



Retirement age

Standard Note: SN/BT/961

Last updated: 30 April 2012

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Under age discrimination legislation ([Employment Equality Age Regulations](#)) which came into force in 2006 compulsory retirement ages were unlawful unless they could be objectively justified. However, this was subject to a national “default retirement age” (DRA) of 65 which allowed mandatory retirement for those over that age (or the employer’s normal retirement age) as long as employees were given the opportunity to exercise their right to request working beyond retirement age. This part of the regulations was subject to an unsuccessful legal challenge on judicial review on the question of whether it complied with EU law. The decision to have a national DRA was due to be reviewed in 2011. The previous Labour Government subsequently announced that the review would instead take place in 2010.

The Coalition Government decided to abolish the DRA. Detailed proposals were published on 29 July 2010 setting out the intention to phase out the DRA starting April 2011 to be complete by October 2011.

The [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011](#) abolished the DRA from 1 October 2011. The Regulations contained transitional arrangements for retirements that were notified prior to April 2011 and where the employee will reach or has reached age 65 by 30 September 2011. A detailed account of how these work is set out under the heading “Current Position” below.

The possibility of mandatory retirement remains but must be objectively justified. Special provisions to take account of the impact of removing the default retirement age on insured benefits was included in the Regulations by way of a voluntary exemption, allowing employers to cease the provision of insured benefits to employees over the age of 65 (or the state pensionable age, whichever is the older).

It is important to note that the ‘retirement age’ and the ‘pension age’ are not synonymous. Retirement age is the age at which one can be required to leave work. Pension age is that age at which one can start to draw an unreduced pension.

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1 Current Position

1.1 End of Default Retirement Age

The [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011](#) abolished the DRA from 1 October 2011. There is no national mandatory retirement age and with effect from 1 October 2011 employers can no longer use the DRA to compulsorily retire employees. Since that date, if an employer wishes to enforce a retirement age, they will have to demonstrate that it is objectively justified.

As stated in the summary, the abolition of the DRA was subject to transitional arrangements. Following a correction to the initial draft Regulations, the Regulations entered into force on 6 April 2011 and provided for the transitional arrangements set out below.

1.2 Transitional arrangements

Compulsory retirements notified before 6 April 2011 will remain lawful provided they fulfil the following criteria

- Notification of retirement is issued before 6 April 2011;
- the employee will be age 65 (or the employer's normal retirement age if that is higher) on or before 30 September 2011; and
 - the statutory retirement procedure is followed.

Employers must give employees between six and 12 months' notice of retirement (NB the ability to provide short notice was abolished under the Regulations). The notice can expire after 30 September 2011, provided the employee is 65 (or the employer's normal retirement age if that is higher) on or before this date.

Under the transitional provisions, employers can agree a maximum six-month extension of employment beyond the proposed retirement date (a longer extension would require a second notice of retirement under the statutory procedure, which the employer would be unable to give after 5 April 2011). Employees who wish make a request not to retire are required to do so more than three months, but not more than six months, before the intended retirement date. If an employee was given the maximum 12 months' notice on 5 April 2011, they will have a proposed retirement date of 5 April 2012. For such employees, the last date to request an extension would have been 4 January 2012 i.e. three months before the intended date of retirement. If a six-month extension was granted, their employment would end on 5 October 2012. This would be the last possible date for a retirement under the statutory procedure.

Guidance on the practical implications for employers of removing the DRA has been published by both [Business Link](#) and [Acas](#).¹

1.3 Insured benefits

The question of unintended consequences of abolishing the DRA with regard to insured benefits e.g. life insurance, income protection, accident and private medical insurance, is a well known element of policy development on this issue, as the Departmental consultation paper, [Phasing out the Default Retirement Age](#), makes clear:

7.4. Unintended consequences

7.4.1. The earlier joint call for evidence identified two specific legal issues that might be unintended consequences of removing the DRA. The Government would welcome further input from stakeholders on these issues in light of the position set out below.

