

promoting  
equality of  
opportunity

Prohibiting Age Discrimination in  
Employment and Training

Legislation for Northern Ireland

Consultation by the

Office of the First Minister and Deputy First Minister

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This consultation represents another very significant step forward in delivering legislative protection from discrimination in Northern Ireland. For the first time discrimination on the grounds of age will be covered by legislation. We are committed to building on progress to promote equality of opportunity for all in our society and the proposals in this document further demonstrate that commitment.

We can all too quickly assume that age discrimination is only experienced by some sections of the population and not others. Age discrimination can happen to anyone. We must recognise and address this if we are to create and build prosperity for all in our society.

I recognise the valuable contribution of organisations representing the full span of the age sector as well as business organisations with both smaller and larger commercial interests in preparation of this document. This partnership approach to development of employment equality policy supports our objective of producing legislation which recognises issues of importance to the individual, business and society generally.

I am anxious to ensure that the necessary legislation is made in a timescale which ensures that the Employment Framework Directive's implementation deadline of December 2006 is achieved. I also believe that individuals, business and age sector organisations should have the maximum possible period of notice of what the new law will mean.

We are largely adopting the same approach to implementing the Framework Directive for age as we proposed in our earlier consultation on religion or belief and sexual orientation regulations. This will lead to greater coherence across all grounds of discrimination.

This consultation recognises an individual's rights to protection from employment practices which discriminate on the grounds of age. It also addresses the view that there may be circumstances or practices where it may be possible to objectively justify treating someone differently because of their age. This is discussed in detail in this consultation document and I would urge you to provide views and evidence on this issue. It is essential that we hear your views on this and on the other issues raised in this document before decisions are made on approach.

These Regulations will deal with employment and training issues. Consideration of policy options in relation to the provision of goods, facilities and services is continuing and will be included in the next stage of development of the equality agenda when we publish a single Equality Bill consultation.

I would urge you to consider carefully the proposals in this consultation and strongly encourage you to let me hear your views.

**John Spellar**

*Minister of State in the Northern Ireland Office*

# 1 purpose of this consultation

1.1 This consultation document is seeking views on our proposals for the implementation of the age strand of the EU Employment Framework Directive which deals with employment and training issues.

1.2 In particular, we are asking you to focus on an issue which is fundamental to the development of age discrimination legislation - whether in exceptional circumstances, treating people differently on the grounds of age can be objectively justified and whether such treatment should be reflected in the legislation.

1.3 We are seeking your views on this fundamental issue as well as other key questions. When you have considered the approach outlined in this document, we would ask you to provide comments on the proposals and where possible, evidence supporting your views.

## **How and when to comment**

1.4 This consultation started on 6th October 2003 and will continue until 23rd January 2004. You can comment on our proposals by completing the consultation response form, which we have enclosed with this document.

1.5 Please send your completed form to the address below before the closing date:

Carol McCabe  
Age Legislation Team  
Office of the First Minister and Deputy Minister  
Room E3.09  
FREEPOST 3900  
Belfast BT4 3BR

1.6 If you have access to the internet you can download a copy of the form from [www.ofmdfmni.gov.uk/equality](http://www.ofmdfmni.gov.uk/equality) and return it by email to [agelegislation@ofmdfmni.gov.uk](mailto:agelegislation@ofmdfmni.gov.uk).

1.7 We have included the relevant consultation questions at the end of each chapter to help you as you read through the consultation document. Please use the response form for your comments.

1.8 A summary version of the consultation document is also available on request in a range of languages and formats: Irish, Ulster Scots, Cantonese, audio tape, Braille or large print. If you need the information in a different format, or you do not wish to complete the questionnaire, please contact us to discuss how we can take account of your views.

2.1 Age discrimination blights employment opportunities for young and old alike. There is no room for it in the 21st Century when younger people are better trained and better qualified than ever before, and older people are living longer and have more active lives. We want employers to draw on the full range of skills and talents available to them from the whole of the working population. It is good for business, good for individuals and good for society.

2.2 We will implement the age strand of the European Employment Directive<sup>1</sup> in Northern Ireland by the end of 2006 to ensure that the Directive's deadline is met and also to ensure that Northern Ireland citizens are afforded the same protection against age discrimination as their GB counterparts. Age discrimination in employment and vocational training will then become unlawful.

### Proposals

2.3 The law will apply to all workers and self employed people and to people who apply for work. It will cover training in, and for, work. It will prohibit direct and indirect discrimination.

Those with new obligations are:

- a. employers;
- b. providers of vocational training<sup>2</sup>;
- c. trade unions, professional associations and employers' organisations - in relation to their membership as well as in their role as employers.

<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000

<sup>2</sup> "vocational training" has a wide meaning. It covers not only in-house training provided by an employer, but also courses or studies which provide training for jobs or professions – including most university degrees and many other further and higher education courses (for example, teacher training courses).

2.4 *Cross-cutting Issues:* In keeping with our planned single Equality Bill (SEB), we intend to be as coherent and consistent as possible across all the various strands of equality legislation. We therefore propose that who is covered by the legislation, indirect discrimination, harassment, victimisation, genuine occupational requirements, positive action and discrimination after employment is consistent where possible with legislation covering all other grounds.

2.5 *Direct Discrimination:* To finalise our approach to direct discrimination we wish to consult on whether there might be circumstances when treating people differently on the grounds of age could be objectively justified.

2.6 If such circumstances were to be recognised in legislation employers and others with obligations under the Directive would have to be able to:

- justify doing so only by reference to specific aims and only if it is appropriate and necessary in the particular circumstances; and
- produce supporting evidence - assertions would not be enough.

2.7 In paragraphs 2.8 - 2.15 (discussed in more detail in Chapters 6-10), are some issues which will be affected directly by the proposed age legislation. How they are dealt with in the legislation will depend to some extent on the outcome of the consultation on the Direct Discrimination, 'objective justification' issue outlined in other parts of this document.

2.8 *Retirement Age:* Retirement ages that employers set for employees will be unlawful under the legislation. As with justification for 'direct discrimination', we are seeking views however on whether the legislation should provide for employers, for objectively justifiable reasons, to be able to apply mandatory

retirement ages. They would only be able to do so by reference to specific aims (see Chapter 5) and only if their particular circumstances made it appropriate and necessary.

2.9 We are asking for comments on a default retirement age of 70, at or after which employers could continue to require employees to retire without having to justify their decision.

2.10 *Recruitment, Selection and Promotion:* Decisions about recruitment, selection and promotion should not normally be based on age. We are proposing that employers should not be able to apply an age limit to recruitment unless they can objectively justify doing so.

2.11 *Pay and Non-pay Benefits:* Similarly, we are seeking your views on whether the legislation should allow employers to provide pay and non-pay benefits based on length of service or experience if they can objectively justify doing so.

2.12 *Unfair Dismissal:* We are proposing that provisions relating to unfair dismissal should be changed so that employees can seek redress at any age, but retirement at an objectively justifiable retirement age could be a fair reason for dismissal.

2.13 We are also proposing that the calculation of financial compensation should be changed so that the basic award is no longer based on the employee's age.

2.14 The calculation of the award will continue to take account of the employee's length of service, which will still be limited to 20 years.

2.15 *Statutory Redundancy Payments:* We propose making a number of amendments to the statutory redundancy payments scheme in order to remove some age-related aspects.

### **Benefits and Costs**

2.16 Legislation on age discrimination is likely to result in increased participation rates for older and younger workers in the labour market in Northern Ireland. This will lead to a wider pool of workers whose abilities and talents better match the requirements of employers when recruiting and developing their staff. We believe there will be net economic and social benefits from the legislation.

2.17 In the medium and long term, benefits will outweigh costs to a net value of £30m to the Northern Ireland economy. However, our assessment shows that initially costs are greater than benefits. This is because we have necessarily omitted some significant benefits that are difficult to quantify because assessing labour market conditions in 2006, when the legislation comes into force, and beyond is problematic. Additionally, many of the costs reflect one-off costs which are concentrated in the first couple of years of legislation, whereas benefits accrue over a longer period.

2.18 Chapter 11 summarises our Regulatory Impact Assessment. The full version is available from [www.ofmdfmi.gov.uk/equality](http://www.ofmdfmi.gov.uk/equality).

