedures, which do not always apply. This is because cases frequently concern more than one incident of discrimination; clients tend to take advice regarding a recent incident, but an earlier incident often emerges which also needs to be kept in time. There is very rarely 8 weeks between the time a client seeks advice and when a tribunal claim must be submitted. This means there is inadequate time to get a reply to the questionnaire and many unnecessary cases may be started.

118. The extension of time by the statutory dispute resolution procedures does not help in this respect. Even where the procedures apply, it is undesirable that a worker should be forced to send a Questionnaire prior to going through grievance procedures which are designed to encourage a conciliatory approach. If the worker waits until a grievance has been heard, he or she is unlikely to have another 8 weeks before the extended time-limit expires.
119. Under the latest Employment Tribunal procedural rules, employers are expected to send their tribunal response within 28 days of receiving the worker's claim. The DLA recommends the same period applies to the Questionnaire procedure. Otherwise its purpose is defeated.

Coming of Age: Response form

We welcome your views on the documents contained in this consultation pack. They will help us finalise legislation to tackle age discrimination. This questionnaire:

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

The consultation closes on Monday 17 October 2005. Please let us have your response by that date. Owing to the interest that is likely to be generated in this exercise, we shall only be able to acknowledge receipt of your comments if you send them by email.

Please fill in your name and address, or that of your organisation if relevant. You may withhold this information if you wish, but we will be unable to add your details to our database for future DTI consultation exercises.

Name	Discrimination Law Association
Organisation (if applicable)	Discrimination Law Association
Address	PO Box 6715 Rushden, Northamptonshire
Postcode	NN109WL

Confidentiality and data protection

Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please tick this box.

Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

Access to information held by or on behalf of DTI is governed by the Freedom

of Information Act 2000. Any requests for information received by DTI in relation to this Consultation will be administered accordingly.

We will handle any personal data you provide approximately in accordance with the Data Protection Act 1998.

You or your organisation

We are committed to open consultation. Questions in this first section will enable us to have a better understanding of who has responded to this exercise.

Q1a	Which county are you in? UK	
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Q1b	In what capacity are you responding?	
	As an individual (After answering please go to Q3a)	<input type="checkbox"/>
	On behalf of an organisation (After answering please go to Q2a)	<input type="checkbox"/>
	As an employer (After answering please go to Q2b)	<input type="checkbox"/>
	Other	<input type="checkbox"/>

Q2a	Is your organisation (please tick the boxes that apply to your organisation)	
	A Local Authority	<input type="checkbox"/>
	A Health Authority	<input type="checkbox"/>
	A voluntary organisation of, or for, younger people	<input type="checkbox"/>
	A voluntary organisation of, or for, older people	<input type="checkbox"/>
	A statutory body	<input type="checkbox"/>
	A Government Department or Agency (please tick box & describe)	<input type="checkbox"/>
	<div style="border: 1px solid #ccc; height: 40px; width: 100%;"></div>	
	An organisation representing employers	<input type="checkbox"/>
	A professional association	<input type="checkbox"/>
	A trade union/staff association	<input type="checkbox"/>
	A university	<input type="checkbox"/>
	A college of further education	<input type="checkbox"/>

	Other training provider	<input type="checkbox"/>
	Other – please specify An association of discrimination lawyers. See p1 of our submission.	<input checked="" type="checkbox"/>

Q2b	If responding as an employer, how many people do you employ?	
	Between 1 and 14 employees	<input checked="" type="checkbox"/>
	Between 15 and 49 employees	<input type="checkbox"/>
	Between 50 and 249 employees	<input type="checkbox"/>
	250 employees or more NO	<input type="checkbox"/>

Q2c	If responding as an employer please indicate which sector best describes you:	
	Electricity, gas and water supply	<input type="checkbox"/>
	Construction and/or building design	<input type="checkbox"/>
	Communications	<input type="checkbox"/>
	Wholesale and retail trade	<input type="checkbox"/>
	Leisure - hotels, restaurants, pubs	<input type="checkbox"/>
	Leisure - cinemas, theatres, museums	<input type="checkbox"/>
	Leisure – other	<input type="checkbox"/>
	Distribution / Transport	<input type="checkbox"/>
	Financial and/or business services	<input type="checkbox"/>
	Legal services	<input type="checkbox"/>
	Advice and/or information services	<input type="checkbox"/>
	Public administration	<input type="checkbox"/>
	Education / training	<input type="checkbox"/>
	Health and social work	<input type="checkbox"/>
	Charity / voluntary work	<input type="checkbox"/>
	Other (please tick box & specify)	<input type="checkbox"/>

	<div style="border: 1px solid black; padding: 5px;"> <div style="float: right; text-align: right;"> <input type="button" value="↑"/> <input type="button" value="↓"/> </div> <div style="clear: both;"></div> </div>	
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Chapter 3. Outlawing age discrimination

The Age Regulations will apply to all workers and to people who apply for work. In addition they will cover access to vocational training. The Age Regulations will prohibit direct and indirect age discrimination, harassment and victimisation.

