

PROMOTING EQUALITY OF OPPORTUNITY

**Prohibiting Age Discrimination
in Employment and Training -
Legislation for Northern Ireland**

**Consultation by the
Office of the First Minister and
Deputy First Minister**

Summary of Responses

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This report summarises the key themes emerging from the responses to the NI Age Consultation and aims to give a flavour of the issues raised by respondents. It does not include every comment received. The Department continues to take account of all responses to the consultation as work progresses on the development of age legislation for Northern Ireland.

Age Legislation Team
Office of the First Minister and Deputy First Minister

INTRODUCTION

1. The NI Age Consultation took place from 6 October 2003 to 23 January 2004 and sought views on proposals for implementing the age strand of the EU Employment Framework Directive. This paper is a summary of the responses, providing an insight into the emerging views. A number of responses did not follow the format of the response form and tended to set out general views, without always answering the specific questions in the consultation document.
2. It is important to bear in mind that this is a preliminary analysis of the responses. The numerical data and responses require further analysis to ensure that views are realistically reflected. In addition, references to specific organisations or employers are not made in this report.
3. This paper sets out:
 - a numerical breakdown of responses by chapter and question, followed by;
 - a summary of emerging opinion by chapter, reflecting the views expressed in all responses.
4. In line with our obligations under Section 75 of the Northern Ireland Act, a final report on the Department's position on responses will be published in due course.

NUMBERS OF RESPONSES

5. In total 38 responses were received. Of those, 14 were submitted on the response form, with the rest being reports or free responses. The majority of responses received, (82%), were on behalf of an organisation. A selection of small and large organisations took part in the consultation with responses received from a variety of sectors:

Breakdown of Responses	%	Number of Respondents
A Local Authority and statutory body	19	7
A voluntary organisation of, or for, younger or older people	22	8
A Government Department or Agency	22	8
An organisation representing employers	14	5
A trade union/staff association	11	4
A university	3	1
Other training provider	3	1
Other	6	2

GENERAL COMMENTS

Summary of emerging views

1. There were many general issues included in the responses, although some key themes have emerged. Some respondents identified the particular circumstances prevailing in Northern Ireland, such as existing equality legislation, the development of the single Equality Bill and the statutory equality duties, in order to reflect the context within which the Northern Ireland age legislation is to be developed.
2. Some expressed concern that a balance is struck between protecting the rights of individuals whilst at the same time permitting employers to continue with those employment practices that are legitimate.
3. Age discrimination, as it relates to other grounds, was also identified as a significant issue. By way of example, one respondent stated that the 2001 census shows that 59% of those over 60 years are women with the number increasing to 64% of those aged 75 or over. This example was used to demonstrate that age is also a gender matter as well as an age issue.

Children and Young People

4. Many responses raised issues relating to the needs of children and young people with most welcoming the inclusion of children and young people within the scope of the regulations. Some respondents felt that in relation to anti-discrimination provisions, children and young people have been largely ignored.
5. Some felt that the commitment to include children and young people within the scope of the legislation could have been more clearly expressed in the consultation, with more discussion and examples of scenarios in which younger workers would be protected.
6. Conversely, one respondent argued that the examples used in the consultation document referred to younger people which set the wrong tone.

Use of Regulations

7. Concern was expressed that the Directive was being implemented by way of enacting Regulations under Section 2(2) of the European Communities Act 1972 rather than introducing primary legislation. Particular concerns were expressed that the process of implementation through Regulations would restrict protection against discrimination to employment and training and could limit the opportunities for debate and amendment which would have been possible had primary legislation been proposed.
8. Some also commented that all attempts should be made to implement the legislation as soon as possible rather than at the latest date possible under the Directive.

Goods, facilities and services (GFS)

9. Many respondents saw GFS as a major source of unfair treatment and commented that the Government should build on the Directive by committing itself to early legislation to outlaw age discrimination in the provision of goods, facilities and services. Some considered it to be unacceptable that the protection against such discrimination should be delayed until such time as legislation is progressed in respect of the Single Equality Bill.

Volunteering

10. Some respondents stated that the use of the phrase 'unpaid voluntary work' was unclear, as students, for example, can often be paid expenses or a stipend. They argued that many volunteers get access to training as part of the process; this training can subsequently lead to employment and could potentially be regarded as employment related training, which would come under the remit of the legislation. The definition therefore of what constitutes employment and training, it was argued, should include work experience and voluntary work and that the exclusion of unpaid voluntary work from the proposals leaves a gap in protection against discrimination.
11. Some respondents suggested that OFMDFM should explore, with the volunteering sector, how all volunteers should be suitably protected and identify the wider implications of extending new rights to volunteers.

Review of existing legislation

12. Many responses proposed a systematic review of current legislation and practice, as it pertains to age, in advance of the regulations, particularly in advance of any decision on making use of the Article 6 'objective justification' option.

Inclusion of Further & Higher Education

13. Some respondents welcomed the inclusion of higher & further education within the scope of the legislation, although many of those commented that it was not clear on whether all further and adult education is covered, irrespective of the provider. Some recognised the validity of having exemptions but argued that current age-based policies in further education should be re-examined and assessed in view of both Section 75 and the ethos of the age legislation.

CHAPTER 4 – KEY EQUALITY CONCEPTS

This chapter proposed an approach on issues such as indirect discrimination, harassment, victimisation, positive action and discrimination after employment, which is consistent with the regulations on race, religion and belief and sexual orientation.

