

The Employment Equality (Age) Regulations (Northern Ireland) 2006

Explanatory Notes on Regulations

INTRODUCTION

1. These explanatory notes relate to the Employment Equality (Age) Regulations (Northern Ireland) 2006 (“the Regulations”). They have been prepared by the Office of the First Minister and Deputy First Minister in order to assist the reader in understanding the Regulations. They do not form part of the Regulations.
2. The Regulations implement in Northern Ireland the age strand of Directive 2000/78 EC establishing a general framework for equal treatment in employment and vocational training. The Regulations are broadly similar in structure and form to the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (S.R. 2003 No.497).

PART 1

GENERAL

Regulation 1 - Citation and commencement

3. Regulation 1(1) sets out the title of the Regulations and provides for them to come into operation on 1 October 2006, except for those provisions specified in paragraph (2). The deadline for implementation of the age strand of the Directive is 2 December 2006.
4. Regulation 1(2) provides for regulations 1 and 2 and regulations 37 to 39 (the functions of the Equality Commission for Northern Ireland) to come into operation on the day following the making of the Regulations. This is to enable the Equality Commission to immediately issue draft codes of practice for consultation with key stakeholders and to enable the Commission to finalise such codes before the Regulations come into operation on 1 October 2006. The aim of the codes is to provide practical guidance to employers and providers of vocational training to help them fulfil their obligations under the Regulations. The codes will also aim to make employees, job seekers and trainees aware of how they are affected by the Regulations.

Regulation 2 - Interpretation

5. Regulation 2(1) specifically attracts the Interpretation Act (NI) 1954 to these Regulations since they are made under powers contained in a Westminster enactment – the section 2(2) of the European Communities Act 1972.

6. Regulation 2(2) provides that the term discrimination is to be construed in accordance with regulation 3 (discrimination on the grounds of age), regulation 4 (discrimination by way of victimisation) or regulation 5 (instructions to discriminate); and the term “harassment” is to be construed in accordance with regulation 6 (harassment on the grounds of age).
7. Regulation 2(3) defines various terms that are used throughout the Regulations. In particular, “worker” is defined for the purposes of regulations 34 and 36 and Schedule 1, because these provisions contain exemptions the application of which turns on the meaning of “worker”.

Regulation 3 - Discrimination on grounds of age

8. Regulation 3 defines direct and indirect discrimination on grounds of age for the purposes of the Regulations. Direct discrimination occurs where, because of B’s age, A treats B less favourably than he treats or would treat other persons unless A can objectively justify that treatment.
9. The significant difference between these Regulations and all other strands of discrimination legislation is that direct discrimination is capable of objective justification. This derives from Article 6.1 of the Directive.
10. Direct discrimination “on grounds of age” includes discrimination based on B’s apparent age, whether or not it is in fact B’s age. This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their age. Nor will they be required to disclose their age in bringing a claim – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their age. A will not be able to raise the defence that B was in fact older or younger than he appeared to be or that A or another person inferred that he was.
11. Indirect discrimination is taken to occur where –
 - A applies to B a provision, criterion or practice which A applies equally to other persons; and
 - that provision, criterion or practice puts persons of B’s age group at a particular disadvantage; and
 - B suffers that disadvantage.

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

12. The reference to an “age group” means that to belong to such a group, not all of the members of the group have to be of the same age – they may have a range of ages.
13. The definition of discrimination in regulation 3 does not copy out the references in Articles 2.2(b) and 6.1 of the Directive to the difference of

treatment, provision, criterion or practice being “objectively justified” by the legitimate aim. The addition of those words would not add anything to the requirement in regulation 3(1) for the discriminator to demonstrate the existence of a legitimate aim (to which he must then show the provision, criterion or practice to be proportionate).

14. The definitions of direct and indirect discrimination also require the means to be “proportionate” rather than “appropriate and necessary”, the term used in Articles 2.2(b) and 6.1 of the Directive. The Directive appears to use the two terms “proportionate” and “appropriate and necessary” interchangeably – compare Articles 2.2(b) and 6.1 with Article 4.1. The term “proportionate” is considered to be clearer than “appropriate and necessary” in implementing the Directive in that it sets the requirement of necessity in its proper context. For the sake of consistency therefore, the Regulations use the same term (“proportionate”) throughout.

Regulation 4 - Discrimination by way of victimisation

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

Regulation 5 - Instructions to discriminate

17. Regulation 5 provides that where B is subjected to less favourable treatment by A either because he has failed to carry out instructions to discriminate against a third person, or because he has complained that he has been given those instructions (whether or not he has carried them out), then that less favourable treatment of B will itself constitute discrimination on the grounds of age. It is not relevant for the purposes of regulation 5 whether the instruction to discriminate was given by A or by another person, or whether B complains to A or to a third party about the giving of that instruction.

Regulation 6 - Harassment on grounds of age

18. Regulation 6 defines harassment for the purposes of the Regulations as an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms using the wording of the Directive. It takes place if A’s conduct has the purpose or effect of either violating B’s dignity or creating an

offensive (etc) environment for him. The same definition is used across the regulations regarding discrimination on grounds of sexual orientation, religion or belief, race and disability.

19. Regulation 6 does not copy out the Directive's definition completely, in that Article 2.3 of the Directive defines harassment as conduct which violates a person's dignity **and** creates an offensive (etc) environment. However, it is difficult to see how the two concepts differ in practice. Conduct which violates a person's dignity almost invariably also creates an offensive (etc) environment for that person, and vice versa. But since there is such a considerable overlap between the two, "or" is used instead of "and" in regulation 6 both to implement the Directive and to maintain consistency with the other discrimination legislation.. To the extent that the definition in regulation 6 goes further than the Directive's obligations (if it does at all), it is closely related to them.
20. Regulation 6(2) provides that harassment is only to be considered to have the effect of violating dignity or creating an offensive (etc) environment if, taking into account all the circumstances, A's conduct "should reasonably be considered" as having violated B's dignity or created an offensive environment for him. This includes a requirement to take into account B's perception of the conduct. An over-sensitive complainant who takes offence unreasonably at a perfectly innocent comment would probably not be considered as having been harassed.

PART 2

DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

Regulation 7 - Applicants and employees

21. Regulation 7 makes it unlawful for employers, at an establishment in Northern Ireland, to discriminate against, or harass, job applicants and employees in a wide variety of circumstances, starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal.
22. The effect of regulation 7(4) is that it is not unlawful for an employer to discriminate against a person in deciding to whom he should offer employment, or by refusing to offer employment to a person where, at the time of the person's application to the employer he is over the employer's normal retirement age or he is over the age of 65 if the employer has no normal retirement age. Such discrimination is also not unlawful where the applicant will reach the employer's normal retirement age or the age of 65 (if the employer has no normal retirement age) within six months of the application to the employer.
23. For these purposes, the employer's normal retirement age must be over the age of 65 and has the same meaning as is given in Article 130ZH of the

Employment Rights (Northern Ireland) Order 1996 (as inserted by Schedule 7 to these Regulations).

24. The employees to which regulation 7(4) applies are the same group of employees to which regulation 32 (exception for retirement) applies. That is to say, employees within the meaning of Article 3 of the Employment Rights (Northern Ireland) Order 1996 and a person in Crown employment.
25. The rationale for this exclusion from the requirement not to discriminate flows from the rationale for regulation 32 (exception for retirement). There is little point in requiring an employer not to discriminate at the point of receiving an application from a prospective employee when, if he were to employ the person, that person could be retired (without it amounting to discrimination to do so) within six months of their appointment.

Regulation 8 - Discrimination by persons with statutory power to select employees for others

26. Regulation 8 makes it unlawful for someone with a statutory function of choosing employees for another to discriminate against applicants or to subject them to harassment in the course of the selection or nomination. The regulation relates to discrimination by a person empowered by virtue of a statutory provision to select or nominate another for employment by a third person. A person so empowered acts unlawfully if he discriminates by refusing to select, or deliberately not selecting, another for employment or, where candidates are selected or nominated in order of preference, if he discriminates by selecting or nominating another lower in order than anyone else selected or nominated.

Regulation 9 - Exception for genuine occupational requirement

27. Regulation 9 allows an employer, when recruiting for a post, to treat job applicants differently on grounds of their age if possessing a characteristic related to age is a genuine occupational requirement (“GOR”) for that post. An employer may also rely on this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post.
28. Paragraphs (1) and (2) follow the wording of Article 4.1 of the Directive. However, paragraph (2) does not copy out the reference in Article 4.1 to “the objective [being] legitimate”. This is because if an occupational requirement is established as a genuine one in order to carry out the job in question, then it also pursues a legitimate objective; a requirement which pursues an illegitimate objective would not constitute a genuine occupational requirement.

Regulation 10 - Contract workers

29. Regulation 10 covers contract workers whose employer contracts to supply their services to another person or business (“the principal”) at an

establishment in Northern Ireland. It is unlawful for the principal to discriminate against, or harass, a contract worker. This regulation, however, does allow a principal to treat contract workers differently on grounds of age if they are required to do work for which possession of a particular age-related characteristic is a GOR.

Regulation 11 - Meaning of employment and contract work at establishment in Northern Ireland

30. Regulation 11 sets out the circumstances in which employment or contract work is to be considered as being “at an establishment in Northern Ireland” for the purposes of regulations 7 and 10. If the employee’s work is undertaken wholly or partly in Northern Ireland, it is treated as being at such an establishment. If the employee works wholly outside Northern Ireland, the work will only be caught if it is undertaken for the purposes of the employer’s establishment in Northern Ireland, and the employee is (or was) ordinarily resident in Northern Ireland at the time of recruitment or at some time during the employment or contract work. Specific provisions are made in relation to employment on ships, aircraft, hovercraft, and oil and gas rigs. This includes oil and gas rigs on the Northern Ireland sector of the continental shelf.

Regulation 12 - Pension schemes

31. Regulation 12 makes it unlawful for the trustees and managers of an occupational pension scheme to discriminate against a member or a prospective member of the scheme, or to harass such a member. It also gives effect to Schedule 1 (Pension Schemes).

Regulation 13 - Office-holders etc.