### **Next Steps**

2.19 We will develop draft regulations in the light of responses to this consultation and consult on them in 2004 with a view to making them as soon as possible after that. Guidance will be developed and published when the regulations have been made.

2.20 The legislation will come into force in late 2006, giving employers time to complete preparations for their new obligations, and it will allow individuals to familiarise themselves with their new rights.

3.1 The Programme for Government set out the Executive's commitment to producing a single Equality Bill for Northern Ireland. An initial consultation document, *Promoting Equality of Opportunity*, which was issued in 2001, set out proposals and sought views on the harmonisation and extension of equality legislation in Northern Ireland.

3.2 It had been the intention that the age strand of the EU Employment Framework Directive would be implemented through the single Equality Bill. However it has been decided that the age strand of the Directive should be implemented by means of Regulations under the European Communities Act 1972. This will ensure that protection against age discrimination is introduced for NI citizens in the same timescale as their GB counterparts whilst work on the development of the SEB continues.

3.3 In implementing the Directive by Regulations we must confine the legislation to the focus of the Directive i.e. employment and training. The Regulations cannot extend protection to the provision of goods, facilities and services (GFS) as this is outside the scope of the Directive. This issue will be considered in the context of the single Equality Bill on which consultation will issue in the near future.

### **The EU Employment Framework Directive and the Northern Ireland Equality Legislation Programme**

3.4 The Directive was adopted under Article 13 of the EC Treaty by the UK and other Member States in 2000 and establishes an anti-discrimination "principle of equal treatment" in the context of sexual orientation, religion or belief, disability and age.

3.5 The Directive has to be implemented by 2 December 2003 in relation to sexual orientation and religion or belief, and by 2 December 2006 in relation to disability and age. A copy of the Directive can be found by using the search facility at:

[http://europa.eu.int/eur-lex/en/search/search\\_lif.html](http://europa.eu.int/eur-lex/en/search/search_lif.html)

3.6 The Consultation Document "*Promoting Equality of Opportunity - Implementing EU Equality Obligations in Northern Ireland*" issued in January 2003 outlined the implications for Northern Ireland of the Employment Framework Directive in the areas of sexual orientation, religion and belief, and disability. It also included proposals for implementing the Race Directive and amendments necessary to implement European Court decisions.

3.7 This consultation is the next stage in the process of implementing the Framework Directive - focusing on age aspects - and is also part of the progressive development of NI equality legislation leading to a single Equality Bill.

### **Our approach to developing specific proposals**

3.8 Implementing the Directive is a significant undertaking. Our proposals in this consultation document aim to:

- a. strike the right mix between new legislation and other measures designed to support culture change;
- b. achieve as coherent an approach as possible across all the equality strands to progress towards a consistent level of protection for individuals; and
- c. keep costs for business to a minimum.

3.9 Clear and accessible guidance will be important in ensuring that everyone understands the law and their rights and responsibilities. Guidance will be developed when the legislation is finalised and the role of the Equality Commission for Northern Ireland is confirmed.

3.10 The consultation "*Implementing EU Equality Obligations in Northern Ireland*", which ran from January to April 2003, sought views on proposals covering religion and belief, sexual orientation, race, disability, and sex discrimination. Some of those proposals are also relevant to age and are discussed in Chapter 4 of this document.

### **Legislation**

3.11 In the consultation referred to in paragraph 3.10 we explained that we intended to bring the sexual orientation and religion and belief strands of the Directive into force by means of Regulations under section 2(2) of the European Communities Act 1972. That is our intention for age employment and training legislation also. This legislative approach is compatible with the requirements of the Directive, meshes with the development of wider issues being taken forward by the single Equality Bill and reflects the most efficient use of available legal and administrative resources to complete a complex range of legislative initiatives.

### **Timetable**

3.12 The age provisions will come into force in late 2006, meeting the requirements of the Directive. We are aiming to make Regulations in 2005 to allow time for preparation before the legislation comes into force. We will consult on the draft Regulations in 2004.

4.1 There are a number of employment issues that are common to all grounds of discrimination in employment - race, gender, sexual orientation, religion or belief, political opinion, disability and age. These issues, *indirect discrimination, harassment, victimisation, positive action, genuine occupational requirements*, were discussed earlier this year in "*Promoting Equality of Opportunity - Implementing EU Equality Obligations in Northern Ireland*".

4.2 We made it clear then that our approach, as we progress towards single equality legislation, is to be as coherent and consistent as possible across all strands of equality legislation and what began in the previous Regulations consultation is now continuing with these proposals relating to age. Who will be affected by the legislation is referred to below and is also discussed in Chapter 5 of this document.

### **Direct Discrimination**

4.3 The Employment Framework Directive states that direct discrimination occurs where "one person is treated less favourably than another is, has been or would be treated in a comparable situation" on any of the grounds of discrimination covered by the Directive.

4.4 In other words, discrimination means a difference of treatment simply because of a person's age, rather than (for example) a person's competence to do a particular job. We propose to use the same direct discrimination definition in Regulations on age as that in the race, religion and belief, disability and sexual orientation legislation.

4.5 The Directive does however provide an option for Member States' implementing legislation to permit, for the age ground, practices that otherwise amount to direct discrimination provided they are objectively justified. As stated at the opening of this document, this is a fundamental issue in this consultation and is dealt with in more detail in Chapter 5.

### Indirect Discrimination

4.6 A coherent approach to indirect discrimination will make it easier for employers, for example, to identify practices which require change. It will also make the law more straightforward for people who believe they are treated unfairly on two or more grounds.

4.7 For age we will follow the test for indirect discrimination as set out in the Employment Directive. Again, this will be the same approach as that proposed in sexual orientation, religion and belief, and gender legislation. Paragraph 5.23 discusses indirect discrimination in more detail.

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

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

### Harassment

4.8 We will make harassment unlawful. As for other equality grounds, we propose to provide that anyone making a complaint of harassment will need to show:

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

4.9 An employer could be liable at a Tribunal for taking inadequate action to prevent harassment, as well as the person whose behaviour is the subject of the complaint. Tribunals should be guided by what is "reasonable" in deciding whether behaviour amounted to harassment. However, to avoid the "reasonable person test" reinforcing rather than challenging prejudice, we will ensure that Tribunals take into account the perception of the complainant as well as all the other relevant circumstances.

### **Victimisation**

4.10 We are proposing that victimisation is defined as happening when a person is treated unfairly because they have been involved in making a complaint about discrimination. This would apply for example, if an employer treats an employee less favourably because that employee makes an allegation of discrimination, or initiates proceedings against the employer, or supports another person's case.

4.11 Protection will not be extended to people who knowingly make false allegations or statements or who knowingly give false information.

4.12 This approach to tackling victimisation will make the law more straightforward for people who feel that they have been victimised and make it easier for employers, for example, to identify practices which require change. Individuals will be protected in the same way, whatever the discrimination ground - whether it is age, religion or belief, disability or sexual orientation.

### **Genuine Occupational Requirements**

4.13 In most jobs personal characteristics - such as someone's age - will be immaterial. However, people work in a wide variety of circumstances and, in some cases, having a particular characteristic will be a genuine occupational requirement. This is already recognised in legislation on race, gender, sexual

orientation, religion or belief, political opinion and disability. Age legislation will also have the flexibility to recognise this, however, we expect there to be very few cases where age is genuinely an occupational requirement.

4.14 Informal consultation to date has not provided substantive evidence supporting where this flexibility is needed. Whilst it is not planned to include a list of 'exempted occupations' in the legislation, the principal of a genuine occupational requirement should be provided for.

4.15 Employers will have to specify how and why a particular age characteristic is an essential requirement for the job. Legislation will make it clear that occupational requirements must be genuine and be narrowly defined by employers.

4.16 Employers cannot use these provisions to get round the law - by discriminating on other grounds, for example. If potential candidates believe that a job description is discriminatory by referring to a particular characteristic, they will be able to complain as usual. It will then be for the employer to demonstrate to an Industrial Tribunal that the characteristic is genuinely needed for the particular job.

### **Positive Action**

4.17 There is evidence to suggest that people in certain age groups can be at a disadvantage in the workplace. We believe that positive action can help to change this culture. Employers and others with responsibilities under the Directive (see paragraph 2.3) will have the flexibility to encourage people from age groups at a disadvantage in the workplace to apply for posts or to benefit from dedicated training.