Summary of emerging views

1. Most of those responding to this part of the consultation agreed that definitions of the key concepts should be consistent with other equality legislation and that this would ensure greater coherence across all strands of equality legislation. Some qualified this with concerns (summarised below) which related specifically to age discrimination. Others stated that the legislation should also outlaw practices that cause potential as well as actual disadvantage.

Direct and Indirect Discrimination

2. Some respondents asked for more clarity on the definitions used and in relation to the definition of 'Direct Discrimination', one respondent felt that the definition of 'direct discrimination' as '*where one person is treated less favourably than another, has been or would be treated in a comparable situation*' is inappropriate for age discrimination and supported, instead, a definition based on the principle of '*disadvantage on the grounds of a prohibited factor*'. This, they argued, would reduce the likelihood of litigation degenerating into a debate about comparators rather than the identification of whether 'age' has been used in a discriminatory fashion.
3. The issue of comparators was raised in several responses, in relation to both indirect and direct discrimination. Some argued that it should be possible to show age discrimination regardless of any comparator. Others stated that the complexity of this area, because there are no defined comparators, requires clear guidance in the legislation to prevent employers, for example, from being exposed to risks of unnecessary and frivolous litigation.
4. In relation to 'Indirect Discrimination', some responses highlighted that there is uncertainty about how far indirect discrimination will extend and in particular whether decisions might lead to either employers having more freedom to discriminate or might instead outlaw almost all employment practices. Some regarded both these outcomes as 'undesirable' and suggested that striking the balance between them is a matter for public policy as well as case-law and Government needs to show leadership in developing both legislation and guidance on this issue.

Harassment

5. Some respondents were opposed to the inclusion of a 'reasonableness test', which, they felt, goes beyond the requirements of the Directive. Others welcomed the fact that Tribunals will take into account the perception of the complainant, as well as the Tribunals "reasonable person" test in determining harassment.

Positive Action

6. Guidance setting out a wide range of examples of 'Positive Action', including making 'reasonable accommodation' was requested. Some also argued that Government should promote the use of positive action, particularly in the public sector, as a route to securing age equality.

Occupational Requirements

7. Most respondents stated that use of age-based occupational requirements should be extremely limited and that any requirements "tainted by ageism" should be illegal. Some felt that it would be impossible to justify age-based occupational requirements on grounds of health and safety and that compliance with legislation or international treaties should be legitimate justification for an occupational requirement, if it is positive action to protect people from danger and exploitation.

Making a complaint

8. The issue of students in further and higher education having to take complaints to a County Court was raised with some concerns expressed in relation to both cost and the period within which a complaint should be lodged.

Discrimination after employment

9. One respondent had concerns in terms of the definition of "close connection to former employment" arguing that if a person believes himself or herself to have been discriminated in this way, it should be for the employer to prove that they did not.

CHAPTER 5 - OUTLAWING AGE DISCRIMINATION

The EU Employment Framework Directive provides an option (Article 6) for Member States' implementing legislation to permit practices that otherwise amount to direct discrimination where they are objectively justified by reference to specific aims, which are appropriate and necessary. The NI Consultation Document sought views on whether use of this option should be made.

Numerical data

Q5 (a)	Do you think that use should be made of the Directive's Article 6 option, which permits practices which directly discriminate on the grounds of age, if those practices are objectively justified?		
		%	No.
	Yes	87	27
	No	13	4
	No views expressed		
	TOTAL RESPONSES RECEIVED:		31

Q5 (b)	Do you think there are practices other than those listed in paragraph 5.14 of the consultation document that employers should be able to justify in certain circumstances?		
		%	No.
	Yes	23	5
	No	55	12
	Uncertain	22	5
	TOTAL RESPONSES RECEIVED:		22

Q5 (c)	Do you agree with the specific aims in paragraph 5.20 of the consultation document which might justify differences of treatment?		
		%	No.
	Yes	61	14
	No	17	4
	Uncertain	22	5
	TOTAL RESPONSES RECEIVED:		23

Q5(d)	Do you think there are other aims which might justify differences of treatment:		
		%	No.
	Yes	33	6
	No	67	12
	TOTAL RESPONSES RECEIVED:		18

Summary of emerging views

1. This chapter focused on the fundamental issue for age discrimination, whether use should be made of the Directive's Article 6 option, which allows Member States' implementing legislation to provide for differences of treatment on the grounds of age where practices can be objectively justified by reference to specific aims.
2. The majority of responses received recognised that there may be occasions when it may be necessary to discriminate against someone of the grounds of age, with many responses however commenting that the scope for justifying direct age discrimination should be strictly limited.
3. Many commented that clarification is required on the rationale for some of the specific aims identified in the consultation document and that further work needs to be done in identifying which employment practices could be justified.
4. Many examples of practices which could be justified in certain circumstances were provided in the responses received¹. Some indicated the difficulty in determining which practices could be justified and others were provided to support the argument for making use of the article 6 option.
5. Most respondents agreed with the specific aims set out in paragraph 5.20 of the consultation document, with some arguing for a flexible approach because of the possibility of unanticipated circumstances arising in this new area. However, others felt that the aims were too broad and could risk presenting an invitation to employers and others to devise means of circumventing the objectives of the European Directive.
6. Respondents argued that some of the aims, e.g. those that afford protection on health and safety grounds and encourage and reward loyalty, could be justified under the legislation, as well as initiatives to promote integration into the labour market of disadvantaged/marginalised groups. These measures, some respondents felt, address fairness, ensuring the necessary welfare of workers and enabling disadvantaged workers to access the labour market.
7. Other comments, specifically, relating to training requirements and the need for a reasonable period of employment before retirement, highlighted that these were only relevant if a mandatory retirement age is in place, while 'employment planning' could be used to justify unfair practices contrary to the terms of the Directive.
8. Most respondents suggested that further guidance was required in relation to this complex area.