Insured benefits

7.4.2. During the call for evidence, a number of stakeholders highlighted the interrelation between insured benefits and age. Their primary concern is that the removal of the default retirement age could impact negatively on the current and future provision of group insured benefits: life assurance; medical cover; income protection schemes and critical illness cover.

7.4.3. With the introduction of the Age Regulations in 2006, employers had to address any benefits not provided equally to all ages. Historically, many employers have and continue to place age limits or age-related conditions on entitlement to insured benefit schemes. These are largely determined by providers' requirements for medical underwriting beyond a particular age or through the charging of higher premiums to insure older workers.

7.4.4. Employers remain uncertain as to the extent that imposing such limits on benefits for their employees remains lawful. Although the Equality Act partly addresses these issues, it was suggested that thought be given to extending the exceptions within the Age Regulations to clarify when employers could stop cover, require medical underwriting or pass the cost on to the employee.

¹ Business Link & Age Positive, [Managing without a fixed retirement age](#); Acas, [Retirement Process and the removal of the Default Retirement Age \(DRA\)](#)

7.4.5. Additional concern was raised about income protection (or 'permanent health insurance') policies, as they create age-related issues in that they traditionally pay a proportion of salary until retirement. There is already a growing trend towards policies which pay out for a maximum period of time (e.g. 3 or 5 years). It was suggested this is a result of employers' concerns that they may be breaking age laws. No definitive evidence was provided to support this view, and it could be that levels of cover are being reduced as a direct consequence of the current economic climate. It was however suggested that adding the Age Regulation's exemptions to cover this would be helpful.²

On 13 January 2011 the [Government response](#) to consultation and the [impact assessment](#) were published, confirming that the Government would proceed with abolition of the DRA. On the question of an exception for insured benefits the Government decided as follows:

E. On possible unintended consequences for group risk insured benefits (income protection, life assurance and sickness and accident insurance, including private medical cover) and employee share schemes, by far the most concern was expressed about the former, although a majority expressed a desire for guidance on both. The principal concern in relation to insured benefits was that removal of the DRA will also in effect remove the cut-off point beyond which such benefits are currently no longer offered, potentially leading to significantly increased costs and uncertainty. A considerable number of respondents therefore argued that there is a risk that benefits are reduced or removed. [...]

The Government recognises that there is a risk that employers may cease to offer insured benefits as a consequence of the removal of the DRA, and will therefore introduce an exception to the principle of equal treatment on the grounds of age for group risk insured benefits provided by employers.³

As mentioned above, the Regulations contain an exemption allowing employers to cease the provision of insured benefits to employees over the age of 65 (or the state pensionable age, whichever is the older).

2 Background

2.1 Employment Equality (Age) Regulations

The *Employment Equality (Age) Regulations 2006* were made on the 3 April 2006 and came into force on 1 October 2006.⁴ They arise out of the need to implement the [EC Directive establishing a general framework for equal treatment in employment and occupation \(2000/78/EC\)](#)⁵ adopted on 27 November 2000. The purpose of this directive, commonly called the "Employment Directive" or "Framework Employment Directive", is to prohibit discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. There was a requirement for the age discrimination strand of the directive to be implemented by December 2006.⁶ The previous Government, through the DTI (now the Department for Business, Enterprise and Regulatory Reform), published a consultation document in July 2003: *Equality and Diversity: Age Matters*. A consultation on the *draft Employment Equality (Age) Regulations 2006* was published in July 2005: *Equality and*

² <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation.pdf>

³ BIS, [Phasing out the default retirement age: Government response to the consultation](#), January 2011

⁴ [Employment Equality \(Age\) Regulations 2006 SI No.1031](#)

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:NOT>

⁶ The provisions covering religion or belief and sexual orientation are included in separate regulations (The *Employment Equality (Religion or Belief) Regulations 2003* SI No.1660 and the *Employment Equality (Sexual Orientation) Regulations 2003* SI No.1661).