32. Regulation 13 prohibits discrimination against and harassment of workers who are not technically in employment (as defined in regulation 2(3)) but whose position may be similar to that of employees. Some of these types of workers can be described as “office-holders” and can include (for example) company directors (where they have no contract of employment), the chairs/members of some non-departmental public bodies, judges and members of tribunals, members of the clergy and other ministers of religion.
33. This Regulation applies to appointments made or recommended by a Minister or government department. It also applies to any other appointment to an office or post, provided the worker is paid and is subject to the direction of another person as to when and where he performs his functions.
34. This Regulation does not apply to elected posts, or to appointments to political offices (such as Ministerial posts or posts held by local councillors within a local council). This is because those holding political office are not covered by the Directive, as they are not engaged in economic activity amounting to employment or self-employment within the meaning of the Directive. A person holding political office is not an ‘employee’ in EC law terms because he does not satisfy the criterion set out in ECJ case-law of providing a service

of economic value under another's direction. Neither can such a person properly be described as being self-employed, particularly given the absence of a service of economic value.

Regulations 14 and 15 - Police Service of Northern Ireland and the Police Service of Northern Ireland Reserve / Other police bodies

35. Regulations 14 and 15 ensure that members of the Police Service of Northern Ireland (including the PSNI Reserve) and members of other police forces, such as the Ministry of Defence Police, enjoy the same protection from discrimination and harassment as employees under regulation 7. The chief constable or chief officer of the force to which they belong is treated as the employer of members of that service or force (except in relation to acts done by the Policing Board or police authority, in which case the Board or authority itself is treated as the employer).

Regulation 16 - Serious Organised Crime Agency

36. Regulation 16 ensures that any person who is seconded to work for the Serious Organised Crime Agency (SOCA), whether they are a police constable or a civilian worker, will enjoy the same protection from discrimination and harassment as they would if they were employed by SOCA. SOCA, which is established under section 1 of, and Schedule 1 to, the Serious Organised Crime and Police Act 2005, replaced the National Crime Intelligence Service and the National Crime Squad from 1st April 2006.

Regulation 17 - Barristers

37. Regulation 17 makes it unlawful for barristers to discriminate against, or harass, pupils (and those applying to be pupils) in a wide variety of circumstances. The circumstances that are covered range from the arrangements that barristers make for determining whom they should take as a pupil, to the circumstances in which the relationship is brought to an end.
38. In addition, regulation 17 makes it unlawful for a person instructing a barrister to discriminate against any person or to subject him to harassment.

Regulation 18 - Partnerships

39. Regulation 18 makes it unlawful for a firm to discriminate against, or harass, a partner or an applicant for a partnership in the firm in a wide variety of circumstances. The circumstances that are covered range from the arrangements that firms make for determining to whom they should offer a partnership, to the circumstances in which a partnership is brought to an end.
40. However, this regulation does allow a firm to refuse to offer a partnership to a person on grounds of their age where the position in question is one for which a particular characteristic relating to age is a GOR. This regulation applies to limited liability partnerships and their members in the same way as it applies to firms and their partners.

Regulation 19 - Trade organisations

41. Regulation 19 makes it unlawful for a trade organisation (such as a trades union or a professional body) to discriminate against, or harass, a member (or an applicant for membership) of that organisation in a variety of circumstances. The circumstances that are covered range from a refusal to admit an applicant to membership to the circumstances in which a member may be deprived of membership.

Regulation 20 - Qualifications bodies

42. Regulation 20 makes it unlawful for a body which confers (conferring includes renewing or extending) professional or trade qualifications on people to discriminate against a person by refusing to confer, or in the terms on which it confers, such a qualification on him, or by deliberately not granting an application by him for such a qualification, or by withdrawing (or varying the terms of) such a qualification which he holds. This regulation also makes it unlawful for such a body to harass the holder of, or an applicant for, a professional or trade qualification conferred by it.
43. This regulation is required by the Directive because the acts of such bodies in conferring professional or trade qualifications (or refusing to do so) can affect a person's access to employment, self-employment or vocational training within the meaning of Article 3.1 of the Directive.

Regulation 21 - The provision of vocational training

44. Regulation 21 makes it unlawful for a person who provides training that helps fit people for employment to discriminate against them in relation to such training, access to it or in connection with the arrangements he makes for deciding to whom to offer training. It also makes it unlawful for the person who provides training to discriminate by terminating the training, or subjecting a person to any detriment during the training. Training is defined as all types and levels of training that would help fit a person for any employment, vocational guidance, facilities for training, practical work experience and assessment related to the award of any professional or trade qualification. This regulation also makes it unlawful for such a training provider to harass a person to whom he is providing such training or who has applied to him for such training.
45. However, it does allow a training provider to refuse to offer training to a person where the employment for which the training is to be undertaken is employment for which possession of a characteristic related to age is a GOR.
46. Regulation 21 does not apply to anything done that is already covered by regulation 7 (applicants and employees) or regulation 24 (institutions of further and higher education).

47. Regulation 21 applies not only to refusals to offer a person vocational training, but also to any discriminatory act which takes place during the course of training which is provided. This is required because Article 3.1(b) of the Directive indicates that it applies to “access to all types and to all levels of vocational training”. It is expected that the European Court of Justice will interpret this to include discrimination during the course of training, because such discrimination could deter a person from continuing his access to training, or from seeking access to further training in the future.

Regulation 22 - Employment agencies, careers guidance etc.

48. Regulation 22 makes it unlawful for an employment agency to discriminate against a person in the way it provides, offers to provide, or refuses to provide its services. It also makes it unlawful for such an agency to harass a person to whom it is providing, or who has requested, its services.
49. However, the prohibition on discrimination does not apply if the employment in relation to which the agency’s services are provided is employment for which a characteristic relating to age is a GOR. Moreover, an agency can defend a claim under this regulation by showing that it relied, and that it was reasonable for it to rely, on a statement from an employer that possession of a particular age-related characteristic was a GOR for a particular employment. It is, however, a criminal offence for employers to provide an employment agency with a statement which they know to be false or misleading. An employer found guilty of such an offence, shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Regulation 23 - Assisting persons to obtain employment etc

50. Regulation 23 makes it unlawful for the Department for Employment and Learning to discriminate against, or harass, a person in the provision of facilities or services under section.1 of the Employment and Training (Northern Ireland) Act 1950.
51. Section 1 of the Employment and Training (Northern Ireland) Act 1950 requires the Department for Employment and Learning –

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

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

52. Regulation 23 does not apply in a case where regulation 21 (the provision of vocational training) applies, or where the Department for Employment and Learning is acting as an employment agency under regulation 22 (employment agencies, careers guidance etc).

Regulation 24 - Institutions of further and higher education

53. Regulation 24 makes it unlawful for institutions (including universities) which provide further or higher education to discriminate against, or harass, their students or persons who have applied to be students. Paragraph (3) provides an exception so that an educational institution can restrict access to a course if it relates to employment to which a GOR would apply under regulation 9, and the student would not meet that requirement.
54. This regulation implements Article 3.1(b) of the Directive. Article 3.1(b) indicates that the Directive extends to vocational training, and the case law of the ECJ suggests that the meaning of “vocational training” includes most higher education and many further education courses. It covers:
- “any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment” (Case C-293/83 Gravier v. City of Liège [1985] ECR 606).
55. The court has also indicated that, in general, university studies are likely to be considered as vocational training, including:
- “...not only where the final examination directly provided the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment” (Case C-24/86 Blaizot v. University of Liège [1988] ECR 355).
56. Accordingly, most university studies and many further education courses will fall within the scope of the Directive. Courses of study which, because of their general nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation, do not fall within the scope of the Directive. Regulation 24 applies to all acts by further and higher education institutions in Northern Ireland, so as to establish a uniform regime in this regard. This includes those acts which relate to courses of study which fall outside of the Directive’s scope, as it can be said that those acts arise out of or are related to the Directive’s obligations in relation to vocational training.

Regulation 25 - Relationships which have come to an end

57. Regulation 25 makes it unlawful for a person covered by Part 2 (e.g. an employer) to discriminate against or harass another person (e.g. a former employee) after the working relationship between them has ended. But an act of discrimination or harassment is only unlawful if it is closely linked to the former relationship. For example, an employer who refuses, on grounds of that employee’s age to provide a reference to a former employee would be acting unlawfully under regulation 25.

58. This regulation does not itself lay down any time limit for bringing a complaint under it, but by virtue of regulation 41 any complaint must normally be presented to an industrial tribunal within 3 months of the alleged act. The further removed the alleged act of discrimination is from the former working relationship, in both time and context, the less likely it is that a person will be able to establish the necessary close connection to the former relationship.

PART 3

OTHER UNLAWFUL ACTS

Regulation 26 - Liability of employers and principals

59. Regulation 26 provides that an employer is vicariously liable for the acts of his employees, whether or not he knew or approved of them. However, the employer may argue, as a defence under paragraph (3), that he took reasonable steps to prevent his employee's act. This regulation also makes a person such as an employer liable for acts done by any other person on his behalf (i.e. acting as his agent).

Regulation 27 - Aiding unlawful acts

60. Regulation 27 provides that a person who knowingly helps someone to do an act that is unlawful under the Regulations is himself treated as having done an equivalent act.
61. Regulation 27(2) applies this rule to employees and agents. So, a person who discriminates against or harasses someone contrary to the Regulations is treated as aiding his employer, or the person for whom he acts as agent (i.e. his principal), to do such an act if the employer or principal would be liable for his acts under regulation 26. In other words, the person doing the act, as well as his employer or principal, acts unlawfully.
62. Regulation 27(3) provides that a person does not knowingly aid another to do an unlawful act of discrimination if he reasonably relies on a statement by that other person that the act is lawful under the Regulations. Under Regulation 27(4) a person who knowingly or recklessly makes a misleading statement in this regard, commits a criminal offence. An person found guilty of such an offence, shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

PART 4

GENERAL EXCEPTIONS FROM PARTS 2 AND 3

Regulation 28 - Exception for statutory authority

63. Regulation 28 provides that the Regulations do not render unlawful any act which is done in order to comply with the requirement of any other statutory provision. This gives an absolute defence to an employer who is forced to

discriminate against an individual in order to comply with age limits required by legislation. The exception would apply only to acts required by the statutory provision. If a provision gives a permission or discretion to act, this provision will not protect the exercise of that discretion in a discriminatory way.