¹ Appendix 1

CHAPTER 6 - RETIREMENT AGE

Compulsory retirement will be unlawful under the Directive unless it can be objectively justified under Article 6. The consultation proposed that employees are allowed to pursue options for continuing in work beyond the traditional age for retirement; considered the extent to which employers might wish to continue to justify requiring employees to retire; and sought views on whether it is suitable for Government to provide a default age at 70 or above.

Numerical data

Q6	How powerful a signal do you think abolition of mandatory retirement age would send?		
	Response	%	No.
	Positive (powerful and welcome)	82	18
	Negative	14	3
	Mixed Opinions	4	1
	TOTAL RESPONSES RECEIVED:		22
Q6(a)	If the legislation made mandatory retirement ages unlawful, to what extent do you think employers and employees would be unable to agree on when an employee would retire?		
	Response	%	No.
	Positive (not a problematic issue)	8	1
	Negative	46	6
	Uncertain	46	6
	TOTAL RESPONSES RECEIVED:		13
Q6(b)	Employers would only be able exceptionally to justify retiring employees on age grounds, or dismiss them for other fair reasons such as on failing competence grounds or as part of a non-age based redundancy measure. What do you think would be the implications and effect of this?		
	Response	%	No.
	Positive (welcome this)	6	1
	Negative (seen as problematic)	71	12
	No views expressed	23	4
	TOTAL RESPONSES RECEIVED:		17
Q6(c)	Do you think that the aims set out in paragraph 5.20 are sufficient for employers to justify their particular retirement age?		
		%	No.
	Yes	50	8
	No	44	7
	Uncertain	6	1
	TOTAL RESPONSES RECEIVED:		16

Q6(d)	Do you think there are other reasons that might justify requiring someone to retire at a set age?		
		%	No.
	Yes	47	7
	No	47	7
	Uncertain	6	1
	TOTAL RESPONSES RECEIVED:		15

Q6(e)	Should the Government specify a default retirement age at which employers would be able to require employees to retire?		
		%	No.
	Yes	58	14
	No	42	10
	TOTAL RESPONSES RECEIVED:		24

Q6(f)	Should the Government specify 70 as the default retirement age?		
		%	No.
	Yes	29	7
	No	71	17
	TOTAL RESPONSES RECEIVED:		24

Q6(g)	If you are an employer do you think you would rely on the default age of 70?		
		%	No.
	Yes	57	8
	No	43	6
	TOTAL RESPONSES RECEIVED:		14

Q6(h)	If you are an employer do you think you would set a higher retirement age?		
		%	No.
	Yes	0	0
	No	100	17
	TOTAL RESPONSES RECEIVED:		17

Summary of emerging views

1. Most responses agreed that the abolition of mandatory retirement age would send a powerful signal, challenging traditional beliefs and stereotypes. However, the details of most responses ranged from those opposed to any form of compulsory retirement to those wishing to see retirement age, in its current form, retained.
2. Most responses welcomed a flexible approach to retirement with some stating that retirement should be based solely upon an assessment of an employee's competency and ability to do the job. Some felt that decisions on retirement should be informed by each employee's financial security and personal choice. However many argued that this retirement age issue required further, careful consideration.

3. Other organisations were completely opposed to compulsory retirement ages stating that retaining retirement ages would not be fair to people who want to continue in work and would reduce the likelihood of employers reforming outdated, ageist practices.
4. Some argued that the imposition of fixed retirement ages disadvantages those who may feel able to work beyond a specified age. This can be a particular difficulty for some women, for example, who have spent time out of the labour market, or entered it late, and may not have been earning sufficiently long to secure an adequate pension.
5. Others were unequivocally opposed to the introduction of a default retirement age and considered that such a measure would contravene the Directive. They argued that mandatory retirement ages should be abolished and that Government should take the necessary measures to ensure that any such abolition is not taken as an opportunity to address the current crisis in the pensions industry by downgrading or delaying receipt of pension benefits.
6. The main concern for businesses however in relation to the proposals in the consultation document was that removing the concept of a normal retirement age could lead to practical problems for employers that are disproportionate to the gains for individuals.
7. Some employers argued for flexibility around a state or default retirement age of 65 but where companies feel they need normal retirement ages, they are free to set them at an appropriate level but, in other circumstances, the company would be free to operate without a retirement age.
8. It has been argued by one respondent that if normal retirement ages are abolished in NI then NI business could expect to pay £450,000 annually in tribunal costs. This is based on OFMDFM's total figure for tribunal costs from age discrimination legislation – which is likely to be an underestimate.²
9. There were also concerns expressed that existing performance management systems are relatively under-developed and SMEs in particular are likely to suffer from increased tribunal claims if retirement ages are removed.

² The OFMDFM Regulatory Impact Assessment has estimated that there would be 150 tribunal cases per year from age discrimination legislation as a whole – at a cost to business of between £300,000 to £600,000.