4.18 We shall, therefore, extend the concept of positive action to also cover age, by providing that positive action should prevent or compensate for disadvantages linked to age. For example, it

might be that younger people are under-represented in an employer's workforce. The employer might encourage applications from younger people by advertising vacancies in publications aimed at a young age group, as well as in other publications. But the employer must not discriminate on grounds of age at interview and selection.

### **Discrimination after Employment or Training**

4.19 Although discrimination by a former employer or others with obligations under the Directive is relatively unusual, it can have far-reaching consequences such as preventing people from finding work elsewhere. We will outlaw this form of discrimination on grounds of age, as has been proposed for other grounds.

4.20 Cases of this type are most likely to involve discriminatory references or a refusal to provide a reference for discriminatory reasons. This kind of discrimination is most likely to occur in the months after someone leaves a job. We will make discrimination after employment or training unlawful where there is a close connection to the former employment.

### **Making a Complaint**

4.21 People who believe that they have been treated unfairly in employment because of their sex, race or disability currently have three months in which to lodge a complaint with the Industrial Tribunal. Those who believe they have been discriminated against because of their religion or political opinion have 13 weeks to lodge a complaint at the Fair Employment Tribunal. The Tribunal hears the case in the first instance.

4.22 It makes good sense that claims of discrimination at work on the new grounds of age should be handled in the same 3 month period. Industrial Tribunals will hear cases of age discrimination in employment. For students in further and higher education complaints will be made to the County Court.

**Cross-cutting Issues**

If you have any comments on the proposals in this chapter please set them out in the response form.

**General**

If you have any other points to make that were not covered by these proposals, please set them out in the space provided on the response form.

### **Who will be affected?**

5.1 We want to consider how best to prohibit unfair practices based on discriminatory attitudes or inaccurate assumptions in order to remove the barriers which people of all ages face if they want to work, or undertake vocational training<sup>3</sup>, or join professional associations and trade unions. That means combating age discrimination through legislation.

5.2 Whilst this would outlaw direct and indirect discrimination this does not mean that employers have to recruit, promote, retain or train people who are not competent, capable and available to perform the essential functions of the post concerned or to undergo relevant training.

### **Who will be protected?**

5.3 Such a law will protect:

- a. people who are working, whether they are directly employed, or working under another type of contract, such as agency workers and self-employed people;
- b. people who apply for work;
- c. office holders appointed by the Crown and some other paid office holders (these can include company directors, members of some independent public bodies, clergy and judges);
- d. people undertaking or applying for employment related training;
- e. people undertaking or applying for courses in further and higher education institutions, but not in schools;
- f. in some circumstances, people who have left work, or employment related training, or further and higher education institutions;
- g. people who are members of, or who apply to join, trade unions or trade or professional bodies.

<sup>3</sup>See footnote at paragraph 2.3

5.4 Unpaid voluntary work will not be covered.

### **Who will have new obligations?**

5.5 Those with new obligations will include:

- a. employers;
- b. providers of vocational training<sup>4</sup>;
- c. trade unions, professional associations, and employers' organisations - in relation to their membership as well as in their role as employers.

### **What is covered?**

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

5.7 *Indirect discrimination* happens when a policy or practice applies to everyone but causes disadvantage to a certain group (such as younger or older people). Indirect discrimination is often inadvertent and may be justified in certain circumstances.

### **Differences of treatment on the grounds of age**

5.8 Age discrimination would be outlawed. Decisions on selection, recruitment, promotion, training needs etc should be made on the basis of merit and competence and not because the person has reached an arbitrary chronological age.

5.9 However, the Directive<sup>5</sup> provides an option for Member States' implementing legislation to permit practices that otherwise amount to direct discrimination where they are objectively justified by reference to specific aims<sup>6</sup> which are **appropriate and necessary**.

<sup>4</sup> See footnote at paragraph 2.3

<sup>5</sup> Article 6.1

<sup>6</sup> The Directive says "objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary"

5.10 Article 6 contains an illustrative list of types of differences of treatment that may be justified, including:

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

5.11 Making use of this provision is not a requirement within the Directive but an option for Governments to provide an exemption to the definition of direct discrimination for the age ground.

5.12 As stated previously, this issue is fundamental to the development of policy on age discrimination and to the preparation of the legislation.

5.13 For that reason we wish to consult on whether in Northern Ireland, use should be made of this option by particularly focusing on whether there might be exceptional circumstances when differences of treatment - or exceptions to the general rule of non-discrimination on the grounds of age - might be able to be justified.

### **What you said in consultation**

5.14 Our informal consultations, as we developed policy on age, have tended to show a general acceptance of competence-based approaches to employment practices rather than age-based ones. Business organisations representing a significant number of businesses, however, have indicated that there are some age-based employment practices, which they would like to see retained in certain circumstances, including:

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

5.15 It has also been indicated that there are some age-based policies associated with further and higher education which may need to be retained.

5.16 We do not want to outlaw initiatives that improve opportunities for people to enter or return to work or training, through New Deal for example. It is also vital that businesses must be able to operate productively.

### **Our Proposed Approach**

5.17 The decision on whether to permit, within the legislation, practices which can be objectively justified will be made following this consultation. To facilitate responses from both those who favour utilising the option and those who do not, we have included examples of differences of treatment which have arisen in our informal consultation locally and with officials in GB.

5.18 Under Section 75 of the NI Act 1998 we must have due regard to the need to promote equality of opportunity in developing our policy on age. Further detail on our statutory equality obligations is outlined in Chapter 13.

5.19 If the legislation were to permit employers, providers of vocational training and others with obligations under the Directive to adopt an age-based approach they would have to be able to justify it - at an Industrial Tribunal, if challenged. It would not simply be a matter of asserting that their age-based policy is necessary. In line with Article 6 of the Directive, they would have to justify it, with evidence, by reference to:

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

5.20 The sort of specific aims which have been put forward as justifying differences of treatment in exceptional circumstances include:

- a. health, welfare and safety - for example, the protection of younger workers as already recognised in other legislation;
- b. facilitation of employment planning - for example, where a business has a number of people approaching retirement age at the same time;
- c. the particular training requirements of the post in question - for example where the post might require a lengthy period of theoretical and practical training where the candidate's 'post-training' employment is unlikely to be sufficient to recoup the business investment;
- d. encouraging and rewarding loyalty;
- e. the need for a reasonable period of employment before retirement – for example, an employer who has objectively justified a retirement age of 65 might decline to employ someone only a few months short of 65 if the need for the cost and length of training meant that the applicant would not be sufficiently productive to recoup that investment in the period before retirement;
- f. financial planning - for example, access to vocational training may be influenced by the level of financial resources available and the targeting of resources on particular groups to facilitate entry into the labour market.

5.21 It is vital to hear your views on these aims. Do they accurately reflect the exceptional circumstances described in informal

consultation to justify treating people differently on the grounds of their age? Is there evidence to support the business case for needing to permit such differences of treatment? Is there evidence to challenge the business and training providers' needs to continue to permit difference of treatment?

5.22 Subsequent chapters discuss specific practices in detail:

- a. retirement age;
- b. unfair dismissal and redundancy;
- c. pay and non-pay benefits based on "seniority"; and
- d. age limits for recruitment, selection and promotion.

### **Indirect Discrimination**

5.23 Indirect discrimination arises when:

- a. an employer applies an apparently neutral provision equally to employees, prospective employees or others protected within the Directive (see paragraph 5.3); but
- b. it puts people of a particular age at a particular disadvantage; and
- c. an individual can show that he/she has suffered that disadvantage.

5.24 Indirect discrimination would be unlawful except where it can be justified objectively. In contrast to direct discrimination, there is no need for the Member State to specify the specific aims that employers can use if challenged on indirect discrimination. Employers and others with obligations under the Directive, therefore, will not have to rely exclusively on the aims set out in paragraph 5.20.

5.25 Indirect discrimination is also discussed in paragraph 4.6, which explains that we propose taking the same approach for age as we are for gender, religion or belief, political opinion and sexual orientation.

### **Age Rules in Northern Ireland Legislation**

5.26 The Directive requires Member States to abolish any legislation contrary to the principle of equal treatment that affects employment or vocational training<sup>7</sup>. However, there is a specific exemption for state benefits or similar schemes<sup>8</sup> which means that rules of entitlement based on age can continue to apply to, for example, Job Seekers' Allowance, Job Grant and tax credits.

