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01 DEC 2005



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To: <agelegislation@ofmdfmi.gov.uk>  
cc:  
Subject: FW: EU Directive response

30/11/2005 08:47

To: Age Team

Please find response attached. Please acknowledge.

Thank you,

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-----Original Message-----

From: david mcconnell [mailto:dwmac77@hotmail.co.uk]  
Sent: 29 November 2005 08:03  
To: Tom Cairns  
Cc: David McConnell  
Subject: EU Directive response

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ACNI response to DEER.doc

# AGE CONCERN NORTHERN IRELANDS RESPONSE TO CONSULTATION ON THE DRAFT EMPLOYMENT EQUALITY (AGE) REGULATIONS (NORTHERN IRELAND) 2006

## 1 Introduction

- 1.1 Age Concern Northern Ireland (ACNI) is a major voluntary organisation committed through campaigning and service provision to promoting the rights of all older people as active, involved and equal citizens. We act as a Northern Ireland-wide campaigning body and support a network of local Age Concern Groups operating throughout Northern Ireland. We offer policy advice on a range of issues which impact on the lives of older people. These policies are based on:
- The expressed views of older people throughout Northern Ireland based on ongoing contact and research;
  - A knowledge of older people and an ageing society;
  - Calls received into our Advice and Information line on a daily basis
- 1.2 ACNI welcomes this opportunity to respond to 'Promoting Equality of Opportunity' and welcomes the legislation which is a significant advance for people who have faced age discrimination in employment and training and who have hitherto had no recourse to law to rectify this.
- 1.3 ACNI have not chosen to use the Response Form but have endeavoured to address the questions and issues it contains.
- 1.4 While we are realistic regarding the extent to which OFMDFM will modify the Draft Statutory Rules, we do believe that the proposals are flawed in significant ways and that this will lead to difficulties in implementation.
- 1.5 Both the Northern Ireland document and its equivalent for Great Britain refer to the need for employers to prepare for what has been described in the Northern Ireland context as possibly the most significant legislation here since Fair Employment. This will be unlikely to happen, particularly with smaller employers, if there is no high profile campaign to raise public awareness. To facilitate planning this would need to take place early in 2006. We would also suggest that given the complexity of the legislation, consultants be made available to SMEs to assist them in preparing for its introduction.
- 1.6 We are also concerned that given 5 above the Equality Commission, which is charged with providing advice and guidance, is currently not in a position to do so. A number of our comments relate to elements we believe need to be included in the guidance.
- 1.7 ACNI as an organisation that campaigns on behalf of older people is clearly concerned, first and foremost, with how the regulations will address discrimination against older workers. However, we oppose discrimination on grounds of age per se and believe that elements of the regulations will discriminate against younger workers. While they are to be justified on grounds

of facilitating good workforce planning, they may actually facilitate the continuation of poor human resource practices. We leave it to organisations representing young people to address these issues in detail.

- 1.8 We note that the European Commission has adopted a new anti-discrimination strategy, is taking legal action against Member States where Directives have been, in part, incorrectly transposed into national law and encouraging movement 'beyond legislation'. Given this, if not already being considered, it would seem logical to 'road test' the present proposals against these developments

## 2 Objective Justification GORs and Positive Action.

- 2.1 Objective Justification represents an additional 'defence' for discrimination on grounds of age – for other strands positive action and genuine occupational requirements are the only grounds. We are opposed to the inclusion of objective justification. However, if it is to be included we support the view of AGE, the European Older People's Platform (of which we are members) that "policy makers need to decide clearly what constitutes an objective and reasonable justification...taking into account their wider national policy and cultural contexts and in consultation with industrial stakeholders and organisations representing the interests of people of all ages who face discrimination." Leaving this issue unanalysed, as many jurisdictions appear to have done has led to legal uncertainty. It is interesting to note, however, in a finding by the US Supreme Court that 'even a pressing legitimate aim such as public safety cannot justify the sweeping use of age limits where individual assessment is possible.'

- 2.2 AGE has also argued that EU Member States 'need to decide the areas for positive action to enable targeted actions to help support the inclusion of groups of workers in employment and training who are currently excluded because of age discrimination or for other reasons'

- 2.3 Age as a GOR is not only a very blunt instrument, during the consultation, despite repeated requests for examples of its necessity, the only one given was acting. Related to this is the temptation to use age as a proxy for qualities such as incapacity, ill health or indeed immaturity. These are likely to be based on negative stereotypes and employers should be clearly advised that they will not constitute a legitimate substitute for a 'real GOR'. Age should only be permitted as a proxy for other characteristics where individual assessment is impracticable.

- 2.4 The points made in 2.1 – 2.3 above all have significant implications not only for the statutory rules but also for the nature of the advice and guidance to be developed for employers.

## 3 Legitimate Aims, Necessity and Proportionality

- 3.1 We would question some of the 'legitimate aims' given at paragraph 4.20. With regard to training requirements, research suggests that younger workers are more likely to change jobs than older workers. The introduction of a default age

provides some apparent validity to this argument that would clearly not be objectively justified in its absence but if a company had a large turnover of younger staff it would be extremely difficult to justify denying training to older workers on this basis. Regarding loyalty, this would appear to be equated with length of service and we would see scope for complaints based around the need to define loyalty.