CHAPTERS 7 & 8 - UNFAIR DISMISSAL & STATUTORY REDUNDANCY PAYMENTS

The current rules for unfair dismissal are incompatible with the Employment Framework Directive. The consultation proposed, amending the Employment Rights (Northern Ireland) Order and consistent with the approach agreed for retirement age, to allow employees to claim unfair dismissal at any age. The statutory redundancy payments scheme has a number of age-related aspects. The consultation proposed removing some of them, meaning that age will cease to be a factor when calculating payment for example or counting service below age 18, which is currently ignored. The upper age limit for entitlement to a statutory redundancy payment will depend on the decision made about retirement ages.

Numerical data

Q7(a)	Do you think that an employer who dismisses employees on grounds of retirement should be able to defend the dismissal as fair (paragraph 7.7 of the consultation document)?		
		%	No.
	Yes	72	13
	No	28	5
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		18

Q7(b)	Do you think that the age-related aspects of the basic award should be removed (paragraph 7.9 of the consultation document)?		
		%	No.
	Yes	68	13
	No	32	6
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		19

Q7(c)	Do you think that the limit of 20 years on the length of service that counts towards the basic award should be retained (see paragraph 7.11 of the consultation document)?		
		%	No.
	Yes	42	8
	No	58	11
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		19

Q8(a)	Should the statutory redundancy payments scheme be amended so that service below the age of 18 counts for qualification purposes and is included in the calculation?		
		%	No.
	Yes	95	18
	No	5	1
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		19

Q8 (b)	Should payments be calculated on the basis of one week's pay (subject, as now, to the statutory maximum) for each year of service, irrespective of age?		
		%	No.
	Yes	63	10
	No	37	6
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		16

Q8(c)	Should the upper age limit for entitlement to a statutory redundancy payment be amended to: <ul style="list-style-type: none"> ○ the employer's retirement age for a job, which would have to be justified if under 70, or ○ where there is no normal retirement age for the job, the age of 70? Yes or no or no strong feeling either way. 		
		%	No.
	Yes	53	8
	No	47	7
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		15

Q8 (d)	Should we repeal the provision under which the amount of payment due decreases by one twelfth for each month elapsed of the year prior to the default upper age limit?		
		%	No.
	Yes	67	8
	No	34	4
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		12

Q8 (e)	Should the statutory redundancy payments scheme retain the use of length of service as a factor in the payment calculation?		
		%	No.
	Yes	69	9
	No	31	4
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		13

Q8 (f)	Should the scheme retain the cap of 20 years on the length of service to be taken into account in the payment calculation?		
		%	No.
	Yes	46	6
	No	54	7
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		13

Q8 (g)	Should we revoke the Redundancy Payments Pension Regulations 1965?		
		%	No.
	Yes	83	10
	No	17	2
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		12

Summary of emerging views

1. Most respondents supported the proposed changes to the Statutory Redundancy Scheme and unfair dismissal legislation commenting that the statutory provisions should not be age-based, both in terms of entitlement to the protection and the bases for calculating compensation. Others stated that the proposed statutory scheme removes unfair direct discriminatory criteria but retains justifiable indirectly discriminatory length of service criteria.
2. In relation to whether an employer who dismisses employees on grounds of retirement should be able to defend the dismissal as fair, some responses stated that this would be acceptable provided the decision was due to a legitimate aim and the means were necessary and appropriate. Some argued however that the specific aims in the document are too broad, and that these coupled with a default retirement age would perpetuate age discrimination in training and promotion, all of which would undermine a workers competency and capability, resulting in a fair dismissal and/or retirement.
3. Some felt that the removal of the upper age limit on unfair dismissal protection is very welcome and argued that unfair dismissal should never be justifiable – by its nature it is unfair and all employees, irrespective of age, should have the right to compensation. By way of example, one respondent commented that the provision to allow dismissal on the grounds of retirement after the age of 70 is like only applying the Disability Discrimination Act to people with certain conditions or race discrimination legislation to people of certain races.
4. Many respondents stated that whilst the proposal regarding the length or service limit is understandable, there must be recognition that someone who has been in the same job for 30 years, for example, will find it harder to gain new employment and therefore either an enhanced rate seems fair or if the 20 year limit is to be retained, further support must be available for such people in continuing their working life elsewhere.
5. In addition, they stated an acceptance of the extension of unfair dismissal rights to all ages providing a default retirement age of 65 was set and dismissal on the grounds of retirement could then be regarded as fair. Similarly, some employer organisations argued that if a default retirement age is to have meaning, then it should be an age where employers can enforce retirement without fear of litigation. They did not regard this view as being inconsistent with objectives of flexibility in respect of retirement age, as it should not inhibit voluntary arrangements between employers and employees, for example, allowing continued employment where this is to the benefit of both parties.