5.27 Other legislation contains a large number of age related limits and rules. Some of them can be objectively justified in line with the Directive's requirements - for example:

- a. National Minimum Wage. The Directive expressly envisages that different pay rates might be set for young people in order to promote their vocational integration. The goal of helping younger workers to find jobs in competition with older workers is consistent with the Directive; and
- b. the 1998 Working Time Regulations restriction on the number of hours worked by young people, which reflects European Community requirements on the health and safety of young people at work.

5.28 Where other legislation necessarily continues to specify age limits, we intend to provide an exemption for employers and others with obligations under the Directive so that they can continue to comply with the provisions of the other legislation. This might apply, for example, to a road haulage contractor whose lower age limit for employing lorry drivers is linked to the age limits for obtaining a large goods vehicle (LGV) licence<sup>9</sup>.

5.29 Chapters 7 and 8 discuss proposals for the unfair dismissal and statutory redundancy payments scheme provisions in Articles 141 and 191 of the Employment Rights (Northern Ireland) Order 1996.

<sup>7</sup> Article 16

<sup>8</sup> Article 3.3

<sup>9</sup> The Road Traffic (Northern Ireland) Order 1981 allows people aged 18 to drive Category C1 and people aged 21 to drive Category C + E vehicles.

## Questions

### Outlawing age discrimination

- a. Do you think that use should be made of the Directive's Article 6 option which permits practices which directly discriminate on the grounds of age, if those practices are objectively justified?
  - If yes, what is the evidence to support the business case for needing to permit such differences of treatment?
  - If no, what is the evidence to challenge the business need to continue to permit difference of treatment?
- b. Do you think there are practices, other than those listed in paragraph 5.14, that employers should be able to justify in certain circumstances?
  - If yes, what are those practices?
  - Do you disagree with the list at paragraph 5.14?
- c. Do you agree with the aims in paragraph 5.20?
  - If no, why?
- d. Do you think there are other aims which might justify differences of treatment?
  - If yes, what are they?

6.1 The Government is committed to supporting more flexible approaches to retirement. This has benefits for both employers and individuals by tackling the barriers that currently restrict individual choice and opportunities to stay in work longer. State Pension age at 65<sup>10</sup> will not change, because to increase it would adversely affect those people on the lowest incomes. However it is important that people have the choice to work beyond age 65. To support this the Government will increase the financial incentives for those people who want to defer receipt of their State Pension - and so would expect that people will start drawing their State Pension at a range of ages starting at 65.

6.2 In the Green Paper *Simplicity, Security and Choice: Working and Saving for Retirement* which was subject to UK-wide consultation, Government said:

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

6.3 That consultation also made it clear that Government is in favour of a more flexible approach to retirement. Both the Green Paper and the associated consultation - *Simplifying the Taxation of Pensions: Increasing Choice and Flexibility for All* - outlined Government proposals to change tax rules which hinder flexible retirement by preventing people from drawing an occupational pension whilst working for the employer paying the pension.

6.4 This is intended to encourage those who can to work longer - allowing the economy to benefit from the skills and experience of older workers<sup>11</sup>. In response to both those consultations which included views from Northern Ireland, this proposal received support from employers, industry representation groups, individuals and voluntary and consumer groups, all of whom acknowledged the real flexibility this would open up for employers and individuals.

<sup>10</sup>The State Pension age for women is being phased up to 65

<sup>11</sup>Paragraph 1.10 of *Taxation of Pensions: Increasing Choice and Flexibility for All*

6.5 This chapter discusses options for retirement ages under the Directive. It is clear from our informal consultations that retirement age is one of the most important issues.

6.6 Age discrimination is not acceptable. We could abolish employers' mandatory retirement ages since retirement is usually a straightforward matter of agreement between employer and employee. However mandatory retirement is only permissible under the Directive when it can be objectively justified.

6.7 From our discussions with businesses it is clear that employers tend to adopt one of two approaches. Some see retirement ages as a way to manage their workforce sensitively and with the minimum of bureaucratic burdens. That reflects concern that some employers have about appraisal systems and the potential indignity of dismissing older workers on competence grounds at the end of their careers. Other employers are moving away from mandatory retirement preferring more flexible approaches to help retain valuable skills and expertise for longer - also recognising the indignity of requiring people to retire simply because they have reached a particular age.

6.8 Whilst many individuals want to retire when their unreduced pensions become payable, others want to be able to work longer to continue saving towards their retirement or simply because they enjoy working and remain competent to do so.

6.9 This consultation aims to explore the flexibility issue in more detail and therefore proposes that employees are allowed to pursue options for continuing in work beyond the traditional age for retirement. We want to consider further the extent to which employers might wish to continue to justify requiring their employees to retire. We are also seeking views on whether it is suitable for the Government to provide a default retirement age at 70 or above.

### **Background**

6.12 Northern Ireland, as the rest of the UK, does not have a national mandatory retirement age. However, 65 is commonly taken to be the national retirement age. This is because 65 is the age from which the state pension becomes payable to men (see also paragraph 6.16). The Employment Rights (Northern Ireland) Order 1996 also limits employees' rights in respect of unfair dismissal to the employer's normal retirement age or 65 if the employer does not have a normal retirement age.

### *Mandatory Retirement Ages*

6.13 Many employers have established their own mandatory retirement ages - typically 60 or 65, but there are variations. Retirement ages can be enforced currently because of the age limit for unfair dismissal and because there is no legislation prohibiting age discrimination.

6.14 Article 6 of the Directive provides the scope for Member States' implementing legislation to provide for exceptions to the general principle of non-discrimination on grounds of age if they are:

- a. objectively justified by reference to specific aims; and
- b. appropriate and necessary

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

### *Pension Scheme Ages*

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

6.17 We propose to take advantage of the Directive's provisions, which allow occupational pension schemes to set ages for admission or entitlement to retirement benefits<sup>12</sup>.

6.18 A normal pension age - that is, the date from which full scheme benefits are payable without actuarial reduction or enhancement<sup>13</sup> - is necessary for the operation of defined benefit schemes. It is not the same as a mandatory retirement age. Indeed the Government has separately announced its proposal to allow people to draw their occupational pension while continuing to work for the same employer<sup>14</sup>.

### **Other Countries' Approach**

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

6.20 We have looked at the approach taken by other countries that have outlawed retirement ages to see whether we could draw on their experiences.

6.21 Australia has outlawed retirement ages and does not have a default age. The implementation of their legislation appears to have progressed successfully but it is too recent to gauge the impact.

<sup>12</sup> Article 6.2

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

<sup>14</sup> *Simplicity, security and choice: Working and saving for retirement*

6.22 The context in the USA differs from our own in the UK:

- a. age discrimination legislation in the USA only covers employees above the age of 40. Employers can offer financial incentives to older employees to encourage them to retire. This practice would be difficult to justify under our legislation, which will cover all people in or seeking employment, as it discriminates against younger people;
- b. for many years US trade unions have pursued a campaign to secure full occupational pensions after 30 years' service. Accrual rates beyond 30 years are very low, so there are strong financial incentives to retire from a career at this point.

6.23 The experiences of other countries are clearly of interest to us but we need to implement an approach that is most appropriate to our own context.

### **Our Proposed Approach**

6.24 We believe, therefore, that a final decision on how to tackle this in the implementing legislation should not be made until we have analysed responses to and information obtained from this consultation. We are reflecting the approach to this issue outlined in the GB consultation issued by the Department of Trade and Industry (DTI), in light of the link between retirement and pensions. However, on the information we have at present we tend towards the view that the legislation should:

- make compulsory retirement ages unlawful; but also
- provide for employers, exceptionally, to be able to justify mandatory retirement ages by reference to certain aims set out in the implementing legislation, and according to their own circumstances.

6.25 We are also seeking views on whether:

- employers should be able to retire their employees compulsorily at or after age 70 without having to justify their decision (we refer to this as the default age).

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

6.27 Either approach might help the move towards a culture change already begun by employers themselves to focus on ability and not age.

6.28 The abolition of non-justified mandatory retirement ages would send a stronger signal. On the other hand, some businesses have said that allowing the default option of a retirement age of 70 might allow them to manage their workforces effectively and operate productively - providing them with more certainty when it comes to workforce planning.