64. A trawl of primary and secondary legislation was undertaken and any provision which could not be objectively justified in terms of Article 6.1 was repealed or revoked, or amended if appropriate. Those amendments which were not undertaken by other government departments are effected in Schedules 7 and 8 to these Regulations.

Regulation 29 - Exception for national security etc.

65. Regulation 29 provides that the Regulations do not render unlawful any act which is done to safeguard national security or protect public safety or public order provided that the doing of the act is justified.

Regulation 30 - Effect of certificates by Secretary of State

66. Regulation 30 provides for an appeal against a certificate signed by or on behalf of the Secretary of State that an act was done for the purpose of safeguarding national security or protecting public safety or public order. Regulation 30(1) sets out the circumstances in which this regulation applies. These are that, in relation to a claim of unlawful discrimination under Part 2 or 3, the respondent proposes to rely for his defence on a certificate issued by, or on behalf of, the Secretary of State specifying that the act complained of was justified and done for the purposes of safeguarding national security or protecting public safety or public order.
67. Regulation 30(2) provides that the claimant may appeal against such a certificate to a tribunal established under section 91 of the Northern Ireland Act 1998. Regulation 30(3) provides that the tribunal shall uphold the certificate where it is satisfied that the act specified was done for the certified purpose and was justified by it. In any other case the tribunal shall quash the certificate. Where a certificate is quashed the case would return to the originating tribunal or court but the respondent would no longer be able to deploy a national security etc defence.
68. Regulation 30(4) states that the certificate shall be conclusive evidence of the matters certified by it where its issue is upheld by the tribunal or the claimant does not appeal against it. Regulation 30(5) applies to this regulation the provisions set out in sections 91 and 92 of the Northern Ireland Act 1998. These concern the establishment of the tribunal and the bringing of an appeal, on a point of law, against a decision of the tribunal of the Court of Appeal.

Regulation 31 - Exceptions for positive action

69. Regulation 31 permits positive action in certain circumstances. The positive action should “prevent or compensate for disadvantages linked to age” among the relevant section of people to whom the positive action relates. This follows the wording of Article 7.1 of the Directive. The disadvantage may be that persons of a particular age are under-represented in jobs or trade organisations, or it may be that there is evidence of widespread harassment of such persons in jobs or trade organisations.

Regulation 32 - Exception for retirement

70. Regulation 32 allows employers to dismiss, on the grounds of retirement, employees who are over the age of 65 without this being regarded as age discrimination. However, where an employee has a normal retirement age which is applicable to him which exceeds the age of 65, if the employee is dismissed on the grounds of retirement before he has reached that normal retirement age, this is capable of amounting to age discrimination.
71. This regulation needs to be read closely with the amendments to the unfair dismissals provisions of the Employment Rights (Northern Ireland) Order 1996, which are carried by Schedule 7 to these Regulations. The notes on those provisions set out in detail the circumstances when a dismissal may be regarded as being for reasons of retirement. Where the dismissal is regarded as a retirement under those provisions and the employee is over the age of 65, the dismissal will not amount to age discrimination.
72. This regulation does not apply to all persons within the wide meaning of “employee” which is used in the Regulations generally (which comes from the definition of “employment” in regulation 2). The exception only applies to employees within the meaning of Article 3(1) of the Employment Rights (Northern Ireland) Order 1996 and those in Crown employment.
73. Compulsory retirement ages are a form of direct age discrimination. Where the retirement age is below the age of 65 it will need to be objectively justified in accordance with regulation 3(1) of these Regulations.
74. This exception for retirement ages of 65 and over is considered to be within the exemption contained in Article 6(1) of the Directive as being justified by reference to a legitimate aim of social policy. The legitimate aim of social policy has two main elements – they are to meet the concerns of employers in relation to:
- (a) workforce planning; and
 - (b) avoiding an adverse impact on the provision of occupational pensions and other work-related benefits.

Regulation 33 - Exception for national minimum wage

75. Regulation 33 permits employers to base their pay structures on the national minimum wage legislation contained in the National Minimum Wage Act 1998 (“the 1998 Act”) and the National Minimum Wage Regulations 1999 (“the 1999 Regulations”).
76. The Directive itself countenances such legislation—

“...Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy..., and if the means of achieving the aim are appropriate and necessary. Such differences of treatment may include...: (a) the setting of special conditions on access to employment..., including dismissal and remuneration conditions, for young people...in order to promote their vocational integration”: see Article 6.1(a).
77. The 1998 Act and the 1999 Regulations mean that the minimum hourly rate of pay prescribed for 16 and 17 year old employees is less than that prescribed for those aged over 17; and the hourly rate prescribed for 18 to 21 year old employees is less than that prescribed for those aged 22 and over i.e. adults.
78. Paragraph (1) enables employers to pay 16 and 17 year old employees less than those aged over 17; and 18 to 21 year old employees less than those aged over 21. This will allow employers to use the development bands of the minimum wage without the threat of legal challenge on the grounds of age discrimination. Employers cannot rely on this exemption, however, if they do not base their pay structure on the national minimum wage legislation. Hence the reason for the limitation in paragraph (1)(b).
79. Paragraph (2) deals with apprentices. It enables an employer to pay an apprentice who is not entitled to the national minimum wage (i.e. any apprentice who is under 19 or in the first year of his apprenticeship) less than an apprentice who is entitled to the national minimum wage (i.e. any apprentice who is 19 or over and not in the first year of his apprenticeship).
80. The treatment of apprentices in the 1999 Regulations is designed to encourage employers to offer apprenticeships to young workers in particular, and paragraph (2) is intended to ensure that this design is not defeated because employers fear the threat of legal challenge on the grounds of age discrimination.
81. Paragraph (3) defines terms used in this regulation.

Regulation 34 - Exception for provision of certain benefits based on length of service

82. Regulation 34(1) enables employers to continue to award benefits to employees using the criterion of length of service.

83. The primary rationale for regulation 34 derives from Article 6.1 of the Directive:-
- “...Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy..., and if the means of achieving the aim are appropriate and necessary. Such differences of treatment may include...:(b) the fixing of minimum conditions of...seniority in service for access...to certain advantages linked to employment”: see Article 6.1(b).”
84. The legitimate aim justifying the retention of service related benefits is employment planning, in the sense of being able to attract, retain and reward experienced staff. They help maintain workforce stability by rewarding loyalty as distinct from performance and by responding to employees’ reasonable expectation that their salary should not remain static. The exact formulation of the exempting provisions ensures that the actual award remains proportionate.
85. Paragraph (1) is, however, qualified by paragraph (2). Without paragraph (2), an employer could award benefits by reference to workers’ length of service, however long that service might be. What paragraph (2) does is to impose a requirement on the employer if the length of service of the worker who is disadvantaged exceeds 5 years. In such a case, if the employer is to rely on this regulation, it must reasonably appear to him that his use of length of service “fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers)”.
86. Paragraph (3) explains how an employer must calculate length of service if he wishes to avail himself of this exemption. Either he must calculate the length of time workers have been working for him doing work at or above a particular level (assessed by reference to the demands made on the worker). Or he must calculate the length of time they have been working for him in total. On each occasion that he uses the criterion of length of service to award benefits, it is up to him which methodology he adopts.
87. Paragraphs (4) and (5) amplify paragraph (3). Paragraph (4)(a) makes it clear that, in calculating a worker’s length of service under paragraph (3), the employer must calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him. This ensures that length of service is not calculated according to the number of hours worked by employees, thereby disadvantaging part-time workers.
88. Paragraph (4)(b) enables an employer, in calculating a worker’s length of service, to discount the worker’s absences from work unless it would be unreasonable for him to do so. Paragraph (4)(c) enables an employer to discount periods when a worker was actually at work if those periods preceded

a time when the worker was absent and, in all the circumstances, it would be reasonable for the employer to discount those periods.

89. Paragraph (5) makes it clear that, in calculating his length of service under paragraph (3), a worker is to be treated as working for his employer (even though, at the time, he was working for another) in the circumstances set out in sub-paragraphs (a) and (b). Paragraph (6) explains certain references used in paragraph (5), while paragraph (7) makes it clear that, for the purposes of the regulation, the term “benefit” does not include benefits awarded to a worker when he ceases his employment. So, for example, regulation 34 does not cover ‘enhanced redundancy payments’ within the meaning of regulation 35.

Regulation 35 - Exception for provision of enhanced redundancy payments

90. The statutory redundancy scheme at Part XII of the Employment Rights (Northern Ireland) Order 1996 (the “1996 Order”) requires an employer to make a payment upon redundancy, the amount of which is dependant upon the employee’s age, length of service, and weekly pay (subject to a cap: see Article 23 of the 1996 Order). The statutory redundancy scheme is lawful under the Directive as it is objectively justified under Article 6.1 of the Directive.
91. An employer who makes a redundancy payment to an employee in accordance with Part XII of the 1996 Order does not have to justify himself. Both the statutory authority exemption (in regulation 28) and this regulation make it clear that he is acting lawfully, even though he calculates the payment using age related criteria.
92. This regulation, however, is not aimed at such employers. The principal object of this provision is to assist those employers who base their redundancy schemes on the statutory scheme but who are more generous than the statutory scheme requires them to be. It would be inequitable if employers who did the minimum necessary did not run the risk of a successful challenge under these Regulations, yet a more generous employer – because he was doing more than he was required to do – could be challenged. If this were the position, there is a real risk that more generous employers would simply ‘level down’.
93. Paragraph (1) enables an employer to make “enhanced redundancy payments” to “qualifying employees”. Qualifying employees are defined in paragraph (2). They are employees who are entitled to redundancy payments in accordance with the statutory redundancy scheme, employees who would be entitled to such a payment but for the operation of Article 190 of the 1996 Order (which requires an employee to have been continuously employed for a period of two years before his redundancy) and employees who, with or without two years’ continuous employment, were not “dismissed” in accordance with Part XII of the 1996 Order but agreed to the termination of their employment in circumstances where, had they been dismissed, the dismissal would have been by reason of redundancy.