6. One employer organisation stated that there was no mention in the consultation document of occupational redundancy arrangements and expressed concerns that the extension of employment rights means that if an employer kept one individual on past a normal retirement age they would not be able to retire other staff at a normal retirement age or that retirement would no longer be an option for that individual. It is necessary, they felt for clarity as to how this would work in practice.
7. An organisation representing children and young people argued that new age discrimination legislation and guidance should explicitly legislate that children and young people have a right to claim unfair dismissal if they fulfil the statutory criteria.
8. Another organisation agreed that the proposal of one weeks' pay for each year of completed service as the fairest approach is clearly unacceptable and contrary to Article 8(2) of the Directive as it would amount to a diminution in the rights of employees age 41 and over who are currently eligible to receive one and a half weeks' pay for each completed year of service. They advised that this opportunity should be taken to enhance considerably the statutory compensation to which an employee is entitled but, in any event the minimum that must happen is that one and half weeks' is applicable to all regardless of age.
9. One respondent was "seriously concerned" about the financial implications of the proposed reduction of the unfair dismissal award for those aged over 41. This, they stated, would send out an inappropriate signal to employers who are intending to dismiss unfairly as these are precisely the employers who should be penalised. Workers who are unfairly dismissed should be protected, not the other way around.
10. In acknowledging that the basic award proposals would be fairer, one respondent stated that further consultation is required because if there is no tapering-off some individuals may be overly compensated. This, they believed, would place an undue financial burden on the employer, although albeit only in unusual circumstances.
11. One business organisation stated that it considers that calculations should be based on actual loss to an employee rather than length of service.

CHAPTER 9 - RECRUITMENT, SELECTION, AND PROMOTION

The consultation proposed that employers should not be able to apply an age limit to recruitment, selection and promotion unless they can objectively justify doing so.

Numerical data

Q9 (a)	Should the Government make provision for employers to apply an upper age limit to recruitment if they can justify doing so by reference to aims set out in legislation?		
		%	No.
	Yes	62	13
	No	28	8
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		21
Q9(b)	Do you think that the aims set out in paragraph 5.20 of the consultation document are sufficient for employers to justify their particular approach?		
		%	No.
	Yes	64	9
	No	29	4
	Unsure	7	1
	TOTAL RESPONSES RECEIVED:		14
Q9(c)	Do you think there are other aims that might justify setting an upper age limit on recruitment?		
		%	No.
	Yes	23	3
	No	77	10
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		13
Q9(d)	Do you agree with our approach?		
		%	No.
	Yes	67	12
	No	33	6
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		18
Q9(e)	Do you know of any types of employment – related insurance where age will be an issue?		
		%	No.
	Yes	38	5
	No	62	8
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		13
Q9(f)	Do you think that the cost of employment-related insurance where age will be an issue should be a factor in recruitment or dismissed decisions?		
		%	No.
	Yes	69	9
	No	31	4
	No strong feelings either way		
	TOTAL RESPONSES RECEIVED:		13

Summary of emerging views

Making provision for employers to apply an upper age limit on recruitment

1. Some consultees stated that although recruitment should be based solely on competence and not age, any exceptions to this should be limited. Some stated for example that an upper age limit could be justified if training costs are such that there would be little or no return on the investment made. This could be the case in a number of the professions where there are long and expensive training periods and there should be provision made to apply an upper age limit to ensure the employers can recoup training investment costs.
2. Some employers' representatives stated that the majority of firms want to employ the right people for the job without reference to age as a matter of good practice. However, others argued that justification for applying an upper age limit could be based on for example a business case, investment, outputs, succession planning, and individuals' ability to fulfil competencies.
3. One respondent stated that an Article 6 exemption for age-limits on recruitment and retention will only be usable if the Government decides to permit Mandatory Retirement Ages. If there is no 'default age' in the age discrimination provisions, it was argued, there might be no basis for calculating a 'decent interval' for training etc.

Using the specific aims to justify recruitment practices

4. Some respondents believed that the aims set out in the consultation document were too broad and not sufficiently convincing so as to allow employers to justify applying an upper age limit to recruitment. If there is no retirement age, they argued, there is no need to put age limits on recruitment, training and promotion since there is no guarantee that people at any age will complete their training with an employer
5. Responses identified occupations which involve potentially significant physical activity, such as the military, police, fire service and construction industry and that an upper age limit could in these circumstances be justified. They also argued that although not all positions in these occupations would entail arduous physical work for those positions that do, an employer should be able to take the age of an applicant into consideration when recruiting and may be able to cite the factors of health, welfare and safety (as set out in the consultation document) to enable them to take age into consideration when recruiting.
6. Graduate training schemes were identified by some respondents as examples of recruitment practices which would not be viewed as discriminatory, as graduates can be of any age, more so now than ever as lifelong learning continues to be promoted. This type of scheme would be based on academic merit rather than age.

7. Some respondents stated that it does not seem unreasonable to permit an employer who is attempting to satisfy the commercial demands of a niche market to take the age of potential employees into account when recruiting. Consequently, provision should be made for employers to apply an upper age limit to recruitment. Employers would then have to provide an objective justification for taking age into account when recruiting.

Clarification and guidance

8. Many respondents requested that clear information, advice and guidance should be produced and promoted to ensure employees and individuals are aware of their rights and responsibilities under this legislation. Some argued that a well-resourced age strand in the Equality Commission is necessary with pre-legislation awareness work, overseen by the Commission to ensure employers are able to prepare adequately for the legislation.
9. One respondent stated that the Directive makes it clear through Article 6.1(b) that the concept of using experience or seniority is acceptable to justify direct discrimination. However, the consultation document makes little mention of these common practices in relation to indirect discrimination for example asking for managerial experience when recruiting or incremental pay scales based on seniority. OFMDFM should they argued make clear that these employment practices are not unlawful under the Directive and should provide further guidance for employers on where and how these practices are justifiable.

Employment related insurance

The consultation document proposed that where compulsory insurance is not available because of an applicant's age, employers would be justified in dismissing employees when they reach the age where such insurance is unavailable if suitable alternative employment is either unavailable or rejected by the employee.