6.29 Some businesses have argued that staff appraisal systems may not be sufficiently sensitive or objective to be able to tackle effectively the declining performance and productivity of some older workers. There may be implications for business and the resources they would have to deploy to manage an ageing workforce, and it might also raise health, welfare and safety issues for employees and the general public if they are put at risk. Others have argued that age is not a reliable indicator of ability or of risk, and that inclusion of a default age could help to perpetuate age discriminatory beliefs.

6.30 Most workers are likely to choose to retire at a point which meets their personal needs and while they are still competent in

their work. A default retirement age of 70 would kick in at the point when most workers will have alternative sources of income from the state pension and from occupational pensions.

6.31 A number of private sector employers are already seeking to remove their mandatory retirement ages completely. Others are moving their mandatory retirement age towards 70 or higher and giving more choice and flexibility to their employees in the preceding years. Both options are compatible with contemporary business practice. Consultation will help us to evaluate those points further, and the implications for effective business.

6.32 Employers who, exceptionally, believe they need an *earlier* retirement for their employees would have to justify it by reference to the specific aims listed in paragraph 5.20 and in relation to their specific circumstances, as supported by evidence.

#### *Unfair dismissal and the statutory redundancy payments scheme*

6.33 Article 141 of the Employment Rights (Northern Ireland) Order 1996 imposes an upper age limit on the right to claim unfair dismissal. Employees over the normal retirement age for their organisation (or if there is no such age, 65) are not entitled to claim unfair dismissal.

6.34 Article 191 of the Employment Rights (Northern Ireland) Order 1996 applies a similar age limit in respect of the Statutory Redundancy Payments scheme. Employees cannot claim redundancy payments if, at the date of their redundancy, they have reached their employer's normal retiring age (or in the absence of an earlier normal retiring age, the age of 65).

6.35 Chapters 7 and 8 discuss these provisions in the light of this chapter's discussion of retirement age.

### What this means in practice

*A large commercial airline requires cabin crew to retire at 60. Some cabin crew want to continue working for longer. If we were to proceed with either of our proposals on retirement age, the employer in this example who chose to set a mandatory retirement age would have to show why it was justified. They would have to do so by reference to the aims set out in paragraph 5.20.*

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

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

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

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

## Questions

### Retirement age

How powerful a signal do you think abolition of mandatory retirement age would send?

- a. If the legislation made mandatory retirement ages unlawful, to what extent do you think employers and employees would be unable to agree on when an employee would retire?
- b. Employers would only be able exceptionally to justify retiring employees on age grounds, or dismiss them for other fair reasons such as on failing competence grounds or as part of a non-age based redundancy measure. What do you think would be the implications and effect of this?
- c. Do you think that the aims set out in paragraph 5.20 are sufficient for employers to justify their particular retirement age?
- d. Do you think there are other reasons that might justify requiring someone to retire at a set age?
- e. Should the Government specify a default retirement age at which employers would be able to require employees to retire?
- f. Should the Government specify 70 as the default retirement age?
- g. If you are an employer do you think you would:
  - rely on the default age of 70 *or*
  - set a higher retirement age?

### Background

7.1 Employees have the right not to be unfairly dismissed. The Employment Rights (Northern Ireland) Order 1996 gives them that right. However, the Order prevents employees from complaining that they have been unfairly dismissed if:

- a. they have reached the normal retirement age for their job at the time of their dismissal, provided that the normal retirement age is the same for men and women; or
- b. in the absence of a normal retirement age for their job, or if a normal retirement age discriminates between men and women, they have reached the age of 65.

7.2 An employee cannot complain after the relevant age (except in limited circumstances) even if the reason for dismissal is not related to his or her age but is on other grounds, such as conduct or capability, which a younger employee would be able to challenge.

7.3 Employees who successfully claim unfair dismissal can be awarded financial compensation. However, the Employment Rights Order places age-related limits on one component of the compensation, known as 'the basic award'. The basic award is calculated as follows:

- a. half a week's pay per year of service up to the age of 21;
- b. one week's pay per year of service between ages 22 and 40; and
- c. one and a half weeks' pay per year of service between ages 41 and 65,

up to a statutory maximum of £260 per week.

7.4 Basic award compensation is progressively reduced, eventually to nothing, if dismissal takes place between the age of 64 and 65. The length of service on which the award is calculated is limited to 20 years.

7.5 More information about unfair dismissal is available from [www.delni.gov.uk/er/publications](http://www.delni.gov.uk/er/publications)

## **Our Proposed Approach**

### *Retirement / Unfair Dismissal*

7.6 The current rules are incompatible with the EU Employment Framework Directive and we are proposing that the Employment Rights (Northern Ireland) Order 1996 should be amended to allow employees to complain of unfair dismissal at any age. However, our proposals are planned to be consistent with the approach being discussed in Chapter 6 about retirement ages, i.e:

- a. a default retirement age of 70, if we decide to proceed with it; and
- b. employers' ability to specify a different retirement age if justified.

7.7 We propose that an employer who dismisses employees on grounds of retirement could defend the dismissal as fair if the employees have reached or exceeded:

- a. the employer's normal retirement age, which would have to be justified if under 70; or
- b. at the age of 70, in the absence of a normal retirement age.

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

### *Basic Award*

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

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

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

### *Length of Service Limit*

7.11 In keeping with GB's approach we propose that the limit of 20 years on the length of service that counts towards the basic award should be retained. Although older employees are more likely than younger ones to have accumulated more than 20 years service, removing the limit - and thus increasing the cost which employers risk incurring if they dismiss older employees and are found to have done so unfairly - would have the disadvantage of putting younger employees at greater risk of dismissal.

### What this means in practice

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

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

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

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

## Questions

### *Unfair dismissal*

a. Do you think that an employer who dismisses employees on grounds of retirement should be able to defend the dismissal as fair (see paragraph 7.7)?

If yes, or no, why?

b. Do you think that the age-related aspects of the basic award should be removed (see paragraph 7.9)?

If yes, or no, why?

c. Do you think that the limit of 20 years on the length of service that counts towards the basic award should be retained (see paragraph 7.11)?

If yes, or no, why?

### Background

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

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

8.2 Under the Contracts of Employment and Redundancy Payments (Pensions) Regulations (Northern Ireland) 1965, employers may also offset pensions or lump sums that are paid immediately on redundancy or within a short time after and that

meet certain specified conditions. The statutory redundancy payment due may be reduced or extinguished completely, according to the amount of the pension or lump sum payable. The potential impact is clearly confined to employees over pensionable age.

### **Our Proposed Approach**

#### *Service below the age of 18*

8.3 The original rationale for discounting service below the age of 18 was that employees should not stand to benefit until they were "established in the workforce". However, the impact of the provision is not confined to young people – for instance, an employee made redundant at age 36 after 20 years of service is entitled to a payment based on only 18 years (the period between ages 16 and 18 being discounted). A colleague made redundant at age 38 who began work at 18 is entitled to a payment based on the full 20 years.

8.4 We believe that there is no longer any valid rationale for this provision. We therefore propose to amend the legislation so that service below the age of 18 is no longer discounted for statutory redundancy payments purposes.

#### *Use of age as a factor in the payment calculation*

8.5 The weighting of payments in favour of older workers was motivated by a perception, at the time, that the adverse effects of being made redundant generally increased with age. However, younger workers can also be seriously affected by redundancy: they more commonly have young families, large mortgages and consequently heavy financial commitments. To the extent that older employees experience greater difficulty in finding alternative work, then this may be due, at least in part, to existing age discrimination.

8.6 It is no longer appropriate for age to be used as a factor in the payment calculation. We therefore propose that, in future, payments should be calculated on the basis of one week's pay (subject, as now, to the statutory upper limit) for each year of service, irrespective of age.

#### *Upper Age Limit*

8.7 The primary purpose of the statutory redundancy payments scheme is to ensure that employers compensate qualifying redundant employees for the loss of expected continued employment in the job. The main justification for the upper age limit has been that, once over the age of 65, or any lower normal retirement age for the job, employees' expectation of continued employment should cease or significantly diminish. Employees over the age of 64 receive a reduced amount for the same reason.