Diversity: Coming of Age. Guidance on the regulations for both employers and individuals has been published by Acas.⁷

At the time they were introduced, the DTI summarised the effect of the age discrimination regulations as follows:

Scope of Regulations

The Regulations apply to employment and vocational training. They prohibit unjustified direct and indirect age discrimination, and all harassment and victimisation on grounds of age, of people of any age, young or old.

As well as applying to retirement they

- remove the upper age limit for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement;
- allow pay and non-pay benefits to continue which depend on length of service requirements of 5 years or less or which recognise and reward loyalty and experience and motivate staff;
- remove the age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay, so that the legislation for all four statutory payments applies in exactly the same way to all;
- remove the lower and upper age limits in the statutory redundancy scheme, but leave the current age-banded system in place. See the Written Statement about this to Parliament on 2 March;⁸
- provide exemptions for many age-based rules in occupational pension schemes (they are contained in Schedule 2 to the Regulations).

A Ministerial Statement on 14 December 2004 by Patricia Hewitt confirmed the Labour Government's final decision in favour of a national default retirement age of 65 together with a right for employees to request working beyond the set retirement age. At that time it was expected that the decision to have a national default retirement age would be reviewed after five years. That review was expected by 2011. The statement announced that mandatory retirement would be unlawful below 65 unless the employer can objectively justify their action:⁹

In setting the default age, we have taken careful note of a number of representations we received in the course of consultations which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. While an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily.

Furthermore, our consultations have demonstrated that if all employers only had the option of individually justified retirement ages at the time the legislation was introduced, this could risk adverse consequences for occupational pension schemes

⁷ Acas, [Age and the Workplace](#)

⁸ See HC Deb 2 Mar 2006 cc39-40WS

⁹ HC Deb 14 December 2004 cc127 - 130WS

and other work related benefits. Some employers would instead simply reduce or remove benefits they offer to employees to offset the increase in costs.

Until now, companies have been able to set the age at which their employees retire without any need to justify their choice. So employees may have had to retire at age 60 or even younger, whether or not they wished to continue working. Currently only 30 per cent. of people are in employment by the age of 65 and a major part of the response to the ageing society will be for more people to choose to work to that age.

Following the implementation of this decision, employers will only be able to set their own retirement age for all or some of their workforce below 65 where they can objectively justify this. They would be subject to challenge and would have to show that it was appropriate and necessary to do so.

The default age is not a compulsory retirement age. Employees will be able to work beyond that age wherever they and their employers agree. Indeed, the Government welcome such agreement, and through the right to request is actively encouraging it.

This decision on retirement age has no direct implications for occupational or state pension arrangements. The Government have emphasised that it has no plans to change the state pension age once it has been equalised for men and women at 65, and we shall continue to provide for pension schemes to set normal retirement ages if they need to.

The default age will be accompanied by a right for employees who want to continue to work beyond the default age or their employer's own justified retirement age to have their request considered seriously by their employer. This right will follow the model of the right to request flexible working for parents with young children, where it has been successful in changing the culture towards more family friendly working. This policy will ensure that employers listen to employees who want to keep working and think about whether they can agree. In doing so, it will help promote a culture change including on workforce planning and the design of employee benefits, and move towards a position where fixed retirement ages are relied on only where they can be objectively justified by the employer.

We will monitor the impact of the default age from the outset. Five years from implementation we will subject to formal review the question of whether this remains appropriate. The review will be firmly grounded in evidence, and amongst other things it will look at relevant data on trends in life expectancy; the number of individuals working beyond 65; and the impact of the regulations on business, including the evolution of business practice with respect to the degree of reliance on retirement ages for workforce planning. If at the point of the review the evidence suggested that we no longer needed the default retirement age at 65, we would abolish it.

At the time it was expected that the decision to have a national default retirement age would be reviewed after five years. That review was expected by 2011.