94. The term “enhanced redundancy payment” is also defined in paragraph (2). Paragraphs (3) and (4)(a) provide that for a payment to be an enhanced redundancy payment, the employer must calculate it in accordance with Article 197(1) to (3) of the 1996 Order. Once he has done so, the employer may pay the resultant amount to a qualifying employee who (for example) does not qualify for a redundancy payment under the statutory scheme. Alternatively, the employer might ‘enhance’ the resultant amount by multiplying it by a figure in excess of one (see paragraph (4)(c)). Or he might enhance that amount by following one or both of the methods set out in paragraph (4)(b) (after which he may multiply the resultant amount by a figure in excess of one (see paragraph (4)(c)). The methods set out in paragraph (4)(b) are as follows.
95. The calculation at Article 197(1) to (3) 1996 Order uses the concept of a week’s pay, which is limited to the amount specified in Article 23 of the 1996 Order. The employer may remove or raise that maximum amount (see paragraph (4)(b)(i)). It also uses the concept of “the appropriate amount”, which is a figure of one and a half weeks’, one week’s, or half a week’s pay (depending on the age of the employee during his employment). The employer may multiply this amount by a figure in excess of one (see paragraph (4)(b)(ii)).
96. Paragraph (5) ‘glosses’ the term “relevant date”, which is used in Article 197(1) of the 1996 Order. It provides that, in relation to qualifying employees who have not been dismissed but have agreed to the termination of their employment, “the relevant date” shall be taken to mean the date on which the termination takes effect.

Regulation 36 - Exception for provision of life assurance cover to retired workers

97. Regulation 36 provides an exception for employers who provide life assurance cover to workers who have had to retire early on grounds of ill health. Life assurance cover is usually provided in respect of people below the age of 65 (or the employer’s normal retirement age if different). Such cover is not provided in respect of older people because, as the probability of death increases, it becomes more and more expensive to provide. If employers were no longer able to impose - or had to objectively justify - a 'cut off' for the provision of such cover to those who have retired early, there is a real risk they would simply 'level down' i.e. they would cease to offer it to anyone. This exemption is intended to avoid that happening.

PART 5

FUNCTIONS OF THE EQUALITY COMMISSION

Regulation 37 - General duty of Commission

98. Regulation 37 confers on the Equality Commission the general duty of working towards the elimination of discrimination, promoting equality of

opportunity between persons of differing age groups, and keeping the working of the Regulations under review.

Regulation 38 - Research and education

99. Regulation 38 permits the Equality Commission to undertake any research or educational activities which appear to it necessary for the purposes of carrying out its general duties. It also permits the Commission to make charges for any such educational activities. The Commission may also assist financially, or otherwise, other persons undertaking any such research and educational activities.

Regulation 39 - Codes of practice

100. Regulation 39 permits the Commission to issue codes of practice in the field of employment, on eliminating discrimination or harassment or promoting equality of opportunity between persons of differing age groups. Paragraph (2) provides that a code of practice may include practical guidance for employers on taking steps which will help prevent their employees from doing anything which is unlawful under the Regulations. Paragraphs (3) to (5) require the Commission to publish the code in draft and in preparing the code to consult with such organisations and bodies which appear to the Commission to be appropriate and to modify the code accordingly.

PART 6

ENFORCEMENT

Regulation 40 - Restriction of proceedings for breach of Regulations

101. Regulation 40 ensures that if a person wishes to complain of discrimination or harassment under the Regulations, they may only do so in an industrial tribunal or the county court, as appropriate (see regulations 41 and 44). This does not, however, prevent the making of an application for judicial review in an appropriate case or to oust the jurisdiction of the Pensions Ombudsman.

Regulation 41 - Jurisdiction of industrial tribunals

102. Regulation 41 provides that complaints under Part 2 of the Regulations (except regulation 24 – institutions of further and higher education) should be brought in industrial tribunals. The usual tribunal rules of procedure apply to a complaint brought under these Regulations. Regulation 41 does not apply to qualifications bodies covered by regulation 20, if there is a statutory appeal already available against that body's decision. Regulation 41 also provides that an industrial tribunal shall not proceed with a complaint with could have been made to the Fair Employment Tribunal for Northern Ireland until all such proceedings in that tribunal have been disposed of.

Regulation 42 - Burden of proof: industrial tribunals

103. Regulation 42 makes provision concerning the burden of proof which applies to complaints brought in industrial tribunals. Once the person making the complaint has made out a prima facie case – in other words, where the tribunal could consider that discrimination or harassment has taken place – it is for the respondent to the complaint (e.g. the employer) to prove that he did not commit the act of discrimination or harassment.

Regulation 43 - Remedies on complaints in industrial tribunals

104. Regulation 43 sets out the remedies which are available for a complaint brought in an industrial tribunal. The tribunal may make a declaration or recommendation, or may order compensation for damages to be paid. No limit is set on the amount of compensation, and interest on the sum may also be ordered.
105. Under regulation 43(2), in cases of unintentional indirect discrimination, the tribunal can only award compensation if (a) it has made a declaration or recommendation (or both) and (b) it considers it just and equitable to award compensation. In any case where a recommendation is made but not complied with, the tribunal can award compensation, or increase any award already made.

Regulation 44 - Jurisdiction of county courts

106. Regulation 44 provides that complaints under regulation 24 (institutions of further and higher education) should be brought in a county court in Northern Ireland. The usual court rules of procedure apply to such complaints, in the same way as any other claim in tort for breach of statutory duty.

Regulation 45 - Burden of proof: county courts

107. Regulation 45 makes provision concerning the burden of proof which applies to complaints brought in a county court. It operates in the same way as regulation 41 does in relation to complaints in industrial tribunals.

Regulation 46 - Help for persons in obtaining information etc.

108. Regulation 46 permits a complainant or potential complainant, if they wish, to serve a questionnaire on the (potential) respondent (e.g. their employer) in order to obtain information relating to their complaint. The complainant may serve the questionnaire before presenting a complaint to a court or tribunal, and in more limited circumstances once a complaint has been presented to a court or tribunal. Paragraphs (3) and (4) of the regulation set out the time limits which apply.
109. Suggested forms for questions and replies are set out in Schedules 2 and 3 to the Regulations, but complainants and respondents are not required to follow these. If the respondent does not reply within 8 weeks, or if their replies are

inadequate in the view of the court or tribunal, the court or tribunal may draw adverse inferences, including an inference that discrimination did take place, if appropriate.

Regulation 47 - Assistance by Commission

110. Regulation 47 permits the Equality Commission for Northern Ireland to give assistance to actual or prospective complainants. Paragraph (1) sets out the criteria that the Commission must apply in deciding whether to give assistance and paragraph (2) specifies what the assistance may include – advice, settlement facilities, arranging legal advice and representation. Paragraphs (3) and (4) provide for the recovery of expenses incurred by the Commission and paragraph (5) defines terms used under this regulation.

Regulation 48 - Period within which proceedings to be brought

111. Regulation 48 lays down the time limits for bringing a complaint under the Regulations. A complaint to an industrial tribunal must be presented within 3 months of the alleged act, and a complaint to a county court within 6 months, though a court or tribunal has a discretion to accept a late complaint if it would be “just and equitable” to do so. Paragraph (2) makes clear that where the period within which a complaint must be presented to an industrial tribunal is extended by the 2004 Dispute Resolution Regulations, the extended period takes precedence. Paragraph (5) sets out how these time limits operate in relation to contracts, acts extending over a period and omissions.

PART 7

SUPPLEMENTAL

Regulation 49 - Validity of contracts, collective agreements and rules of undertakings

112. Regulation 49 gives effect to Schedule 4, which makes provision concerning contracts, collective agreements and rules of undertakings.

Regulation 50 - Application to the Crown etc

113. Regulation 50(1) provides that the Regulations apply to acts by government Ministers and departments, and to acts of other Crown bodies. Paragraph (2) applies the employment provisions of regulation 7 to staff working for such departments and bodies. Paragraph (6) makes provision regarding the Crown Proceedings Act 1947, which concerns proceedings to which the Crown is a party.
114. Paragraph (4) provides that the Regulations do not apply to members of the Armed Forces. Article 3.4 of the Directive contains a derogation permitting Member States to exempt their armed forces from the application of the Directive in so far as it relates to discrimination on the grounds of age, and this derogation has been used in order to maintain combat effectiveness. This

covers all service personnel who may be required to deploy on demand: regular naval military and air forces, and reservists. It extends to all terms and conditions of service of members of the Armed Forces, including benefits under the Armed Forces Pension Scheme. However the exemption does not extend to civilians working for the Ministry of Defence.

Regulation 51 - Duty to consider working beyond retirement

115. Regulation 51 gives effect to Schedule 5 which makes provision concerning the duty to consider working beyond retirement.

Regulation 52 - Duty to consider working beyond retirement - transitional provisions

116. Regulation 52 gives effect to the transitional provisions set out in Schedule 6.

Regulation 53 - Amendments, transitionals, repeals and revocations

117. Regulation 53(1) gives effect to Schedule 7 which makes various amendments to primary and subordinate legislation in consequence of these Regulations. Regulation 53(2) gives effect to Schedule 8 which repeals or revokes legislation in consequence of these Regulations.

SCHEDULES

Schedule 1 - Pension schemes

Part 1 – Pensions schemes - general

Paragraph 1 - Interpretation

118. Paragraph 1 defines terms used in Schedule 1 and in regulation 12.
119. Sub-paragraph (1) defines various legislative references used in this Schedule and sub-paragraph (2) defines the term “occupational pension scheme” as having the meaning given by section 1(1) of the Pension Schemes (NI) Act 1993. Occupational pension schemes are referred to in this Schedule (and these notes) as “schemes” (see sub-paragraph (5)). Sub-paragraph (3) further limits the definition of “occupational pension scheme” for the purposes of the exception at paragraph 7(a) of this Schedule.
120. Sub-paragraph (4) provides that, for the purposes of the exceptions at paragraphs 12, 13 and 30, the definition of “occupational pension scheme” is extended to include both the Pension Schemes (NI) Act 2003 definition and the definition given at section 150(5) of the Finance Act 2004. The extended definition is used to ensure that the exemptions at paragraphs 12, 13 and 30, which relate to or are of relevance to tax rules for registered pension schemes, cover all those registered pension schemes which fall within the scope of the

Directive. Registered pension schemes are defined under the Finance Act 2004 by reference to occupational pension schemes as defined under the Finance Act, rather than as defined under the Pension Schemes (NI) Act 1993.