8.8 Such a rationale is inconsistent with the approach to retirement age we outline in chapters 5 and 6 of this document. However, removing the upper age limit altogether would not be appropriate:

- a. it would run contrary to the primary purpose of the scheme; and
- b. it could have the unwelcome effect of acting as a disincentive for employers to keep employees on beyond retirement age.

8.9 The upper age limit to for entitlement to a statutory redundancy payment will depend on the decision we make about retirement ages. Entitlement would either:

- end at the employer's normal retirement age for the job, which would have to be justified if under the default retirement age, if it is decided to have one; or

- end at the default age if one was set out in legislation and if the employer had no normal retirement age for the job and if it was decided not to set out a default age in legislation, or
- continue for as long as the person remained in employment - if the employer had no normal retirement age for the job and if we decided not to set out a default age in legislation.

8.10 We consider it would be valid to regard employees' legitimate expectation of continued employment as ceasing at these ages. If, in the light of this consultation, we decide against introducing a default retirement age, we envisage that statutory redundancy payment entitlement would continue indefinitely in the absence of a normal retirement age for the job.

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

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

8.12 Paragraph 8.7 explains that the primary purpose of the scheme is to ensure that employers compensate qualifying redundant employees for the loss of expected continued employment in the job. It does not compensate for "loss of rights in the job". However, the weighting of payments in favour of more senior employees appears to be a widely supported aspect of the scheme.

8.13 We have therefore concluded that it is appropriate that employers recognise, in the amount of any payment to which a redundant employee is entitled, the extent of that employee's past commitment to the business.

8.14 We believe that, by reference to this supplementary purpose, the use of length of service as a factor in the payment calculation remains justified and appropriate. We propose therefore to retain this provision. Other changes to the scheme will take place at the same time as the legislation implementing the age strand of the Directive.

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

8.15 The cap of 20 years on reckonable service is another well-established and accepted feature of the scheme. It constitutes a fair and equitable measure that is justified by the need to avoid imposing excessive financial burdens on employers and creating an unwelcome disincentive to the retention of longer-serving employees. We therefore propose to retain this aspect of the scheme.

*Pensions Offset*

8.16 The original justification for the Contracts of Employment and Redundancy Payments (Pensions) Regulations (Northern Ireland) 1965 appears to have been to avoid a situation whereby employers who had already contributed toward financial provision for their employees above pensionable age were then required to make redundancy payments to them as well. However, the existence of an upper age limit (which would remain, in modified form, under the proposals set out above) means that few employees over pensionable age are entitled to a statutory redundancy payment in any event.

8.17 This may perhaps explain why the Regulations have essentially fallen into disuse: within the last decade, the Secretary of State has received only one request from an employer to confirm that the relevant conditions for offsetting have been met, as is a prerequisite under the Regulations.

8.18 These Regulations now serve little or no useful purpose, and we propose to revoke them.

### What this means in practice

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

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

## Questions

### Statutory Redundancy Payments

- a. Should the statutory redundancy payments scheme be amended so that service below the age of 18 counts for qualification purposes and is included in the calculation?
- b. Should payments be calculated on the basis of one week's pay (subject, as now, to the statutory maximum) for each year of service, irrespective of age?
- c. Should the upper age limit for entitlement to a statutory redundancy payment be amended to:
  - the employer's normal retirement age for a job, which would have to be justified if under 70, or
  - where there is no normal retirement age for the job, the statutory default retirement age of 70, if we decide to introduce one?
- d. Should we repeal the provision under which the amount of payment due decreases by one twelfth for each month elapsed of the year prior to the default upper age limit?
- e. Should the statutory redundancy payments scheme retain the use of length of service as a factor in the payment calculation?
- f. Should the scheme retain the cap of 20 years on the length of service to be taken into account in the payment calculation?
- g. Should we revoke the Contracts of Employment and Redundancy Payments (Pensions) Regulations 1965?

### Background

9.1 The Directive provides for the possibility of justifying "the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement<sup>15</sup>."

9.2 There is a widespread acknowledgement that there is no room for age-based recruitment practices. They simply perpetuate inaccurate stereotypes – for example, the 30 year old whose best is in the past as far as IT work is concerned; or the older worker who cannot get to grips with new techniques. Neither should promotion depend on age: the crucial factor is the person's ability to do the job at the higher level.

9.3 However, there are circumstances – usually to do with the return on investment in training and development – when the length of time a potential recruit would have with a company would not make business sense.

9.4 In those exceptional situations an upper age limit on recruitment might be justified.

### Age Based Recruitment - What you said in consultation

9.5 Informal consultation in Northern Ireland concerning this policy reflected the same mixed responses received in GB. The main argument in favour of retaining age-based practices was that it should be justifiable not to recruit someone near to retirement age who, on the completion of training, would have reached the company's retirement age. This tended to reflect concern about high training costs in relation to the length of time the person would work before retirement in order to recoup that investment.

9.6 Those against challenged the link made between recruitment/training and retirement on the basis of the flexible retirement policies being progressively considered by some businesses and being promoted by Government.

<sup>15</sup> Article 6.1(c)

9.7 We also wish to seek your views on whether age-based recruitment schemes could be justifiable - for example, graduate training schemes. Views have been expressed that graduate recruitment schemes help employers plan their intake and focus the recruitment process and those in favour of their retention thought that if there was a genuine need to employ a graduate as specific knowledge or level of learning is required it was justifiable. Many views were expressed, however, that graduates could be of any age, not necessarily in their early twenties, and that this should be taken into consideration.

### **Our Proposed Approach**

9.8 Before finalising policy proposals we are seeking further formal views on the need to make specific provision for employers to be able to justify an upper age limit to recruitment.

9.9 Bearing in mind the arguments outlined in Paragraphs 9.5 and 9.6, we wish to establish if there are objective justifications which support the need for such recruitment, selection and promotion policies, including graduate training schemes, and identify what these are.

### **Questions**

#### **Recruitment, selection and promotion**

- a. Should the Government make provision for employers to apply an upper age limit to recruitment if they can justify doing so by reference to aims set out in legislation?
- b. Do you think that the aims set out in paragraph 5.20 are sufficient for employers to justify their particular approach?
- c. Do you think there are other aims that might justify setting an upper age limit on recruitment?

### **Employment Related Insurance**

9.10 Most insurance schemes, such as employers' liability insurance, do not use age as a requirement. However, there could be a small number of occupations whose insurance provision might be based on age.

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

### **Our Proposed Approach**

9.12 We believe that, where compulsory insurance is not available because of the applicant's age, employers would be justified in not recruiting. Equally, employers would be justified in dismissing employees when they reach the age where such insurance is unavailable if suitable alternative employment is either unavailable or rejected by the employee.

### **Questions**

#### **Employment related insurance**

- d. Do you agree with our approach?
- e. Do you know of any types of employment-related insurance where age will be an issue?
- f. Do you think that the cost of employment-related insurance where age will be an issue should be a factor in recruitment or dismissal decisions?
- g. Are you aware of any types of employment-related insurance where premiums are significantly increased as a result of an employee's age?

10.1 Differences of treatment based on length of service or experience (or seniority in service) might amount to indirect discrimination.

10.2 Pay or non-pay benefits based wholly or partly on chronological age are relatively rare. However, determining pay and benefits on the basis of length of service or experience - for example, extra annual leave after so many years' service - is quite common.

10.3 Informal consultation in both Northern Ireland and GB confirm that employers and employees alike want to retain such practices. Unions and lobby organisations also generally support them. The Directive itself provides for the possibility of justifying "the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment."

### **What you said in consultation**

10.4 A number of practices have been identified that might be based on seniority, length of service or experience. These included additional annual leave, long service awards, trainee pay, incremental pay and redundancy pay. Such arrangements:

- are accepted ways of recognising loyalty. Employers feel that such practices have nothing to do with age and should not be outlawed - all employees are potentially eligible if they remain in service;
- are accepted as providing incentives for staff;
- reward experience, particularly incremental pay.

### **Our Proposed Approach**

10.5 The benefits of many seniority provisions are widely accepted. The Directive clearly envisages that where such arrangements amount to direct discrimination they can be

justifiable. Therefore, we propose to make specific provision for employers to be able to justify seniority conditions by reference to the aims set out in paragraph 5.20 - specifically, encouraging and rewarding loyalty.

10.6 Seniority practices which are indirectly discriminatory will also be able to be justified - see paragraph 5.23, through aims which are not limited to those listed at paragraph 5.20.