Practical aspects of the 2006 Regulations

Schedule 6 of the 2006 Regulations (see further explanation in the [explanatory memorandum](#)¹⁰ to the Regulations) contains the procedures that need to be followed by an employer in dismissing an employee. These involve a notification period and the right to request working beyond retirement. The employer must convene a meeting with the employee to discuss this request and; if the resulting decision is appealed, an appeal meeting to further discuss the request. The employer, provided they follow the procedure, is not obliged to give reasons for refusal at any stage of the process. The DTI provided a summary of the procedure:

¹⁰ http://www.legislation.gov.uk/ukxi/2006/1031/pdfs/ukxiem_20061031_en.pdf

Employers should notify employees of their intended retirement date not more than one year, but no less than six months in advance. If they do not, the employee may be liable for compensation.

If the employer fails to notify the employee six months in advance they will have an ongoing duty to do so, up to two weeks before the intended retirement date. Failure to notify up to two weeks before the intended retirement date will make the dismissal automatically unfair.

If an employee has been properly notified of their retirement they must make their request to continue working at least three months before the proposed retirement date.

The employer must consider all requests not to be retired. Where possible the employer must meet the employee to discuss their request and must inform them of their decision as soon as is reasonable.

The employee may appeal against the decision. If this happens an appeal meeting should be held as soon as is reasonable.

If it's not possible to hold an appeal meeting within a reasonable period, the employer can consider the request without a meeting, as long as the employee's case for continuing to work is taken into account.

An appeal can be made if:

- the employer refuses the request in its entirety; or,
- if the employer accepts it, but decides to continue employment for a shorter period than the employee requested.

This procedure must be repeated each time an individual nears the agreed extended point for retirement, unless the agreed extended period is less than six months.¹¹

It is important to note that there is nothing in the Regulations to compel an employer to retire employees after they have reached the age of 65. Government Departments were advised by the Cabinet Office not to introduce a default retirement age. Notwithstanding this, many departments retained mandatory retirement at 65 or their staff.

2.2 Review

The following BBC News article gave news of an announcement by the Prime Minister bringing forward the timing of the review:

A review of the default retirement age, which allows employers to compel staff to retire at 65, is to be brought forward by a year, the government says.

BBC home editor Mark Easton says the move effectively signals an end to the default retirement age.

The majority of people retire before 65, but 1.3 million people work beyond state pension age. Many more say they would if their employer permitted it.

The employers group the CBI said the move was "disappointing".

The review had been expected in 2011 but will now take place next year.

¹¹ DTI, *Age Legislation fact sheet No.7*, March 2006

Ministers have brought the review forward to respond to changing demographic and economic circumstances.

Economic recovery

Explaining the change in the timing of the review, Prime Minister Gordon Brown said: "Evidence suggests that allowing older people to continue working, unfettered by negative views about ageing, could be a big factor in the success of Britain's businesses and our future economic growth."

The TUC welcomed the move.

"It cannot be right that an employer can sack someone simply for being too old," said TUC general secretary Brendan Barber.

"Employees should have choice - neither forced by employers to give up work, nor forced by inadequate pensions into working longer than they should."

'Discriminatory'

Separately, the Court of Appeal will hear a legal challenge to the default retirement age this week in a case backed by the Equality and Human Rights Commission.

A solicitor, Leslie Seldon, will argue he was discriminated against on the grounds of age when he was not permitted to work beyond the age of 65. He says he needed to go on working to support his family.

Dinah Rose QC, acting for the Department for Business, Innovation and Skills, says the hearing will rise "important questions of policy and principle".