121. Sub-paragraph (6) defines various terms used in relation to schemes. Sub-paragraph (7) provides that where a scheme has separate sections, the provisions of the Schedule apply as if each section were a separate scheme. Sub-paragraph (8) defines “personal pension scheme” and “registered pension scheme”. Sub-paragraph (9) provides that the terms used in regulation 12 (which brings this Schedule into effect) have the same meaning as in this Schedule.

Paragraph 2 - Non-discrimination rule

122. Sub-paragraph (1) provides that every scheme is treated as including a non-discrimination rule. The non-discrimination rule is a rule requiring the trustees or managers of a scheme not to act contrary to regulation 12.
123. Sub-paragraph (2) provides that all provisions of every scheme shall be subject to the non-discrimination rule. This means that, where there is a conflict between the non-discrimination rule and a rule of the scheme, which would otherwise require the trustees/managers to act in a discriminatory way, the non-discrimination rule prevails.
124. Sub-paragraph (3)(a) provides that, if they do not otherwise have such a power, the trustees/managers shall have the power to alter schemes by resolution to ensure that the scheme complies with the non-discrimination rule. Sub-paragraph (3)(b) provides that the trustees or managers may make such alterations as are necessary by resolution, when, even though the trustees or managers have the requisite power to change the scheme, the procedure for exercising it is likely to be unduly complicated or protracted, or it involves gaining consent which cannot be obtained, or can only be obtained with undue delay or difficulty.
125. Sub-paragraph (4)(a) provides that any resolution made under sub-paragraph (3) may be made so as to have retrospective effect, but shall have no retrospective effect before 1st October 2006 (the date the Regulations come into operation). Sub-paragraph (4)(b) provides that any resolution made under sub-paragraph (3) shall also be subject to the consent of any scheme employer, whose consent would have been required if the change to the scheme had been made under the scheme rules

Paragraph 3 - Exception for rules, practices, actions and decisions relating to occupational pension schemes

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

Paragraph 4- Exception for rules, practices, actions and decisions relating to contributions by employers to personal pension schemes

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

Paragraph 5 - Procedure in industrial tribunals

128. Paragraph 5 provides that where a member or prospective member of a scheme brings a complaint against the trustees or managers of the scheme in an industrial tribunal:
- that the trustees or managers of the scheme have committed an act that is unlawful under regulation 12 (pension schemes) or regulation 25 (relationships which have come to an end), or
 - that where other parties by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) are to be treated as having committed such an act,

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

Paragraph 6 - Remedies in industrial tribunals

129. Sub-paragraph (1) provides for the situation where a complainant, (who is a member or prospective member, but not a pensioner member, of a scheme) makes a complaint which relates to the terms on which a person may become a member of the scheme or the terms on which a member of the scheme is treated, and the industrial tribunal finds the complaint to be well founded.
130. Sub-paragraph (2) provides that in this situation, the industrial tribunal may make an order giving the complainant a right either to be admitted to the scheme (if the complaint related to the terms on which people can become members) or to be granted membership without discrimination (if the complaint related to the terms on which members of the scheme are treated).
131. Sub-paragraph (3)(a) provides that the industrial tribunal may specify in any order it makes under sub-paragraph (2), the date from which the order is to have effect, but that this date may not be before 1st October 2006 (the date the Regulations come into operation). Sub-paragraph (3)(b) provides that when an industrial tribunal makes an order that a complainant is to enjoy admission or membership, it may make such provision as it considers appropriate as to the terms or capacity of that membership.

132. Sub-paragraph (4) provides that an industrial tribunal cannot make an order for compensation under regulation 43(1)(b) (remedies on complaints in industrial tribunals) where this paragraph applies, unless the compensation is for injury to feelings or if the compensation is under regulation 43(3), where a respondent fails to comply with a recommendation made by an industrial tribunal.

Part 2 - Rules, practices, actions and decisions relating to occupational pension schemes

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

Paragraph 7 - Admission to schemes

134. Paragraph 7(a) provides that it shall not be unlawful under these Regulations for a scheme to set minimum or maximum age limits for a person's admission to a scheme, and that different ages can be set for different groups or categories of worker. This exception does not apply to all schemes. To rely on this exception, schemes must only carry out retirement benefit activities as set out in section 232 Pensions (NI) Order 2005. This is to ensure that the exception is not wider than Article 6(2) of the Directive permits.
135. Paragraph 7(b) provides that it shall not be unlawful under these Regulations for a scheme to set a minimum level of pensionable pay that a person must receive in order to gain admission to the scheme. The minimum level of earnings must not be above the lower earnings limit which is referred to at section 5(1) of the Social Security Contributions and Benefits (NI) Act 1992. Such a rule may be necessary for the efficient functioning of a scheme.

Paragraph 8 - The use of age criteria in actuarial calculations

136. Paragraph 8 provides that it is not unlawful under these Regulations to use age criteria in making actuarial calculations in relation to a scheme. This exemption is based on Article 6(2) of the Directive. Sub-paragraphs (a), (b) and (c) give examples of when age criteria may be used in such calculations, although the exemption is not limited to these examples. The examples cover age criteria used for:
- actuarial reduction of benefits paid to a member who has not reached a scheme's early retirement pivot age, or actuarial enhancement of benefits paid to a member who continued to work after late retirement pivot age. Early and late retirement pivot age are defined at paragraph 1(6) of Schedule 1 to these Regulations;
 - the calculation of member or employer contributions;
 - the calculation of pension commuted in exchange for a lump sum.

Paragraph 9 - Contributions

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

Paragraph 10 - Contributions under money purchase arrangements

138. Paragraph 10 provides exemptions for age related contributions under money purchase arrangements. Money purchase arrangements are defined in paragraph 1(6) of this Schedule. Under money purchase arrangements, contributions are invested on a member's behalf and the member's pension benefit is the result of that investment. The exemption applies to money purchase arrangements under which members or employers make age related contributions where the aim is for the arrangement to yield more equal emerging benefits than would follow from equal contributions at all ages. Such arrangements are reasonable because it costs a scheme more to provide the same rate of pension for an older member compared to a younger one.
139. Paragraph 10(b) provides an exemption for equal rates of contribution irrespective of the age of members. It could be claimed that the setting of equal rates was discriminatory. For example, if two members, comparable except for their ages, both retired aged 65, under money purchase arrangements the older worker would receive much lower pension benefits, than the younger worker at age 65, since the younger member's fund would have enjoyed extra years of growth. The older worker could claim to have suffered a disadvantage even though both were treated equally with regard to the rate of employer/member contributions.

Paragraph 11 - Contributions under defined benefits arrangements

140. Paragraph 11 provides that it is not unlawful under these Regulations, under defined benefits arrangements, to set the rate of employer or member contributions according to a member's age, if the aim in setting different rates of contributions is to meet the cost of the benefits defined by the scheme. Defined benefits arrangements are defined at paragraph 1(6) of this Schedule 1 of these Regulations and involve a member being guaranteed a particular level of benefit. This exemption reflects the fact that it costs a scheme more to provide the same rate of pension for an older member than for a younger member.

Paragraphs 12 to 18 - Age related rules, practices, actions and decisions relating to benefit

141. Paragraph 12 provides an exemption for schemes which fix a minimum age below which members are not entitled to receive age related benefits. In order to obtain tax advantages available to registered pension schemes under Part 4 of the Finance Act 2004, schemes may set a rule that such benefits are not payable to members before age 50. Benefits provided to members under defined benefits arrangements before early retirement pivot age must not be “enhanced”. Thus such benefits must be subject to actuarial reduction and must be calculated without crediting the member with additional years of service. Early retirement pivot age is defined at paragraph 1(6) of Schedule 1 to these Regulations. Age related benefits are also defined at paragraph 1(6) and comprise benefits provided to a member on retirement, on a member reaching a particular age, or on the termination of a member’s service
142. Paragraph 13 provides a further exemption for schemes which fix a minimum age below which members are not entitled to receive age related benefits. This exemption goes wider than the exemption at paragraph 12. This exemption allows a scheme to stipulate a minimum age for existing or prospective members to become entitled to any age related benefits without making an actuarial reduction for early receipt, and also allows schemes to credit existing and prospective members with additional periods of pensionable service. This exemption is included because although Government does not consider that it can justify including an exemption for “enhanced early retirement benefit” in relation to all members of schemes, it does consider that it is justifiable to allow such an exemption for existing and prospective members of a scheme (who have an expectation or a contractual entitlement to such benefits, and who might well be unable to remedy any shortfall in any early retirement pension at this stage in their working lives).
143. Paragraph 14 provides an exemption for early and late retirement pivot ages, including different ages for different groups or categories of member. An early retirement pivot age is an age specified in a scheme’s rules as the earliest age at which benefit becomes payable without actuarial reduction (disregarding any special provision as to early payment on grounds of ill health or otherwise). A late retirement pivot age is an age specified in a scheme’s rules above which benefit becomes payable with actuarial enhancement. It will be reasonable for schemes to actuarially reduce benefits for early receipt to reflect the fact that benefits received early will generally be paid for longer (i.e. until the member dies) and that contributions will have less time to increase in value through investment before payment to the member. By setting different early and late retirement pivot ages schemes are able to provide that members who retire between particular ages receive pensions which are neither actuarially reduced nor enhanced. This reflects common practice and may be necessary for the viability of a scheme.
144. Paragraph 15 provides an exemption for rules whereby schemes enhance any age related pension benefit paid to a member who retires early on ill health grounds by reference to the number of years which the member would have

completed had he continued working in pensionable service up to an age specified in scheme rules. Without this exemption schemes might face claims by an older ill health retiree complaining that he had not received as much enhancement as a younger ill health retiree with the same length of service. The rule is reasonable because otherwise schemes might be expected to make pension provision to ill health retirees in respect of periods before a member joined a scheme.