10.7 It is our recommendation that, whilst all stakeholders in this policy are in broad agreement with the provision to retain these practices, employers must develop supporting statements of aims and justifications which are appropriate to their individual practices.

### What this means in practice

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

*This involves indirect discrimination, since it is unlikely that younger staff could have built up 10 years' service. If challenged, the organisation would have to show that awarding extra leave serves a legitimate aim, and that it is appropriate and necessary to achieve that aim. For example, the aim could be encouraging and rewarding loyalty; and the organisation might produce evidence to show that, with limited financial resources, this is an effective way of rewarding staff for loyal service.*

## Questions

### **Pay and non-pay benefits**

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

If yes or no, please say why.

b. Do you think there are reasons or aims other than those set out in paragraph 5.20 that might justify pay and non-pay benefits based on experience or length of service?

If yes or no, please say why.

11.1 The table on page 61 presents *quantifiable* and the main *unquantifiable* costs and benefits associated with the legislation in Northern Ireland. This Regulatory Impact Assessment (RIA), which draws upon available data including information from GB, analyses the potential impact in Northern Ireland of both adopting the Article 6 option or not making use of it.

11.2 The level of detail provided at paragraphs 11.19 and following, relating to costs associated with not adopting the option, is indicative of the amount of available data. The assessment also reflects the scope of the proposed legislation as it applies to all age groups.

11.3 Overall, there will be net economic (not to mention social) benefits from the legislation over time with potentially large effects on tax and national insurance receipts, and the long run potential of the economy. It is recognised that the current low employment rates among older people reduces the contribution this group can make to the local economy.

11.4 The analysis presented in this RIA will tend to underestimate potential benefits to the economy of the legislation for two main reasons:

- There are large *unquantifiable* benefits, which can be achieved by increased employment rates and better matching of people to suitable jobs.
- There are unquantifiable costs too, due to possible increased monitoring costs, but we believe that these are of a lower magnitude.
- There are major uncertainties about how the demand side of the economy would react to an increased participation of older workers. Even on conservative assumptions, however, such responses could bring significant benefits in terms of many extra workers remaining in the labour market.

- Uncertainties about what labour force participation will look like in 2006 and beyond in the absence of the proposed legislation (for example because of pension reforms and demographics) and how the economy would adjust to such numbers make quantification difficult.

11.5 There is a *time profile* attached to the quantifiable costs and benefits presented below. Simple modelling suggests that the benefits will build up and peak sometime during the first twenty years of the legislation. By contrast, the awareness costs are one-off and concentrated in the first few years of the legislation. The best approach in these circumstances is to look at the present value<sup>16</sup> of these future costs and benefits over a period of time.

11.6 Accordingly this RIA is unable to provide any firm global quantitative estimate of the impact in Northern Ireland of one of the key issues for this consultation i.e. the option offered under Article 6 to permit objective justification in cases of otherwise direct discrimination. (The RIA included in the equivalent GB consultation reached the same conclusion.)

11.7 Article 6 relates to many aspects of the Directive, covering recruitment, access to training, retirement etc. The RIA has thus considered costs under a set of alternatives, invoking, or not, Article 6.

11.8 While wider costs associated with not permitting the defence of objective justification cannot be readily estimated, as they are dependent entirely on assumptions relating to, for example, the propensity for older employees to pursue training opportunities, which cannot readily be tested, it is likely that potential costs to employers could be high.

<sup>16</sup> Present value is a standard tool in economic appraisals to value future returns. It takes into account that future returns are worth less than returns today. This is captured in the discount rate applied to future returns.

11.9 For example, approximately one fortieth of those working are within a year of their retirement age. In Northern Ireland this is around 15,000 people. If this group received an average of 5 days training, beyond any that they otherwise would, this would be 75,000 additional training days, with an average direct cost of around £50 and a loss of production or output of £200 each. This assumes that the remaining part of the year before retirement is too short to allow the worker to recover the employers costs and that training with a quick payback is unaffected. The cost of this additional training would then be around £4m a year to employers, with a loss to the economy of £15m of output per year.

11.10 The quantifiable costs and benefits of the legislation, presented in the table below, would produce a net benefit to the Northern Ireland economy of just over £30 million<sup>17</sup> in present value terms during the first twenty years of the legislation and net benefits remain positive even under more pessimistic assumptions. Over a shorter period - say ten years - the net benefit to the economy is still positive at around £20 million. This is without quantifying where the large benefits will be in terms of increased employment rates.

11.11 The impact of legislation on retirement is likely to be lower than the other parts, although still positive. However we have not been able to quantify the impact of employers monitoring costs of workers. These are likely to be highest where there is no provision in the legislation for a default retirement age nor for employers to have their own mandatory retirement ages (MRA).

### **Small Firms**

11.12 The legislation will cover all firms. There is likely to be a significant effect on smaller firms. They will bear disproportionate implementation costs of all aspects of the legislation, which are

<sup>17</sup>The above calculations are based on a discount rate suggested by the Treasury Green Book of 3.5% and 2002 prices. More details on the methodology can be found at: [http://www.hm-treasury.gov.uk/economic\\_data\\_and\\_tools/greenbook/data\\_greenbook\\_index.cfm](http://www.hm-treasury.gov.uk/economic_data_and_tools/greenbook/data_greenbook_index.cfm)

expected to be relatively high, because of the complex nature of the subject. The cost per small firm in NI is between £87 and £102, depending on whether the Article 6 option is chosen. Small firms are also more likely to rely on informal recruitment methods and so may need to take more actions to comply with the Directive.

11.13 Very small firms (those employing fewer than 10 people) may experience greater impact in the areas of retirement age as they are more likely to employ workers over 65. They will therefore be proportionally more likely to be taken to industrial tribunal.

### **Implementation Costs**

11.14 We expect overall implementation costs for small firms in Northern Ireland to be between £3 million and £4 million. For all firms, large and small, in Northern Ireland, the implementation costs are estimated at between £3.5m and £4.5m. Like all companies, however, they will benefit from improvements in the functioning of the labour market.

11.15 Informal consultation in Northern Ireland has led to a mixed reaction from business, with some not concerned while many others have raised business interests, which would seek to continue to justify some form of age discrimination.

### **On-going Costs**

11.16 In addition to these 'one-off' costs there are annual costs relating to recruitment, training, promotion, redundancy and enforcement costs. These are likely to run at a total level of £1m to £2m a year, excluding training, where the likely range could only be narrowed down to £1m - £10m.

11.17 However, it is assumed that training and promotion costs to employers are more than offset by benefits to them, and similarly recruitment costs are broadly nil when netting off savings that accrue. Savings of around £1m a year arise by employers being able to recruit from people who would previously have been regarded as retired.

11.18 The annual net direct financial cost, after the changes are introduced, on employers in Northern Ireland is therefore broadly nil on an ongoing basis.

11.19 The key difference between the 'adopt' and 'do not adopt' options would be potential additional costs to employers associated with the 'do not adopt' option, primarily relating to training, in those cases where the employer calculates that there is a net cost (capable of being objectively demonstrated) which they must bear to avoid charges of discrimination. These could be considerable, though the degree to which employees would in practice seek such opportunities remains unknown.

11.20 The Department's RIA finds that this cost must be positive but believes that its estimation is highly uncertain. An example calculation of the scenario outlined above showed a cost to employers of £4m a year. It is possible to construct estimates ranging from around this to very much higher, depending on assumptions made. This cost could be magnified if, as a result, competitiveness in Northern Ireland suffered.

11.21 As noted in the foregoing, a decision not to adopt the option provided for within Article 6 would give rise to additional employer costs, largely around training and recruitment costs of employees that arise just prior to the end of their working lives.

11.22 Again, the information available to fully inform this aspect of the RIA is limited. Whilst we have been informed of anecdotal evidence on the subject, the Department would welcome cost and benefit assessments associated with responses to the consultation which support arguments relating to not adopting the option permitting objective justification of direct discrimination practices and would welcome views as to the best way to estimate the premium that not adopting Article 6 might carry.