Q3a	Is our explanation of who will have rights and responsibilities under the Age Regulations clear in the Consultation document?	
	Yes	<input checked="" type="radio"/>
	No	<input type="radio"/>
	No strong feelings either way	<input type="radio"/>
	<p>If no, please specify</p> <div style="border: 1px solid black; padding: 5px;"> <p>There are parts of the document which do not reflect the regulations themselves - these areas are detailed further in our written submissions.</p> </div>	

Q3b	Will our approach give rise to significant practical difficulties?	
	Yes	YES
	No	<input checked="" type="radio"/>
	No strong feelings either way	<input type="radio"/>
	<p>If yes, please specify</p> <p>Please see the entirety of our attached written submission.</p>	

Q3c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input checked="" type="radio"/>
	No	NO

	No strong feelings either way	<input checked="" type="checkbox"/>
	If no, please specify Please see our attached written submission. On a number of points, the draft Regulations inadequately implement your stated policy objectives.	

Chapter 4. Justifying age discrimination

In most situations, it will be unlawful to treat people differently on the grounds of age. However, employers and others with obligations under the Age Regulations will be able to justify doing so, but only by reference to specific aims and only if it is appropriate and necessary in the particular circumstances ("objective justification"). They will have to be able to produce supporting evidence if challenged: assertions will not be enough.

Q4a	Is our explanation of objective justification clear in the consultation document?	
	Yes	<input checked="" type="checkbox"/>
	No	NO
	No strong feelings either way	<input checked="" type="checkbox"/>
	If <u>no</u> , please specify It is unclear because (1) there is no clarity as to what will in practice suffice as an objective justification; (2) the numerous lists of exceptions, examples, different measures of objectivity and GORs, with different tests to be satisfied, mean that all but the most specialist discrimination lawyers will find the Regs impossible to understand, remember and apply. Please see attached submissions	

Q4b	Will our approach give rise to significant practical difficulties?	
	Yes	YES
	No	<input checked="" type="checkbox"/>
	No strong feelings either way	<input checked="" type="checkbox"/>
	If yes, please specify Please see comments at 4a above and 4c below. In particular, there is no clarity whatsoever as to what type of defence or what evidence will suffice to justify direct age discrimination and how strong it will need to be. This is a recipe for many years of uncertainty, continuing or increased age discrimination and/or expensive litigation. Please see attached submission	

Q4c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input checked="" type="checkbox"/>

	No	NO
	No strong feelings either way	<input type="checkbox"/>
	<p>If <u>no</u>, please specify Please see comments at 4a and 4b above. In addition, although the government says it intends exceptions to direct discrimination to be extremely rare, there is nothing in the Regs that ensures this. The matter is entirely left to the uncertainty of interpretation by the tribunals and courts, which may involve many years of expensive litigation to the higher courts before clarity is achieved, which even then may be a lower threshold than the government desires. Please see written submissions for further detail</p>	

The question arises whether separate provisions on genuine occupational requirements and positive action are necessary bearing in mind that the possibility of objectively justifying age-based requirements will be available.

Q4d	Do you think that there should be a separate provision on genuine occupational requirements in the Age Regulations (see paragraph 4.2.4 of the consultation document)?	
	Yes	<input type="checkbox"/>
	No	NO
	No strong feelings either way	<input type="checkbox"/>
	<p>If <u>yes</u> or <u>no</u> please specify Please see our written submission. There are far too many lists, exceptions, exclusions and examples, with different tests to be satisfied. There is lack of clarity between proposed justification of direct discrimination and proposed statutory exceptions, including GOR, when the prohibition of discrimination will not apply.. No one but the most specialist discrimination lawyers will understand the law. It should all be simplified.</p>	

Q4e	Do you think that there should be a separate provision on positive action in the Age Regulations (see paragraph 4.2.5 of the consultation document)?	
	Yes	YES
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	<p>If <u>yes</u> or <u>no</u> please say why Provided it applies at a high threshold, it is necessary to enable years of discrimination to be corrected. Moreover, it parallels similar provisions in other discrimination legislation.</p>	

Chapter 5. Exemptions

5.1 Service-related pay and benefits

Length of service is often used as a criterion for pay and non-pay benefits. This can amount to indirect discrimination because some age groups are more likely to have the necessary length of service than others. Such benefits are used widely to motivate staff, reward loyalty, and recognise experience. We intend to exempt any length-of-service requirement of five years or less, and any benefit which mirrors a statutory benefit. In addition, benefits that depend on length of service will be exempt if they are to recognise experience, loyalty or maintain motivation and the employer concludes that there is a benefit in rewarding loyalty, encouraging motivation or from recognising the experience of employees.