A number of age discrimination cases are waiting in the pipeline for the outcome of this and another challenge being brought against the government by the charities Age Concern and Help the Aged next week.¹²

The Coalition Agreement of May 2010 contained the following announcement:

We will phase out the default retirement age and hold a review to set the date at which the state pension age starts to rise to 66, although it will not be sooner than 2016 for men and 2020 for women. We will end the rules requiring compulsory annuitisation at 75.¹³

A Lords Written Answer gave an update:

Asked by **Lord Ouseley**

To ask Her Majesty's Government when they expect to phase out the default retirement age.[HL90]

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Baroness Wilcox): We are committed to phasing out the default retirement age, but it is important to do this in a way that allows individuals and employers to adapt to the new situation. BIS and the DWP have assembled a considerable body of evidence on this issue. Once this has been analysed we will set out the way forward.¹⁴

¹² BBC News, [End of retirement age signalled](#), 13 July 2009

¹³ Cabinet Office, [The Coalition: our programme for government](#), May 2010

¹⁴ [HL Deb 3 June 2010 c WA10](#)

Detailed proposals were published on 29 July 2010:

BIS, DWP, [Phasing out the Default Retirement Age, Consultation document](#), July 2010

These proposals were summarised as follows:

The Government has decided to phase out the DRA. This consultation document sets out the background to the DRA, and explains the transitional arrangements which the Government is proposing for its removal. Removal of the DRA will begin in April 2011, with transitional arrangements covering the period until 1 October 2011.

Phasing out the DRA is just one of the steps that the Government is taking to enable and encourage people to work for longer, alongside reviewing when the State Pension Age should reach 66 and ensuring there is effective support for those out of work to find work. There are a range of reasons for pursuing these policies, including demographic change; the financial benefits to both the individual and the wider economy; and the health and social benefits many people gain from working later into life.

As well as removing the DRA to enable people to work for longer, the Government is also proposing to help employers by removing the administrative burden of the current DRA-associated retirement procedure – the so-called 'right to request' working beyond retirement, which an employer has a duty to consider.

Although the Government is proposing to remove the DRA, it will still be possible for individual employers to operate a compulsory retirement age, provided that they can objectively justify it.

The consultation document seeks input on whether the Government could provide additional support for individuals and employers in managing without the DRA or a statutory retirement procedure, including the possibility of further guidance or a more formal code of practice on handling retirement discussions.

Finally, the consultation document describes two issues identified in an earlier call for evidence which might have unintended consequences when the DRA is removed: insured benefits and employee share plans. Further views of stakeholders are invited on these issues.¹⁵

A number of associated documents were also published:

- [Second Survey of Employers' Policies, Practices and Preferences Relating to Age 2010](#)
- [A Comparative Review of International Approaches to Mandatory Retirement](#)
- [Default Retirement Age: Employer qualitative research](#)
- [Pathways to Retirement: The influence of employer policy and practice on retirement decisions](#)
- [Review of the Default Retirement Age: Summary of the stakeholder evidence](#)

¹⁵ BIS, DWP, [Phasing out the Default Retirement Age, Consultation document](#), July 2010, page 5

On 13 January 2011 the [Government response](#) to consultation and the [impact assessment](#) were published. They confirmed that the Government would proceed with abolition of the DRA.

The Draft [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011](#) and draft [Explanatory Memorandum](#) were laid before Parliament on [1 March 2011](#) and come into force on 6 April 2011.

2.3 Legal challenge

The default retirement age was challenged in a judicial review soon after the age equality regulations came into force. The case was brought by the National Council on Ageing, which operates under the names Heyday and Age Concern. It brought a case in the High Court claiming that the default retirement age in the Regulations is incompatible with the EC Directive. The challenge focussed on that aspect of the Regulations (in particular Regulation 30) on the grounds that it contravenes the Framework Employment Directive because it left people over age 65 without the right to choose to continue working.¹⁶ The matter which was heard on 6 December 2006 was referred by the High Court to the European Court of Justice (ECJ) for ruling on compatibility with the Directive. The ECJ delivered its final ruling on 5 March 2009. There was then a final determination by the UK High Court in light of the principles clarified by the ECJ which was delivered in September 2009.