## Summary of costs and benefits of age discrimination legislation

All costs (£'000s, and rounded to nearest £50,000)

	Benefits Annual	Costs Annual	Costs One-off
<b>Employers</b>			
Implementation (Awareness and Decision Making)			£3,650 - 4,300 <sup>a</sup>
Enforcement		£300 - 600 <sup>b</sup>	
Recruitment	£150 - 300	£250	
Recruitment from retirement options	£950 - 1,300 <sup>c</sup>		
Training <sup>d</sup>	£900 - 11,500	£800 - 10,400	
Promotion <sup>d</sup>	£1,400 - 3,200	£1,150 - 1,600	
Redundancy payments		£100	
Monitoring		May need to improve internal systems such as appraisal and staff monitoring including keeping records of management decisions. This is likely to be highest under the retirement option to have no default and no mandatory retirement age.	
<b>Individuals</b>			
Training <sup>d</sup>	£100 - 900		
Promotion <sup>d</sup>	£900 - 1,250		
Redundancy	£100		
<b>Exchequer</b>			
Enforcement		£100 - 150	
Redundancy		£50	
		General Improvements in the macroeconomy will mean higher tax and national insurance receipts.	
<b>Macroeconomic</b>		These are likely to be high as we see the better use of those who are currently being discriminated against, with increased employment rates and the better matching of individuals to jobs, training and promotion.	

Notes:

- The lower number represents the costs if the retirement option with no default and no mandatory retirement ages (MRAS) is chosen.
- This cost is annual but gradually declines to about £200,000 by 2011.
- This benefit is annual but gradually declines to about £150 –200,000 by 2014.
- Many of these costs and benefits are transfer payments from employers to workers. However there are net economic benefits discussed in Annex F of the full RIA.

12.1 In the consultation document "*Promoting Equality of Opportunity – Implementing EU Equality Obligations in Northern Ireland*" we proposed conferring on the Equality Commission certain duties in relation to the new ground of sexual orientation. It is currently proposed that these will include a general duty of working towards the elimination of discrimination, promoting equality of opportunity, keeping the law under review and the issue of guidance. (These provisions are similar to the equivalent duties already in place for other grounds.)

12.2 Some of the responses to these particular proposals reflect a view that the Equality Commission's role should also include the capacity to support discrimination cases of a strategic nature - similar to the duties currently in place for existing equality grounds. The outcome of the Department's consideration of all responses to the consultation will be reflected in the new Sexual Orientation Regulations for Northern Ireland.

12.3 We propose extending the duties of the Equality Commission to cover age in line with the proposals contained in the consultation referred to in 12.1 above and would plan to adopt a final position in the draft age regulations which will be consistent with the ECNI role which is determined by the Sexual Orientation legislation.

### Questions

#### **Role of the Equality Commission**

- a. Do you agree with the approach to extending the duties of the Equality Commission to cover age which is outlined above?

If yes or no, please say why.

13.1 In developing policy on age, in order to implement the age strand of the Employment Framework Directive, we have been considering our obligations under Section 75 of the Northern Ireland Act, to have due regard to the need to promote equality of opportunity:

- a. between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- b. between men and women generally;
- c. between persons with a disability and persons without; and
- d. between persons with dependents and persons without.

13.2 There is at present no legal protection against discrimination on the grounds of age. Introducing new age legislation will therefore promote equality of opportunity for persons of different ages by providing protection in employment and training which is comparable to that provided for the other grounds covered by existing anti-discrimination law in respect of employment and training.

13.3 We are aware however that some of the issues raised in this consultation, specifically the Directive's Article 6 provision, which allows for practices which discriminate on the grounds of age to be justified, have potential for differential or adverse impact for the age category. We have discussed this in more detail in the Equality Impact Assessment which is available on request or at [www.ofmdfmi.gov.uk/equality](http://www.ofmdfmi.gov.uk/equality)

13.4 The consultation document outlines our proposals for how the legislation might tackle the issue of age discrimination, placing particular emphasis on two main areas:

- Making use of the Directive's Article 6 provision, which permits some practices which discriminate on grounds of age, to be justified, and

- Implementation by means of Regulations under Section 2.2 of the European Communities Act 1972 limits the scope and level of protection afforded to the scope of the Directive.

13.5 Our Equality Assessment concluded that ‘Persons of Different Ages’ are likely to be affected more than any other category by the outcome of this consultation, particularly in relation to the direct discrimination issue outlined in Chapter 5. Equally, using Regulations to implement the Directive limits protection to employment and training and does not provide the scope to consider protection for the provision of goods, facilities and services since this is outside the Directive’s requirements.

13.6 We have not yet made a decision on the Article 6 issue and views are being sought specifically on whether or not the Article 6 option should be taken up. The arguments in favour and against are outlined in Chapter 5.

13.7 If, as a result of this consultation, a way forward which makes use of this option is proposed, the legislation, as a means of alleviating the adverse impact, would indicate that any practices must be appropriate and necessary and must be shown to be objectively justifiable.

13.8 Individuals could challenge their employers to demonstrate that their particular circumstances justified their reliance on one of the justifications for differential treatment. It would then be for the employer, rather than the Government as legislator, to demonstrate justification in the particular circumstances of the case.

13.9 The case for the need to use the Article 6 option, however, needs to be explored further and this consultation is seeking views on this issue.

13.10 Implementation of the Directive means new legal protection against discrimination on the grounds of age which will promote equality of opportunity by affording protection to the age ground, in line with that which exists already for race, religious belief, political opinion, gender, disability and sexual orientation.

13.11 We are aware that much of the focus to date has been on implementation of age legislation through the single Equality Bill (SEB) and that the opportunity provided by the SEB to extend GFS protection to the age ground, has the potential to better promote equality of opportunity for age in this particular aspect of discrimination.

13.12 However, given the restrictions relating to implementation by Regulations, the development of policy on age GFS will be taken forward under the revised timing of the SEB. A consultation is planned for later this year, which will provide an opportunity for consideration to be given to this issue.

13.13 To enable us to complete the Equality Impact Assessment of these proposals, we are also seeking views on the equality impact through this consultation process.

13.14 Following the consultation we will evaluate the responses received and will publish our decision in a consultation report early in 2004.

## Questions

### Equality Assessment

- a. Is there any other data or information, which might be drawn upon to assess the equality impact of the proposals in this document?
- b. Do you consider that:
  - the proposals have any positive or negative equality impacts on any of the Section 75 categories that have not been identified in this document and, if so, what are they?
  - taking account of the requirements of the Framework Directive, there are alternative approaches to better promote equality of opportunity and, if so, what are they?
- c. Do you have any other comments on the equality impact of these proposals?

14.1 This consultation paper sets out the main features of proposed equality legislation to implement the age strand of the Employment Framework Directive in Northern Ireland. Comments on all areas covered by the paper are welcome. The questions on which we would particularly welcome views are set out in the text and are summarised in the response form. Please reply using the enclosed response form and return it to the freepost address below.

14.2 THE CONSULTATION PERIOD CLOSES ON  
23rd JANUARY 2004

14.3 Under the code of practice on Open Government, any responses will be made available to the public on request, unless respondents indicate that they wish their response to remain confidential.

14.4 The following documents are available to download at:  
[www.ofmdfmni.gov.uk/equality](http://www.ofmdfmni.gov.uk/equality)

- Consultation Document "*Prohibiting Age Discrimination in Employment and Training – Legislation for Northern Ireland*"
- Summary document
- Response form
- Regulatory Impact Assessment
- Equality Impact Assessment

14.5 A summary version of the consultation document is also available on request in a range of languages and formats: Irish, Ulster Scots, Cantonese, audio tape, Braille or large print. If you need the information in a different format, or you do not wish to complete the response form, please contact us to discuss how we can take account of your views.

14.6 For further copies or alternative formats such as those listed above, please contact us at the address below:

Carol McCabe  
Age Legislation Team  
Anti-Discrimination Division  
Office of the First Minister and Deputy First Minister  
Room E3.09  
FREEPOST 3900  
Belfast BT4 3BR

**Please note that no stamp is required.**

Email: [agelegislation@ofmdfmi.gov.uk](mailto:agelegislation@ofmdfmi.gov.uk)  
Telephone: 028 9052 0080  
Facsimile: 028 9052 3272  
Textphone: 028 9052 2526

14.7 If we can assist your consideration of the proposals through presentations and attending meetings etc, we will be pleased to try to do so.

# CONSULTATION DOCUMENT

For further copies or alternative formats  
please contact us at the address below:

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