Q5a	Is our explanation of pay and non-pay benefits under the draft Age Regulations clear in the consultation document?	
	Yes	<input type="checkbox"/>
	No	NO
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify Not very clear and complexity makes it worse – see our full submission	

Q5b	Will our approach give rise to significant practical difficulties?	
	Yes	YES
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>yes</u> , please specify See our comments in our submission. Whereas the 5 year exemption is clear, the additional set of rules regarding benefits is superfluous to the general justification of indirect discrimination to discrimination and makes things over-complex.	

Q5c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify	



5.2 National Minimum Wage

Q5d	To ensure that the Age Regulations do not discourage employers from using the development rates of the NMW, they will allow for certain exemptions. As they stand do the Age Regulations achieve this effect?	
	Yes	<input checked="" type="checkbox"/>
	No	NO
	No strong feelings either way	<input checked="" type="checkbox"/>
	If <u>no</u> , please specify We do not agree with your approach to the NMW or your assumptions of what will influence employers. See our submission.	

Chapter 6. Retirement

There will be a default retirement age of 65. This means that it will not constitute age discrimination if employers retire employees at or above the age of 65 where there is a genuine retirement. Employers will be free to continue employing people beyond the default age. Lower retirement ages will be possible if the employer can objectively justify them. There will be a new procedure for compulsory retirement of employees - the "duty to consider" procedure. This will allow employees to request working beyond a compulsory retirement age. If the employee makes such a request, the employer will have to consider it seriously.

Q6a	Is our explanation of retirement (including retirement ages, "planned retirement" and the duty-to-consider procedure) under the draft Age Regulations clear in the consultation document?	
	Yes	<input checked="" type="checkbox"/>
	No	NO
	No strong feelings either way	<input checked="" type="checkbox"/>
	If <u>no</u> , please specify	

	Mostly it is clear though extremely complex. However, there are a couple of areas of lack of clarity. Please see our general comments in our written submissions.
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Q6b	Will our approach give rise to significant practical difficulties?	
	Yes	YES
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>yes</u> , please specify Please see our extensive comments in our written submission.	

Q6c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input type="checkbox"/>
	No	NO
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify (1) Your policy of eliminating age discrimination is largely defeated by maintaining a default retirement age and by such age being 65 rather than 70. (2) Your policy of encouraging a change in attitude by employers is defeated by inadequacies of the duty-to-consider procedure and its remedies, as set out in our written submission	

Q6d	Are the various deadlines and time periods set out in 6.2 and 6.3 of the consultation document for planned retirement and the new "duty to consider" procedure appropriate and workable?	
	Yes	<input type="checkbox"/>
	No	NO
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please say why The time-scale for starting the process of notification and discussion of continued working is vastly inadequate because irreversible forward planning will already have been committed to by both employer and employee. See our detailed comments in our written submission.	

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Chapter 7. Occupational Pensions

Many rules in pension schemes are age-based and necessary for their proper operation. The regulations will effectively exempt most age-related rules. Scheme managers will be able to retain other age-related rules of schemes, provided they can be objectively justified. The aim is to ensure that age discrimination legislation does not undermine the provision of occupational pensions, or interfere unduly with their normal operation.

Q7a	Is our explanation of the occupational pension scheme rules under the draft Age Regulations clear in the consultation document?	
	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify <div style="border: 1px solid black; width: 95%; height: 100%; margin: 5px;"> <div style="position: relative;"> <div style="position: absolute; top: -10px; right: -10px;">▲</div> <div style="position: absolute; top: 10px; right: -10px;">▼</div> <div style="position: absolute; bottom: -10px; left: -10px;">◀ ▶</div> </div> </div>	

Q7b	Will our approach give rise to significant practical difficulties?	
	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>yes</u> , please specify	

	<div style="border: 1px solid black; width: 95%; height: 95%; margin: 5px;"> <div style="position: relative;"> <div style="position: absolute; top: -10px; right: -10px;">▲</div> <div style="position: absolute; bottom: -10px; right: -10px;">▼</div> <div style="position: absolute; left: -10px; bottom: -10px;">◀ ▶</div> </div> </div>
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Q7c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input checked="" type="radio"/>
	No	<input type="radio"/>
	No strong feelings either way	<input type="radio"/>
	If <u>no</u> , please specify <div style="border: 1px solid black; width: 95%; height: 100%; margin: 5px;"> <div style="position: relative;"> <div style="position: absolute; top: -10px; right: -10px;">▲</div> <div style="position: absolute; bottom: -10px; right: -10px;">▼</div> <div style="position: absolute; left: -10px; bottom: -10px;">◀ ▶</div> </div> </div>	

Chapter 8. Changes to other legislation

The current upper age limit of 65 for unfair dismissal and redundancy rights will be removed. This means that older workers will get the same rights to claim unfair dismissal or to receive a redundancy payment as younger workers. However, retirement will not constitute unfair dismissal if it is after 65 (or a lower retirement age, if justified) and the employer has followed the "duty to consider" procedure.