Given the legal challenge, some employees who had been forced to retire were advised to take out prospective tribunal claims in the event that the case returned a favourable ruling. The Employment Appeal Tribunal ruled in *Johns v Solent SD Ltd* that such claims could be received by tribunals and then put on hold pending the decision of the ECJ.¹⁷

On 23 September 2008, the Advocate General Jan Marzak handed down an Opinion (prior to final judgement of the Court) stating that the UK would not have broken EU law if it could justify allowing employers to insist on compulsory retirement provided it had a legitimate policy aim. Advocate General's opinions are given before the ECJ considers a case.¹⁸

The final decision of the Court was delivered on 5 March 2009:

[R \(on the application of The Incorporated Trustees of the National Council on Ageing\) v Secretary of State for Business, Enterprise and Regulatory Reform](#) Case C-388/07

The ECJ held that the UK age discrimination legislation which allowed dismissal of employees aged 65 or over if the reason for dismissal is retirement could, in principle, be justified under the Directive. They noted that the Directive did not require that member states draw up a list of the specific differences in treatment that could be justified by a legitimate aim. However, the court said that the general context of the measure concerned should enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy. The question was whether the means put in place to achieve that aim are appropriate and necessary.

¹⁶ Equal Opportunities Review, *In the News*, EOR No.158, November 2006; Age Concern news release, [Heyday takes Government to court over mandatory retirement age](#), 3 July 2006

¹⁷ Clare Dyer, "[Firms could face big payouts over forced retirement at 65](#)", *The Guardian*, 19 November 2007

¹⁸ ECJ, [Opinion C-388/07](#) in *The Incorporated Trustees of the National Council for Ageing*, 23 September 2008, OJ C 283 of 24.11.2007, p.9

The ECJ recalled that under the Directive the aims that may be considered legitimate for justifying derogation from the principle prohibiting age discrimination are social policy objectives. These could relate to the labour market, employment policy or vocational training. These could be legitimate aims because of their public interest nature unlike reasons that are merely related to the employer's interests, such as cost reduction or competitive advantage.

However, the ECJ held that while member states have broad discretion in choosing how to pursue their social policy objectives they cannot frustrate the principle of non-discrimination on grounds of age. For example, generalisations about the ability of a specific measure to contribute to employment policy, labour market or vocational training objectives would not be enough to justify derogation from the principle of non-discrimination and would not constitute evidence that the means chosen are suitable for achieving those aims.

The final decision of the UK High Court was given on 25 September 2009.¹⁹ The issue was whether the mandatory retirement provisions in the *Employment Equality (Age) Regulations 2006* reflect a legitimate aim and if the means chosen to achieve this aim are appropriate and necessary. The Regulations were held to be compatible with the EU Directive, although the judge referred to the government review of the provisions due to take place that year.²⁰

2.4 Consequential Amendments

Employment Rights Act 1996

The above Act was amended to remove *retirement* as a potentially fair reason for dismissal and Sections 98ZA-98ZH for judging fairness of retirement dismissals no longer applies. From the 1st October 2011, an employer that wishes to retire an employee will now have to follow a fair procedure under the ordinary unfair dismissal rules and rely on one of the potentially fair reasons for dismissal under the *Employment Rights Act 1996* i.e. capability, conduct, redundancy, illegality or some other substantial reason

Equality Act 2010

The Regulations removed paragraph 8 of Schedule 9 of the Act. This means that, subject to the transitional arrangements, it is discrimination for an employer to compulsorily retire an employee who is aged 65 or over.

Paragraph 9, Schedule 9 of the *Equality Act 2010* is repealed. This means that it is unlawful not to recruit someone because they are age 65 (or over) or are within 6 months of reaching that age.

Employment Equality (Age) Regulations

Schedule 6 was repealed to remove the duty for employers to consider requests from employees to work beyond retirement.