Summary of emerging views

10. Some respondents provided motor insurance as an example of discrimination against younger people which inhibits them from seeking certain types of employment (eg HGV driving). Insurance companies should be required to demonstrate, they argued, that any such raised premiums can be justified on actuarial grounds and that employers should not be able to justify failure to appoint on grounds of higher premiums unless these are at a level that would be genuinely prohibitive to the employer.
11. One respondent stated that the legislation should cover insurance that is essential for employment and obligations should extend to insurance providers, although a person's employment status should be based purely on their capacity to do the job. This consultee however acknowledged that where insurance is unavailable this could be used to justify indirect discrimination or an occupational requirement, however further legislation, through a single Equality Bill pertaining to goods, facilities and services will be needed to close this loophole.
12. Some felt that the proposals should be broadened to include not just circumstances where compulsory insurance becomes unavailable but also where such insurance cover can be demonstrated to be unaffordable by the business. In those occupations where the cost of employment-related insurance is influenced by the age of the employee, then it would be reasonable for an employer to take the age of applicants into account when recruiting. Higher employment related insurance costs reduce profitability and naturally employers will want to minimise this problem.
13. Conversely, others argued that it is fundamentally unfair to deny a person employment or dismiss them for reasons of insurance. This, they felt, clearly demonstrates how goods and services, not included in the scope of the legislation, will detrimentally impact, upon employment. Those insurances where age prohibits employment or results in dismissal should be properly scrutinised to ensure risks are fairly calculated, and that age is not used as a proxy for an individual's competence, capability, fitness etc.
14. If it is decided to proceed by way of Regulations, they should at least ensure that the provisions contain, in common with the other discrimination legislation, a prohibition on "aiding and abetting" an unlawful act of discrimination under which insurance companies who refuse or increase the cost of insurance (on grounds of age) may be liable.

CHAPTER 10 - PAY & NON-PAY BENEFITS

The proposal in the consultation sought views on allowing employers to continue to provide pay and non-pay benefits based on length of service or experience if they can justify doing so.

Numerical data

Q10 (a)	Where pay and non-pay benefits based on length of service, and / or experience amount to direct discrimination, should the Government provide for employers to be able to justify them by reference to aims set out in legislation?		
		%	No.
	Yes	68	15
	No	27	6
	No strong feelings either way	5	1
TOTAL RESPONSES RECEIVED:			22

Q10 (b)	Do you think there are reasons or aims other than those set out in paragraph 5.20 of the consultation document that might justify pay and non-pay benefits based on experience or length of service?		
		%	No.
	Yes	23	3
	No	77	10
	No strong feelings either way		
TOTAL RESPONSES RECEIVED:			13

Summary of emerging views

1. One organisation identified that this area is going to be very difficult for employers and assistance would be needed in terms of justification. Another argued that access to pension rights should be covered by the legislation, although accepted that there may need to be exemptions for some occupational pension rules and that there should be consultation on the scope of the exemption to ensure that the principle of equal treatment is upheld. The proposals in the consultation, e.g. an Article 6 exemption for non-pay benefits, equate, they argued, loyalty with length of service and except where this is essential for the operation of Defined Benefit pensions, opens the door to undermining the spirit of the legislation.
2. Some argued that employers should be able to use pay and non-pay benefits to reflect seniority and experience (e.g. incremental progression) as often employers need to be able to use incentives such as these to attract new employees and reward loyalty.
3. This was echoed by another respondent who stated that local authorities would generally have incremental pay scales, service based occupational sick pay entitlements and long service leave.

4. Some argued strongly that the basis for matters relating to employment should be capability and competency and that length of service is not related to a person's age but instead to the length of time a person has worked for an employer.
5. One respondent stated that length of service is often seemed to apply only to older people but as people change career so often this is not necessarily the case and would not be for the foreseeable future. It was suggested that seniority payments are removed from the legislation, as they would be indirectly discriminatory on the grounds of age and gender, even if justifiably so.
6. One respondent commented that pay systems are often performance related and not based on length of service/experience. However, they argued that employers should be able to justify discrimination by encouraging and rewarding loyalty – e.g. higher annual leave allowances.
7. An employer representative organisation stated that age discrimination legislation should protect people against discrimination on the grounds of age and should not rewrite the pay and benefits structure – nor further undermine the position of employers with defined benefit pension schemes. OFMDFM was advised to make full use of the flexibilities within the Directive to protect these legitimate practices.
8. Another organisations argued that there are too many permutations on length of service benefits to ask companies to justify each and every one at a tribunal. The additional burden on employers of justifying every different use and motivation of length of service criteria in employment is too onerous to be practical.
9. Conversely, some did not accept that it is either necessary or desirable that specific provision should be included to enable employers to justify direct discrimination in relation to length of service or experience based benefits as these should be addressed using established indirect discrimination principles.
10. One organisation stated that the time and financial cost would be a significant burden to small employers and they need to feel able to offer both pay and non-pay benefits as part of reward and retention without the fear of tribunal.

CHAPTER 11 - BENEFITS AND COSTS

This chapter in the consultation stated that legislation on age discrimination is likely to result in increased rates for older and younger workers in the labour market in Northern Ireland although initially costs are likely to be greater than benefits.

Summary of emerging views

Consultees were asked for their views on the costs and benefits and some are summarised below.