145. Paragraph 16 provides an exemption for schemes which provide male members with a bridging pension. A bridging pension is an additional amount of pension which may be paid by a scheme to retired men aged 60-65 to compensate for the fact that such men do not qualify for the basic state pension whereas women of the same age do qualify for such a pension. The exemption means that male pensioners over 65 cannot bring age discrimination claims complaining that they are no longer paid the bridging pension which is paid to men aged 60-65. This is reasonable because men over 65 receive a state pension.
146. Paragraph 17 provides an exemption for any rule whereby a scheme reduces the amount of benefit paid on the death of a member to any dependant who is more than a specified number of years younger than the member. The exemption protects schemes against a claim by a member that he and others in a particular age group are disadvantaged by this rule because members in a particular age group are more likely to have younger partners than members in another age group. The rule is reasonable because a younger partner may receive pension for longer than a partner closer in age to the deceased member, causing costs, which, if not limited, could lead to schemes withdrawing the provision of survivors' benefits.
147. Paragraph 18 operates in relation to schemes in the same way as regulation 36 does in relation to employers who provide life assurance to workers outside a scheme. Schemes which provide life assurance cover for retired members usually do so only up to the age of 65 (or up to the age at which a worker normally retires if different). Such cover is not provided in respect of older people because, as the probability of death increases, it becomes more expensive to provide. If schemes had to objectively justify a 'cut off' age for the provision of such cover to people who had retired early on ill health grounds, there is a risk they would simply 'level down' i.e. they would cease provide the cover to any ill health retirees. This exemption is intended to avoid such "leveling down".

Paragraphs 19 to 24 - Other rules, practices, actions and decisions relating to benefit

148. Paragraph 19 provides an exemption for rules which stipulate that members' (or survivors') entitlement to benefits under a defined benefits arrangement may be calculated by reference to the number of years of pensionable service a member has completed, provided that, for each year of pensionable service, members in a comparable position are entitled to accrue benefits based on the same fraction of pensionable pay. Thus if two workers had different pensions

due to their differing lengths of service, and the worker with shorter service was a younger worker than the worker with longer service, the younger worker could not bring a claim alleging that he and other younger workers were disadvantaged by being provided with less benefit than older members who had accumulated more pensionable service. The rule reflects the way in which defined benefit schemes work. It is reasonable to expect the level of pension benefits to be commensurate with a member's length of pensionable service.

149. Paragraph 20 provides an exemption for rules whereby schemes may provide different amounts of pension benefit to different members to the extent that the difference is due to differences over time in the pensionable pay of those members. Under both defined benefits and money purchase arrangements the level of eventual benefits will depend on a member's pensionable pay. It is reasonable for higher paid members to receive higher pensions than lower paid members. This exemption prevents claims brought by younger workers claiming that they tend to be lower paid than older workers and are therefore disadvantaged as regards the provision of pension benefits.
150. Paragraph 21 provides an exemption for rules whereby a scheme imposes a limit on the number of years of pensionable service by reference to which benefits may be calculated. A limit on the number of years which are taken into account in calculating pensionable service may be necessary as otherwise the provision of pensions could become so expensive that employers could be discouraged from providing occupational pensions. The exemption prevents older members whose length of pensionable service exceeds the limit set by the scheme from complaining that the limit disadvantages them.
151. Paragraph 22 provides an exemption for rules which stipulate that pension benefits are only provided to members who have completed more than a minimum period of pensionable service, provided that the period is not longer than two years. Although such a requirement may disadvantage younger members, limiting provision of benefits to those who have completed a minimum period of pensionable service may be necessary for the efficient functioning of a scheme.
152. Paragraph 23 provides an exemption for rules stipulating that members (or survivors) are only entitled to benefits if a member's pensionable pay is above a specified amount. Such an amount must not be more than the lower earnings limit, referred to in section 5(1) of the Social Security Contributions and Benefits (NI) Act 1992. Such a rule may be necessary for the efficient functioning of the scheme.
153. Paragraph 24 provides an exemption for schemes that impose an upper limit on the level of pensionable pay used to calculate benefits. Older workers who have a higher level of pensionable pay may be disadvantaged compared to younger workers with lower pensionable pay, as less of their salary will be pensionable. However, an upper limit on the amount of pension that a scheme is liable to fund, may be necessary for the viability of a scheme.

Paragraph 25 - Closure of schemes

154. Paragraph 25 protects schemes from age discrimination claims if they close to new members. Thus a defined benefit scheme may remain open to existing members but not to new joiners. Without this exemption employers might feel compelled to close defined benefit schemes altogether to achieve equality of treatment for all workers.

Paragraphs 26 to 29 - Other rules, practices, actions and decisions

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

Paragraph 30 - Registered pension schemes

159. Paragraph 30(1) provides an exemption for rules which registered pension schemes must comply with in order to secure tax advantages available under Part 4 of the Finance Act 2004. Paragraph 30(2) provides that the exemption at sub-paragraph (1) does not apply to the setting of a minimum age for payment of age related benefits. However, paragraphs 12 and 13 of Schedule 1 to these Regulations provide exemptions, subject to certain conditions, for schemes which set such minimum ages

Part 3 - Excepted rules, practices, actions and decisions relating to contributions by employers to personal pension schemes

160. The provisions of the Directive do not extend to personal pensions except in relation to contributions by an employer. Contributions by an employer are pay and therefore subject to the Directive's provisions. The rules, practices, actions and decisions at paragraphs 31 and 32 relating to contributions by employers to personal pension schemes are objectively justified under Article 6.1 of the Directive.

Paragraphs 31 and 32 - Contributions by employers

161. Paragraph 31 provides an exemption to allow age related contributions by a worker or an employer where the aim is to yield more equal emerging benefits than would follow from equal contributions at all ages.
162. Paragraph 32 provides that, in relation to a worker's personal pension scheme, it is not unlawful under these Regulations for an employer to make contributions which differ according to workers' remuneration. The justification for this is the same as that given for the exemption set out at paragraph 20 of Schedule 1 to these Regulations.

Schedule 2 - Questionnaire of person aggrieved

163. Schedule 2 sets out a suggested format for the questionnaire which may be used under regulation 46. This includes a warning to the respondent that a court or tribunal may draw adverse inferences from a failure to reply or an inadequate reply.

Schedule 3 - Reply by respondent

164. Schedule 3 sets out a suggested format for the reply to a questionnaire under regulation 46.

Schedule 4 - Validity of contracts, collective agreements and rules of undertakings

165. Schedule 4 contains detailed provisions relating to terms of contracts, collective agreements, and rules of undertakings which are discriminatory.
166. Part 1 of the Schedule deals with terms in contracts. Under paragraph 1(1), a term of a contract is void in certain circumstances. Paragraph 1(2) makes clear that paragraph 1(1) does not apply where the term provides for discrimination against or harassment of a party to the contract. The term is merely unenforceable against that party, and he or she may choose to rely on it if it also has some benefits for them. Paragraph 1(3) provides that a term which tries to exclude or limit the operation of the Regulations is unenforceable by the person in whose favour the term operates. Paragraph

1(4) specifies that these provisions apply whether the contract was entered into before or after 1st October 2006 (the date the Regulations come into operation). Under paragraph 3(1) and (2), a county court has the power to modify or remove a discriminatory term which is void or unenforceable.

167. Paragraph 2(1) to (8) contains special provisions relating to compromise agreements to settle complaints brought under the Regulations, and the safeguards which they must meet to be valid. Paragraph 1(3) does not apply in relation to such agreements.
168. Part 2 of the Schedule deals with terms of collective agreements, and rules made by employers, trade organisations or qualifications bodies, as specified in paragraph 4(1). Paragraphs 5 to 7 set out the circumstances in which an individual may bring a complaint about such an agreement or rule (e.g. if he or she believes the rule may affect them in the future). Under paragraphs 8 and 9, a tribunal may declare a discriminatory term or rule to be void, but the rights of certain persons under the agreement or rule may also be preserved.

Schedule 5 - Duty to consider working beyond retirement

169. Schedule 5 sets out the procedures that need to be followed by an employer in dismissing an employee in order for the reason for the dismissal to be retirement under the Articles inserted into Part XI of the Employment Rights (Northern Ireland) Order 1996 by Schedule 7, and in order for the dismissal to be fair.
170. Paragraph 1(1) defines the terms used in the Schedule. In particular it defines “operative date of termination” as being the date on which notice given by the employer expires or, if no notice is given, the date on which termination of the contract of employment takes effect.
171. Paragraph 1(2) defines the term “intended date of retirement”. Normally this is the date stated by the employer as the date on which the employer intends the employee to retire in the notification that the employer is required to give the employee of his right to request not to be retired. However, special provision is made for the case where the employer does not give the employee such a notification and in some circumstances a different date supersedes the original intended date of retirement.
172. Paragraph 2 requires the employer to notify the employee of the employee’s right to request not to be retired and of the date on which the employer intends the employee to retire. The notification is required to be given at least six months, but not more than a year, before that date.
173. Paragraph 3 provides for the case where the employer and employee agree, when following the procedure required by this Schedule, or the employer decides under the procedure, that the retirement will take place on a later date than the original intended retirement date, and for the case where the employer

and employee agree that the retirement will take place on an earlier date. In that event the earlier or later date supersedes the original intended date of retirement provided, in the case of a later date, that it falls not more than six months after the original date.

174. Paragraph 4 has the effect that if an employer fails to notify the employee in accordance with paragraph 2 within the time limits allowed by that paragraph the employer remains under a continuing duty to notify the same information to the employee until the fourteenth day before the operative date of termination.
175. Paragraph 5 gives the employee the right to request not to be retired on the intended date of retirement. The request must say whether the employee wishes his employment to continue indefinitely, for a stated period or until a stated date. If the employer has notified in accordance with paragraph 2, the request must be made at least three months but not more than six months before the intended date of retirement. If the employer has failed to notify in accordance with paragraph 2, the request can be made at any time within the six month period before the intended date of retirement.
176. Paragraph 6 provides that an employer to whom a request is made has a duty to consider it in accordance with paragraphs 7 to 9 of the Schedule.
177. Paragraph 7 sets out the procedure to be followed when considering a request. The employer must hold a meeting with the employee within a reasonable period after receiving the request unless, during that period, the employer and employee agree that the employee is to retire later or it is not practicable to hold a meeting within the period. If it is not practicable to hold a meeting within the period the employer must still consider the request. After the meeting or the employer's consideration of the request, the employer must give a notice to the employee saying, if the request is accepted, whether the employment will continue indefinitely or for a stated period. If the request is refused the notice must confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.
178. Paragraph 8 gives the employee a right of appeal from the decision reached by the employer under paragraph 7. The right can be exercised either if the employer refuses the request entirely or if the employer accepts it but has decided to continue employing the employee for a shorter period than the employee asked for in the request. The procedure to be followed on an appeal is the same as that to be followed when considering a request under paragraph 7.
179. Paragraph 9 gives an employee who reasonably requests to be accompanied at a meeting held under paragraph 7 or 8 a right to be accompanied by a companion of the employee's choice provided the companion is an employee or worker employed by the same employer. The employer must allow the companion to address the meeting and confer with the employee but need not allow the companion to answer questions on behalf of the employee.