- 3.2 This general area is one in which employers and trainers will require very clear guidance if they are not to overestimate the extent to which they can use the defence of legitimate aim.

#### 4 Recruitment, Selection and Promotion

- 4.1 Even a brief glance at advertisements for recruitment provides ample evidence of age discrimination arising from spurious criteria required of would be applicants. We are not surprised therefore, that the majority responded positively to the idea of a specific provision for employers to be able to apply an upper age limit to recruitment if they can justify doing so – although 62% is hardly a landslide and there is the distinct possibility that what they have in mind as a legitimate aim, may not stand up to this test under the legislation. Companies that have abandoned face-to-face interviews during the selection process have found that the age profile of the workforce has increased.

- 4.2 We feel this is an area in which younger and older workers may have experienced an equal level of discrimination – albeit for different reasons. This is another area in which clear guidance will be very important.

#### 5 Insurance

- 5.1 Paragraph 4.47 permits employers to use the defence of objective legislation where age is a factor in insurance arrangements. It does not address the issue of whether or not there is actuarial justification for them in the first place. Insurance, generally, is an area in which older people feel they experience discrimination purely on grounds of age based on stereotypical views – in the absence of real justification. This is an example that highlights the need for age to be a protected ground in the area of goods facilities and services in a Single Equality Act. The very recent inclusion of sexual orientation as a protected ground in these areas leave the age ground more isolated and in need of legislative protection.

#### 6 Exceptions

- 6.1 These exceptions will still be open to the test of legitimate aim under the EU Directive and we believe that a number may not survive such a process. In general, they are more likely to impact on younger workers and we leave it to our colleagues in the children and youth sectors to address them in detail.

#### 7 Retirement and Duty to Consider

7.1 During the consultation period the options that were presented were a default age of 70 or no retirement age. Therefore introducing a default age of 65 in both the British and NI regulations/statutory rules has been done in the absence of consultation and no explanation has been given regarding how it came to be the favoured option. This is contrary to the letter and spirit of Section 75 of the Northern Ireland Act and reflects a way of working that gave 'consultation' such a bad reputation in the past. The figures given in paragraph 6.13 need further clarification. It states that 58% of consultees were in favour of a default retirement age and 42% against. For a default age of 70 the corresponding figures are 29% for and 71% against – but the 71% may well include the vast majority of the 42% who supported a default retirement age in principle – what would the figures be for 65?

7.2 We opposed and continue to oppose the concept of a retirement age and feel that the regulations as detailed will lead to many employers, especially SMEs, unintentionally, finding themselves in breach of the statutory rules.

7.3 Four surveys are referred to in the British document as providing the information on which the default retirement age will be reviewed. Only one applies in Northern Ireland and there are, apparently, no proxies for the other three. The Northern Ireland document is vague on this issue, making generalisations rather than referring to specific data collection.

7.4 We believe the balance of the rules is wrong, in that it pays greater attention to ensuring employers do not fall foul of the regulations around retirement age and the duty to consider, than it does in affording older workers rights in these areas and in encouraging the continued employment of those over 65:

- We oppose any provisions that would permit lesser employment rights or benefits for people aged over 65;
- Guidance on retirement needs to promote the positive case for retaining employees over the age of 65 and very clear and specific guidance on the retirement and request to stay on procedures;
- Employers should be obliged to provide reasons for the rejection of a request to stay on;
- Planned retirement should not be permitted prior to an employers normal retirement age – even if this is over 65;
- The time limits need to be reconsidered, especially in relation to the duty to inform and consider in relation to staying on.

## 8 Pensions

8.1 Occupational pensions are effectively exempted from the legislation. OFMDFM needs to clarify the implications of its policy for people over their employers' normal pension age. Employers should not, for example, be able to bar older employees from building up pension entitlements or stop making employer contributions.

## 9 Redundancy Payments and Unfair Dismissal

- 9.1 We welcome the removal of the lower age limit and the upper age limit to qualify for redundancy payments, the tapering-down rule and the multiplier based on wide age brackets
- 9.2 We assume that the statement in paragraph 8.12 that ‘steps will be taken to gauge stakeholder opinion, with a view to settling on the most appropriate method of calculation and level of payment (for redundancy payments) to be included in the Age Regulations’ refers to a consultation subsequent to and additional to this present one. As a general principle, however, we would be strongly opposed to any decision that left older workers made redundant worse-off.
- 9.3 It seems odd that a worker over the retirement age of 65 will be able to challenge dismissal on a range of grounds, while s/he will be unable to challenge termination of employment on grounds of retirement at 65 providing the employer has followed a bureaucratic procedure laid down in statutory rules that are designed to make age discrimination illegal.

## 10 Support, Legal Action and Burden of Proof

- 10.1 In paragraph 1.6 above, we referred to our concerns regarding the forward planning of the Equality Commission NI to prepare for the introduction of the legislation. As a matter of urgency ECNI needs to address and adequately resource its forthcoming responsibilities as detailed in paragraph 9.5
- 10.2 ACNI would welcome the opportunity to be involved in preparations for the introduction of the legislation.
- 10.3 There are particular, although not insurmountable problems regarding finding comparators in cases of both direct and even more so with indirect discrimination. C. O’Cinneide in his review of Age Discrimination and European Law suggests that experience gained in the development of case-law in the gender discrimination context is of particular relevance in providing guidance.

ACNI

November 2005

Select Bibliography

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