1. The legislation is going to hit the small employer very hard. Some thought should be given to exemptions of part or all of this legislation for small employers for a period of time like the DDA 2004 Regulations.
2. The benefits of the introduction and implementation of Anti Age Discrimination legislation would far out weigh any additional costs, however in the absence of reliable and accurate data in respect of children who work and the total lack of enforcement of Regulations relating to working children how can an effective or accurate Regulatory Impact Assessment or Equality Impact Assessment can be carried out? OFMDFM, in consultation with other Departments, most notable the DHSSPS and the Education and Library Boards needs to urgently undertake comprehensive empirical research in respect of working children.
3. The cost to small businesses have been significantly underestimated and the figure of 40,000 businesses should be challenged. Northern Ireland has 60,000 businesses. In addition, it is likely that the legislation will result in an increase in discipline and grievance and tribunal applications for small business at a heavy time, cost and stress factor.
4. It is not possible to specifically quantify the impact this legislation might have in terms of human and financial resources.
5. The one aspect not covered in this chapter is the possible perpetuation of gender / religious imbalances within certain workforces. By legislating to allow older workers to remain in post longer it may be that the recruitment processes which have been put in place to redress this will be delayed and appointments made as a result of discriminatory recruitment practices will be sustained.
6. The Regulatory Impact Assessment would appear to be a fair analyses, however, this could vary from organisation to organisation. The true and actual costs and benefits would need to be calculated locally to ascertain the approximate result.

CHAPTER 12 - MAKING IT HAPPEN – ROLE OF THE EQUALITY COMMISSION FOR NORTHERN IRELAND

The consultation sought views on extending the duties of the Equality Commission to cover age consistent with the ECNI role which is determined by the sexual orientation regulations.

Q12	Do you agree with the approach to extending the duties of the Equality Commission to cover age?	%	No.
	Yes	88	15
	No	12	2
	No strong feelings either way		
TOTAL RESPONSES RECEIVED:			17

Summary of Emerging Views

1. Most of the respondents who addressed this issue agreed that it was appropriate for the ECNI to carry out this role, arguing that it makes sense to have one all-embracing body to enforce the legislation. However one organisation commented that they didn't believe that it is necessary to include within the duties of the Equality Commission powers to support discrimination cases since, in their view, there already exists a significant network of services available to the public through both the private, voluntary and trade union sectors in this regard.
2. One respondent stated that the ECNI role should include a duty to support the development of new and strategically important casework on the new grounds with another consultee stating that age discrimination must be taken as seriously as other types of discrimination and for this to sit within the Equality Commission there must be an adequate commitment of staff and resources. If the provision for age, it was argued, within the Commission fails to match the resources needed to tackle the huge problem of age discrimination issues, it would send the message to older people that their needs to challenge inequality is secondary to other groups.
3. One respondent who agreed that the Equality Commission should have a duty to support age discrimination cases argued that this is particularly important in respect of children, given the reluctance/inability of children to self advocate. They argued that the Equality Commission's approach to date has been a passive one in respect of discrimination relating to children and the age component of the S75 duty and stated that a duty should be imposed in respect of the Equality Commission itself as opposed to their being given a power.

4. The same organisation also drew attention to the fact that both the Northern Ireland Human Rights Commission and the Commissioner for Children and Young People have a residual power/duty related to the proposed Anti Age Discrimination Legislation.

CHAPTER 13 EQUALITY ASSESSMENT

The Equality Assessment identified that since there is at present no legal protection against discrimination on the grounds of age, introducing new age legislation will promote equality of opportunity for persons of different ages by providing protection in employment and training which is comparable to that provided for the other grounds by existing anti-discrimination law in respect of employment and training. The assessment did however also identify that some of the issues raised in the consultation, specifically the Directive's Article 6 provision, which allows for practices which discriminate on the grounds of age to be justified, have potential for differential or adverse impact for the age category.

Summary of Emerging Views

1. The consultation sought views on the equality assessment and in particular asked consultees if they considered that:
 - a. the proposals have any positive or negative equality impacts on any of the Section 75 categories that have not been identified in the document; and
 - b. taking account of the requirements of the Framework Directive, there are alternative approaches to better promote equality of opportunity.

Opportunity and risks for disadvantaged groups

2. One respondent stated that whilst the age legislation should improve the opportunities of older people from disadvantaged groups, particularly those with intermittent employment histories, it feared that the proposal for a default retirement age has negative implications for disadvantaged groups.

Multiple Discrimination

3. It was argued that the legislation should specify that it is acceptable to take claims for discrimination on more than one ground and to adopt positive action policies for people suffering multiple disadvantage. The legislation should be used for example to promote good practice in the retention of older people who develop illness or disability and guidance should focus on the disadvantage suffered by older people and young people from minority ethnic communities.
4. Some organisations agreed that the introduction of the proposed legislation, provided objective justification is properly policed and current legislation is reviewed to eliminate age discriminatory provisions, will have a positive affect on children. They also argued that the continuing absence of anti age discrimination protection in respect of goods, facilities and services and the failure to so legislate in respect thereof at this juncture is in breach of the Human Rights Act 1998.

CHAPTER 14 – OTHER COMMENTS

Many respondents provided additional comments and some of these are summarised below.