180. Paragraph 10 has the effect that where an employer has received a request from an employee but has not yet given the employee notice of the decision as required by paragraph 7, any dismissal of the employee that would otherwise take effect before that notice is given is ineffective if it is the dismissal envisaged in the request. Instead the employee's contract is continued until the day after the giving of the notice. If paragraph 10 applies, the day after the giving of the notice supersedes the original intended date of retirement as the intended date of retirement.
181. Paragraph 11 has the effect that where an employer fails to notify an employee in accordance with paragraph 2, the employee has the right to complain of that failure to an industrial tribunal. If the tribunal finds such a complaint well-founded it is required to order the employer to pay the employee compensation of such amount, not exceeding 8 weeks pay, as it considers just and equitable.
182. Paragraph 12 has the effect that where an employer fails, or threatens to fail, to comply with the right to be accompanied in paragraph 9, the employee has the right to complain of that failure to an industrial tribunal. If the tribunal finds such a complaint well-founded it is required to order the employer to pay the employee compensation of an amount not exceeding two weeks pay.
183. Paragraph 13 gives employees who use or try to use the right to be accompanied in paragraph 9 the right not be subjected to a detriment by their employer for doing so. The paragraph also gives employees and workers who accompany or seek to accompany an employee pursuant to a request made under paragraph 9 the right not be subjected to a detriment by their employer for doing so. The paragraph also provides that an employee is to be regarded as unfairly dismissed if the reason, or principal reason, for dismissal is that the employee used or tried to use the right to be accompanied in paragraph 9 or accompanied or sought to accompany another employee pursuant to a request under that paragraph.

Schedule 6 - Duty to consider working beyond retirement - transitional provisions

184. As noted above, paragraph 2 of Schedule 5 requires the employer to notify the employee of the employee's right to request not to be retired and of the date on which the employer intends the employee to retire. The notification is required to be given at least six months but not more than a year before that date.
185. Transitional provision is therefore required in order to cater for circumstances where the employer gives notice of termination before the commencement date of the Regulations (1st October 2006) and dismissal is to occur after the commencement date, but before 1st April 2007. Also provision is made for circumstances where notice of termination is given after commencement and dismissal is to take effect before 1st April 2007.

186. This Schedule sets out the circumstances in which the employer will be treated as having complied with either paragraph 2 or 4 of Schedule 5.
187. Paragraph 5 of Schedule 5 gives the employee the right to request not to be retired on the intended date of retirement. If the employer has notified in accordance with paragraph 2 of Schedule 5, the request must be made at least three months but not more than six months before the intended date of retirement. If the employer has failed to notify in accordance with paragraph 2 of Schedule 5 the request can be made at any time within the six month period before the intended date of retirement.
188. Schedule 6 sets out the circumstances in which a request made by an employee is to be treated as a request made under paragraph 5 of Schedule 5 where the dismissal is to occur after commencement of the Regulations (1st October 2006) but before 1st April 2007.

Schedule 7 - Amendments to legislation and related transitional provisions

189. Article 16 of the Directive requires the abolition of legislation contrary to the principle of equal treatment. Schedule 7 amends primary and subordinate legislation in order to remove unjustified provisions. It also adds references to the Age Regulations to various other legislative provisions.
190. Amendments to primary legislation are listed in Part 1, and to secondary legislation in Part 2. Subject to that, all legislation appears in chronological order.

Part 1 - Primary legislation

Paragraph 1 - The Social Security Contributions and Benefits (Northern Ireland) Act 1992

191. The Social Security Contributions and Benefits (Northern Ireland) Act 1992 (“SSCBA”) is amended in order to remove age limits relating to entitlement to statutory sick, maternity, paternity and adoption pay.
192. Section 159 of the SSCBA is amended in order to remove the lower limit age limit for entitlement to statutory sick pay. Section 159(1) defines who is an ‘employee’ for the purposes of entitlement to statutory sick pay. The amendment omits section 159(1)(b) and so extends this definition and therefore the scheme, to employees under 16 years of age. The definition of ‘employer’ is also amended in order to bring those under 16 within its scope. An employer is a person who pays, or is liable to pay secondary Class 1 National Insurance Contributions in relation to an employee. Because employers are not required to pay contributions on behalf of employees under 16, the amendment extends the definition where employers would have been liable to pay contributions for employees had they not been under the age of 16.

193. The amendment to section 167(1) produces similar effects to the amendments to section 159(1) and removes the lower age limit for entitlement to statutory maternity pay. The amendment also makes provision for this change in entitlement to have effect in a way that is appropriate to statutory maternity pay. For statutory maternity pay the crucial date for determining the employer's liability is whether a woman was employed by him in the fifteenth week before her expected week of confinement. The amended provisions therefore apply to women whose expected week of confinement begins on or after the 14th January 2007, that is 15 weeks after 1st October 2006.
194. The amendments to sections 167ZJ and 167ZS amend the definitions of 'employer' and 'employee' in relation to statutory paternity pay and statutory adoption pay respectively and make provision for the application of these amendments. In these sections, the definition of 'employer' refers to section 6 of SSCBA. That section limits the requirement to pay Class 1 national insurance contributions to people aged 16 or over. These amendments continue to keep the reference to section 6 but provide that the definition of employer applies even where the employee is 16 or under. The definition of 'employee' is amended so that the reference to the employee being over the age of 16 is removed
195. The amended provision applies statutory paternity pay for birth in respect of children whose expected week of birth is the 14th January 2007 or later. This will ensure the amended provisions apply to employees whose eligibility for SPP is to be assessed at any time from 1st October 2006 (the date these Regulations come into operation) onwards. The amended provisions apply in respect of statutory paternity pay in the case of adoptions, and statutory adoption pay in respect of children matched or adopted on or after the commencement of the provision.
196. By virtue of sub-paragraph (9), the upper age limit of 65 for entitlement to statutory sick pay is removed by the omission of paragraph 2(a) of Schedule 11 to the SSCBA which prevents a period of incapacity for work arising where a person is over the age of 65. Employees over the age of 65 who have a period of incapacity beginning after commencement of these Regulations (1st October 2006) may therefore be entitled to statutory sick pay. However, because some employees might otherwise have been disallowed on the grounds of their age prior to 1st October 2006 if their period of incapacity for work in which a claim is made began before commencement, sub-paragraph (10) ensures entitlement arises from commencement onwards.

Paragraph 2 - The Statutory Sick Pay (Northern Ireland) Order 1994

197. The omission of the words after Article 3(2)(b) of the 1994 Order are purely consequential upon the omission, by the Age Regulations, of paragraph 2(a) of Schedule 11 to the Social Security Contributions and Benefits (NI) Act 1992 (see amendment made by paragraph 1(9) of Schedule 7 to the Age Regulations).

Paragraph 3 - The Employment Rights (Northern Ireland) Order 1996

198. Article 7(2) of the Employment Rights (Northern Ireland) Order 1996 (“the 1996 Order”) is omitted so as to remove the lower age limit in relation to the computing of a period of continuous employment for the purposes of compensation for unfair dismissal and for redundancy payments.
199. Article 130 of the 1996 Order is amended to include a new potentially fair reason for dismissal – that of retirement. As with other reasons for dismissal, it remains the case that the employer must “show” the Industrial Tribunal what the reason for dismissal is.
200. The insertions of new Articles 130ZA to 130ZH into the 1996 Order set out a number of alternative factual scenarios which may apply to the dismissal. In some cases the provisions say whether the reason for dismissal is or is not retirement. In other cases it is left for the Industrial Tribunal to decide whether the reason for dismissal is retirement.
201. If the employer wishes to be able to rely on retirement as a reason for dismissal, the chances of successfully doing so are greatly increased if he follows the procedures set out in paragraph 2 of Schedule 5 to the Regulations. That is to say that at least six months prior to the dismissal (but no more than a year prior to the dismissal) he notifies the employee of the date on which he intends that the employee should retire and he informs the employee that the employee has a right to request to work beyond retirement age.
202. The circumstances where retirement will be the only reason for dismissal are as follows:
 - where the employee has no normal retirement age, the employer gives the required notice in accordance with paragraph 2 of Schedule 5, and the dismissal takes effect on or after the employee’s 65 birthday and on the intended date of retirement;
 - where the employee has a normal retirement age which is over the age of 65, the employer gives the required notice in accordance with paragraph 2 of Schedule 5, and the dismissal takes effect on or after the employee has reached the normal retirement age and on the intended date of retirement;
 - where the employee has a normal retirement age which is below the age of 65, that retirement age does not amount to unlawful age discrimination, the employer has notified the employee in accordance with paragraph 2 of Schedule 5, and the dismissal takes effect on or after the employee has reached the normal retirement age and on the intended date of retirement.

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

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

- where the employee has no normal retirement age, but the dismissal takes effect before the employee reaches the age of 65;
- where the employee has no normal retirement age, the employer gives notice in accordance with paragraph 2 of Schedule 5, but the dismissal takes effect before the intended date of retirement notified to the employee;
- where the employee has a normal retirement age (whether above or below 65), but the dismissal takes effect before the employee reaches that age;
- where the employee has a normal retirement age over the age of 65, the employer gives notice in accordance with paragraph 2 of Schedule 5, but the dismissal takes effect before the intended date of retirement date so notified;
- where the employer does not notify the employee in accordance with paragraph 2 of Schedule 5, but he does notify the employee of an intended date of retirement, but the dismissal takes effect before that intended date of retirement
- where the employer has a normal retirement age which is below the age of 65, the dismissal takes effect after that age, but it is unlawful age discrimination for the employee to have that retirement age (i.e. the retirement age is not objectively justified);
- where the employer has a normal retirement age which is below the age of 65, that retirement age is objectively justified, the employer has notified the employee in accordance with paragraph 2 of Schedule 5, but the dismissal takes effect before the intended retirement date.