8.1 Statutory redundancy payments

Q8a	Is our explanation of the statutory redundancy payments scheme under the Age Regulations clear in the consultation document?	
	Yes	<input checked="" type="radio"/>
	No	<input type="radio"/>
	No strong feelings either way	<input type="radio"/>
	If <u>no</u> , please specify	

	Please see our comments in our written submission regarding statutory redundancy pay.
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Q8b	Will our approach give rise to significant practical difficulties?	
	Yes	<input checked="" type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>yes</u> , please specify Please see our comments in the written submission regarding statutory redundancy pay.	

Q8c	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input type="checkbox"/>
	No	<input checked="" type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify Please see our comments regarding statutory redundancy pay.	

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Chapter 8.2 Unfair dismissal

Q8d	Is our explanation of unfair dismissal under the Age Regulations clear in the consultation document?	
	Yes	<input type="checkbox"/>
	No	NO
	No strong feelings either way	<input checked="" type="checkbox"/>
	If <u>no</u> , please specify Very hard to follow. We were also uncertain whether the one year qualifying period is to stand for automatic unfair dismissal based on failure to follow the notice to consider procedure. See our written submission.	

Q8e	Will our approach give rise to significant practical difficulties?	
	Yes	YES
	No	<input type="checkbox"/>

	No strong feelings either way	<input type="checkbox"/>
	If <u>yes</u> , please specify See our written submission generally.	

Q8f	Do the draft Age Regulations reflect our policy, as set out in the consultation document, effectively?	
	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify	
	<div style="border: 1px solid black; height: 150px; width: 100%;"></div>	

Chapter 9 Support and legal action

The process for pursuing legal action will mirror the procedures for pursuing legal action under other strands of equality legislation, however we have introduced specific burden of proof rules for unfair dismissal.

Q9a	Does the consultation document explain clearly the requirements for proving discrimination, harassment and victimisation?	
	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No strong feelings either way	<input type="checkbox"/>
	If <u>no</u> , please specify	
	<div style="border: 1px solid black; height: 150px; width: 100%;"></div>	

Q9b	Do the draft Age Regulations reflect our policy as set out in the consultation document, effectively?	
	Yes	<input type="radio"/>
	No	<input type="radio"/>
	No strong feelings either way	<input type="radio"/>
	If <u>no</u> , please specify <div style="border: 1px solid #ccc; height: 150px; width: 100%;"></div>	

Chapter 10 Benefits and costs

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

Q10	Please let us have your views on the estimate of costs and benefits summarised in chapter 10. We welcome comments on the methodology or assumptions used in the analysis. A more detailed regulatory impact assessment is available at www.dti.gov.uk/er/equality/age	
	<div style="border: 1px solid #ccc; height: 150px; width: 100%;"></div>	

Other comments

Q11	Do you have any other comments about the proposals in the consultation document <i>Coming of Age</i> or on the consultation exercise itself?	
<p>Overall, we find these Regulations inordinately complex, both in terms of their content and in their drafting. We speak as specialist discrimination lawyers and we are very concerned as to the difficulty of conveying such a myriad of different rules, lists, exceptions and examples to more generalist advisers, let alone to employers and workers. We strongly recommend simplification.</p> <p>Secondly, we would reiterate our strong disappointment that a default retirement age has been retained and that it is set at 65. We believe that this, together with the availability of a general defence for direct discrimination, significantly undermines the effectiveness of the entire legislation. In our view the current proposals fall short of what is required of the UK under the EU Framework Employment Directive 2000/78/EC, and we are not persuaded that they are capable of achieving a real and measurable reduction in discrimination on grounds of age.</p> <p>We believe</p> <ul style="list-style-type: none"> - the complexity of the content and drafting; - the existence of areas where precise justifications required by the Directive are overlooked or not met; and - the unrestrained breadth of the defence to direct discrimination, will together lead to prolonged uncertainty, inadequate protection and expensive litigation. <p>For further and detailed comments, please see our full written submission, attached.</p>		