1. A major source of discrimination for children and young people relates to how they access and how they are provided with goods, services and facilities. These issues must be progressed as a matter of priority with the Single Equality Bill.
2. The exclusion of schools from the coverage of the proposed legislation in relation to training will also significantly impair the ability of children to tackle unfair treatment in vocational, educational and training provision and should be removed.
3. We would urge OFMDFM to take full cognisance of the relationship between this proposed legislation and the Single Equality Bill. As an employer we would further urge you to be ensure that the legislation can be implemented in a realistic way and does not automatically lead to an increase in IT cases.
4. Anti-discrimination measures should be extended to include goods facilities and services as well as employment, in the interests of fairness and parity between the strands.
5. Older workers need a level playing field. They will continue to be disadvantaged, and the success of measures to do away with age discrimination in employment will inevitably be hindered, unless age discrimination is also tackled with regard to disability benefits, insurance, learning and skills policies and practice, improved rights for adults with caring responsibilities, and volunteering, as well as other goods and services such as health care.
6. It is vital that clear guidance is given on all of the proposals that ultimately become law. Employers have been inundated in recent years with legislation in the employment field. Age discrimination, unlike other areas of discrimination, potentially affects everybody in the workforce. It could subsequently give rise to far more tribunal claims than any other area. It is essential therefore that clear user-friendly guidance is available well in advance of the legislation coming into force.
7. The new protection against age discrimination, if properly implemented will have significant economic and social benefits for all and will radically transform the rights of older and younger workers in particular.
8. This Consultation Document is welcomed as a valuable discussion of the range of issues raised by implementation of the Framework Directive in relation to age.

9. Although the implementation of these proposals will revolutionise the rights of older and younger people in employment, these proposals are still grounded in a minimalist approach towards implementation of the Directive which has featured in earlier implementation exercises.
10. It is anticipated that, in a context in which an equality impact assessment will be required on implementation proposals in Northern Ireland, and in which the timetable for this implementation exercise dovetails with that of the Single Equality Act, that the eventual integration of age discrimination within a single statute will result in a more effective regime of age discrimination law in Northern Ireland than that proposed in this document.

SUGGESTED PRACTICES THAT EMPLOYERS SHOULD BE ABLE TO JUSTIFY IN CERTAIN CIRCUMSTANCES

The consultation document (paragraphs 5.14, 5.15 and 5.16) discussed age-based employment practices and sought views on whether consultees thought that there might be practices, other than those listed, that employers should be able to justify in certain circumstances. Some consultees identified practices in addition to those included in the consultation and these are listed below.

- Where the employer funds vocational training and may not be able to get a realistic return on investment.
- Where a specified duration of training is required to undertake a post, Commencement date of training should allow for a reasonable time to work on completion.
- Some tasks require a level of fitness whether mental or physical and for health and safety reasons certain jobs may not be open to older people.
- Age restrictions in relation to driving licences
- The business case for employers in relation to succession planning and associated training/development.
- Maintaining a balanced and diverse workforce and in pursuance of positive action measures.
- Ability to undertake positive action initiatives should be retained.
- Airline industry provides a clear example. Many countries prohibit commercial aircraft with pilots over the age of 60 entering their airspace. An airline might therefore find it a commercial necessity to use a maximum age limit for entering pilot training (it is estimated that it takes 4 years for an airline to recover the cost merely of a conversion course for a pre-trained pilot changing airline).
- Uneconomic insurance premiums or excesses
- Legislation precludes under-18s from selling alcohol, petrol or knives. This does not prevent them being employed in supermarkets, but may require them to be paid less to compensate for the fact that they are performing a reduced job and that additional supervisor time must be paid.
- Graduate recruitment schemes. Despite the fact that a number of graduates are mature students, graduate recruitment schemes are likely to be indirectly discriminatory because the majority of graduates are young people.

- Specific level of expertise and experience, the nature of which means that a younger person could not claim to have achieved by a certain age. A teacher, for example, would be very unlikely to have attained a sufficient level of experience to take on the role of principal of a large secondary school by the age of, say, 25.
- Many companies place restrictions on recruitment for people under 18 for 24/7 shift work or night shifts.

The Department is currently assessing these suggestions and will advise on the outcome of that consideration in its response report on the consultation exercise.

Responses received to the NI Age Consultation

1. CBI
2. Children's Law Centre
3. Save the Children
4. Disability Action
5. Coleraine Standing Conference of women's organisations
6. Ulster Community and Hospital's Trust
7. Northern Ireland Council for Voluntary Action (NICVA)
8. Children in Northern Ireland
9. National Association of Student Union of Women Teachers (NASUWT)
10. Age Concern
11. Training for Women Network
12. Housing Executive
13. The National Union of Students – Union of Students in Ireland (NUS-USI)
14. Institute of Directors (IOD)
15. Construction Employer's Federation
16. Northern Ireland Committee - Irish Congress of Trade Unions (NIC-ICTU)
17. Equality Commission for Northern Ireland (ECNI)
18. NI Fire Brigade
19. Invest NI
20. Department of Culture, Arts & Leisure (DCAL)
21. Northern Ireland Public Service Alliance (NIPSA)
22. Down District Council
23. Help the Aged
24. Federation of Small Businesses
25. NI Joint Council for Local Government Services
26. University of Ulster
27. Department of Finance and Personnel (DFP)
28. Homefirst Community Trust
29. Department of the Environment (DOE)
30. Westcare Business Services

Responses received to the NI Age Consultation (Contd)

31. Department of Agriculture and Rural Development (DARD)
32. Paul Maidment
33. NI Court Service
34. Department of Enterprise, Trade and Investment (DETI)
35. Youth Council Northern Ireland (YCNI)
36. Department for Employment and Learning (DEL)
37. The Committee on the Administration of Justice (CAJ)
38. Intergenerational Conference