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

- (a) where the employer has not notified the employee in accordance with paragraph 2 of Schedule 5 – perhaps he notified late or not at all (whether or not the employee has a normal retirement age); or
- (b) where the employer notified the employee in accordance with paragraph 2 of Schedule 5, but the dismissal takes effect after the intended date of retirement.

In the circumstances described in (a) above, when deciding what is the reason for dismissal, the tribunal must take into account the matters listed in Article 130ZF of the 1996 Order – these matters are whether the employee was notified of an intended retirement date in accordance with paragraph 4 of

Schedule 5, when that notification was given and whether the employer followed the procedures in paragraph 7 of Schedule 5. In the circumstances described in (b), the tribunal may take these matters into account.

205. Where a tribunal has concluded that retirement is the reason for dismissal, whether or not the dismissal is fair is assessed in accordance with Article 130ZG of the 1996 Order. This fairness test ousts the fairness test in Article 130(4) of the 1996 Order which applies in relation to dismissals for other reasons. The test amounts to a procedural fairness test – if the employer has not failed to comply with paragraphs 4, 6, 7 and 8 of Schedule 5 (if applicable) then the dismissal will be fair.
206. Schedule 7 goes on to make other amendments to the unfair dismissals legislation, namely –
- removal of the upper age limit on bringing unfair dismissal claims;
 - allowing Industrial Tribunals to make an order of compensation to the employee of four week's pay where the dismissal is found to be unfair in accordance with Article 130ZG of the 1996 Order (employer's failure to comply with paragraph 4,6, 7 or 8 of Schedule 5);
 - the tapering of the basic award for unfair dismissal after the age of 64 is removed (Article 153(4) and (5));
 - where the basic award for unfair dismissal would be less than four week's pay, the Industrial Tribunal may increase the amount of compensation to four week's pay where the dismissal is unfair as a result of the employer's failure to comply with paragraph 4,6,7 or 8 of Schedule 5.
207. The amendment to Article 140 of the 1996 Order secures that the normal qualifying period of one year's continuous employment needed to claim unfair dismissal does not apply if the reason or principal reason for dismissal is that the employee used the right to be accompanied at a meeting to consider the employee's request not to be retired held under paragraph 7 or 8 of Schedule 5 to the Regulations or that the employee accompanied or sought to accompany another employee at such a meeting.
208. The omission of Article 141 of the 1996 Order removes the upper age limit on bringing a claim for unfair dismissal.
209. Article 145(5)(a) of the 1996 Order is amended to provide for the payment of a minimum of four weeks compensation where the employee is unfairly dismissed as a result of the employer's non-compliance with the duty to consider procedures in Schedule 5 to the Regulations and where the tribunal orders the employee to be reinstated or re-engaged.
210. Article 153(4) and (5) of the 1996 Order are omitted so as to remove the tapering of compensation for unfair dismissal after the employee's 64th birthday.

211. Article 154(1A) of the 1996 Order is amended to provide for the payment of minimum of four weeks compensation where an employee is unfairly dismissed as a result of the employer's non-compliance with the duty to consider procedures in Schedule 5 to the Regulations.
212. Article 160 of the 1996 Order is amended so that, where an act is both unfair dismissal and discrimination or harassment under these Regulations, compensation cannot be awarded twice for the same loss.
213. The omission of Article 191 of the 1996 Order removes the upper age limit on receiving a redundancy payment.
214. Article 193 of the 1996 Order is omitted. It excludes the right to a redundancy payment in certain circumstances where the employee is also entitled to claim a pension. The Contracts of Employment and Redundancy Payments (Pensions) Regulations (NI) 1965 (S. R. & O. (NI) 1965 No. 246), which are treated as being made under this Article are also revoked.
215. Paragraphs (4), (5) and (8) of Article 197 of the 1996 Order are omitted so as to remove the tapering of the amount of a redundancy payment after the employee's 64th birthday.

Paragraph 4 - The Industrial Tribunals (Northern Ireland) Order 1996

216. Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996 is amended so that its conciliation provisions also apply in relation to complaints brought in industrial tribunals under the Age Regulations. Accordingly the Labour Relations Agency will be able to act in such a case.

Paragraph 5 - The Fair Employment and Treatment (Northern Ireland) Order 1998

217. Article 85 of the Fair Employment and Treatment (NI) Order 1998 is amended so that a complaint brought in the Fair Employment Tribunal which could have been made to an industrial tribunal under the Age Regulations may be heard and determined by the Fair Employment Tribunal.
218. Paragraphs 1(1) and 1(2) of Schedule 2A to the Fair Employment and Treatment (NI) Order 1998 are amended so that the references to definitions in the Pensions (NI) Order 1995 and the Pension Schemes (NI) Act 1993 no longer refer to those statutes as at the date of the coming into operation of Schedule 2A of the Fair Employment and Treatment (NI) Order 1998, but to those statutes as amended.

Paragraph 6 - The Employment (Northern Ireland) Order 2003

219. Schedule 2 to the Employment (NI) Order 2003 is amended so that the adjustment of awards under Article 17 of that Order also applies to complaints made under the Age Regulations. This means that a tribunal may reduce or

increase the amount of compensation it awards, in cases where the employer or employee has not followed the statutory procedure for making an internal complaint, as set out in Schedule 1 to the 2003 Order.

220. Schedule 3 to the Employment (NI) Order 2003 is amended so that, under Article 19 of that Order, an employee wishing to complain under the Age Regulations must first submit a statement of grievance to their employer. The relevant procedure is set out in Schedule 1 to the 2003 Order.
221. Schedule 4 to the Employment (NI) Order 2003 is amended so that the provisions of Article 27 of that Order, also apply to cases brought under the Age Regulations. This means that, where an employer has failed to give a statement of employment particulars to the employee, the tribunal must make an award of compensation to the employee for this, separate from its consideration of the complaint of discrimination.

Part 2 - Subordinate Legislation

Paragraph 7 - The Riding Establishments Regulations (Northern Ireland) 1980

222. The substitution of regulation 4(1) of the Riding Establishments Regulations (NI) 1980 removes an unjustified age limit.

Paragraph 8 – The Statutory Sick Pay (General) Regulations (Northern Ireland) 1982

223. Regulation 16(1) of the Statutory Sick Pay (General) Regulations (NI) 1982 is amended to enable people under the age of 16 to be treated in the same way as those aged 16 or over who are subject to the Social Security (Categorisation of Earners) Regulations (NI) 1978 which categorise certain workers as being employed earners or not. This determines whether or not a person is treated as an employee for the purposes of SSP.
224. Regulation 17(2) of the Statutory Sick Pay (General) Regulations (NI) 1982 is amended to change the meaning of “earnings” so that the definition applies in the same way to employees under the age of 16 as to those over 16.

Paragraph 9 – The Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987

225. The provisions amending regulations 17(1) and 20(2) of the Statutory Maternity Pay (General) Regulations (NI) 1987 make similar amendments to those made to regulations 16(1) and 17(2) of the Statutory Sick Pay (General) Regulations (NI) 1982 to achieve the same effects for the purposes of statutory maternity pay as for statutory sick pay. These amendments apply in relation to women whose expected week of confinement begins on or after 14th January 2007.

Paragraph 10 – The Employment Protection (Continuity of Employment) Regulations (Northern Ireland) 1996

226. The Employment Protection (Continuity of Employment) Regulations (NI) 1996 are amended so as to preserve continuity of employment in situations where an employee is reinstated or re-engaged as a result ‘a decision taken arising out of’ Schedule 5 of the Age Regulations - the duty to consider procedure requests to continue working beyond retirement. This is intended to catch both decisions which are a formal part of the procedure – such as a decision to reinstate following an appeal meeting, and decisions which are not a formal part of the procedure, but which can be said to ‘arise out of’ use of the procedure. An example of the latter would be a decision to reinstate which resulted from an employee expressing dissatisfaction with an earlier decision to dismiss (as part of the duty to consider procedure), but where there was no formal appeal made by the employee. The effect would be that continuity of employment would be preserved as a result of both types of reinstatement decision.

Paragraph 11 - The Petshops Regulations (Northern Ireland) 2000

227. The amendments to the Schedule to the Petshops Regulations (NI) 2000 are aimed at removing unjustified age limits.

Paragraph 12 – The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (Northern Ireland) 2002

228. Regulation 32 of the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (NI) 2002, is amended to allow people aged 16 or younger to be treated in exactly the same way as people aged over 16 under the Social Security (Categorisation of Earners) Regulations (NI) 1978. This categorises people as employed earners or not and this categorisation determines whether the individual is to be treated as an employee for the purposes of entitlement to statutory paternity pay or statutory adoption pay.
229. Regulation 39 of the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (NI) 2002 is amended to ensure that the earnings which must be taken into account for the purposes of statutory paternity pay or statutory adoption pay apply to people aged 16 and under in the same way that they apply to those over 16.

Paragraph 13 - The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003

230. Paragraphs 1(1) and 1(2) of Schedule 1 to the Employment Equality (Sexual Orientation) Regulations (NI) 2003 are amended so that the references to definitions in the Pensions (NI) Order 1995 and the Pension Schemes (NI) Act 1993 no longer refer to those statutes as at the date of the coming into operation of the Employment Equality (Sexual Orientation) Regulations (NI) 2003, but to those statutes as amended.

Paragraph 14 – The Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004

231. Regulation 4(1) of the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 is amended so that the statutory grievance and the statutory dismissals procedures do not apply in relation to a dismissal for reasons of retirement. Whether or not a dismissal is for reasons of retirement is to be determined in accordance with new Articles 130ZA to 130ZF of the Employment Rights (NI) Order 1996 (as inserted by Schedule 7 to the Age Regulations).

Paragraph 15 – The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005

232. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 are amended so as to add references to the Age Regulations. Rule 22 of Schedule 1 to the 2005 Regulations is amended so that its conciliation provisions also apply in relation to complaints brought in industrial tribunals under the Age Regulations. Rule 60(9) of Schedule 1 is amended so that the requirement to send documents to the Equality Commission for Northern Ireland under rule 29, 30 or 32 of the 2005 Regulations, also applies to proceedings under the Age Regulations.

Schedule 9 - Repeals and revocations

233. Schedule 9 repeals or revokes respectively primary and secondary legislation so as to remove unjustified age-related provisions. Article 16 of the Directive requires the abolition of legislation contrary to the principle of equal treatment.

**Office of the First Minister and Deputy First Minister
June 2006**