¹⁹ [Age UK, R \(on the application of\) v Attorney General \[2009\] EWHC 2336 \(Admin\)](#) (25 September 2009); see also: Age Concern press release, [Forced retirement is lawful - but only because of Government climb-down \(25.09.09\)](#)

²⁰ BIS, [Default retirement age](#)

3 Historical background

3.1 EC Directive

In November 1999, the European Commission introduced proposals for a directive establishing a general framework for equal treatment in employment and occupation, which covered discrimination on grounds of age.²¹ The DfEE's Explanatory Memorandum on the proposed directive, submitted on 6 January 2000, suggested that the UK Government intended to continue to address questions of age discrimination through the Code of Practice, at least for the time being:

13. Our negotiating strategy will have to take account of an evolving domestic agenda. Adoption of the proposal in its current form would require changes to UK law. The Government is open to making necessary and proportionate changes in this area to promote equal opportunities if the case is made. However, the need to avoid unnecessary and burdensome regulation will remain a priority in the Government's considerations. It will also be guided by assessments of the progress which can be achieved through non-legislative means such as codes of practice. The possible requirement for legislative change differs according to the type of discrimination. (...)
- Sexual orientation and age: the Government has produced a Code of Practice on discrimination in employment based on age and proposes that a Code of Practice on the ground of sexual orientation should be produced in conjunction with the Equal Opportunities Commission.

However, after much discussion and revision, political agreement on the directive was reached at the Employment and Social Policy Council on 17 October 2001.²² Employment Minister Tessa Jowell who led the Government's negotiations said:

Our chief concern was to get the detail right. We have fought hard to ensure the Directive is workable in practice and does not burden business, schools and other organisations with unintended problems. We have also secured an exemption for the armed forces in order to ensure combat effectiveness.

Delivering real benefits for individuals suffering discrimination at work depends on a realistic timetable for implementation. That is why we have agreed a deadline for 2003 for the provisions on religion and sexual orientation and 2006 for disability and the more complex age discrimination laws.²³

Among the negotiating successes highlighted in the DfEE press release at the time, were:

- Age provisions clarified with exemptions for occupational pensions.
- Exemption for the armed forces from the provisions on age and disability²⁴

The directive was finally adopted at the Employment and Social Policy Council on 27 November 2000 and published in the Official Journal on 2 December 2000. This *Directive*

²¹ COM (1999) 565 final, 25 November 1999

²² DfEE press release, 17 October 2000, *UK reaches political agreement on new EU anti-discrimination directive*

²³ Ibid

²⁴ Ibid

establishing a general framework for equal treatment in employment and occupation (2000/78/EC) is designed to outlaw discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. Member States have until 2 December 2003 to implement the directive's provisions on religion or belief and sexual orientation, and until 2 December 2006 to implement the provisions on age and disability.

The Directive was adopted under the new Article 13 added to the Treaty establishing the European Community by the Treaty of Amsterdam agreed in June 1997. Directives adopted under this Article require the unanimous support of all Member States. It provides:

Article 13 (ex Article 6a)

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

3.2 Provisions on age

The directive imposes a general prohibition on both direct and indirect discrimination on grounds of age in the following areas:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.²⁵

It makes it clear, though, that it “does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes”,²⁶ and that Member States may exempt the armed forces from the age provisions.²⁷

The directive does, however, allow discrimination where age is a genuine occupational requirement. Less favourable treatment of older workers would be allowed where:

by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, [age] constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.²⁸

There are more specific provisions on age discrimination in Article 6:

²⁵ Article 3 (1)

²⁶ Article 3 (3)

²⁷ Article 3 (4)

²⁸ Article 4 (1)

1. Notwithstanding Article 2(2), 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, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
 - (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
 - (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

DfEE evidence to the Education and Employment Committee explains the significance of these provisions for pension ages:

64. In light of Article 6.2 of the Directive, the United Kingdom (and other Member States) will be entitled to exclude the fixing of ages for admission to, or for entitlement to benefits payable under, occupational pension schemes from the scope of the legislation implementing the age provisions of the Directive. Our current intention is to make use of this derogation.²⁹

3.3 Background to the “default age” debate

There has been a long debate over proposals for a national “default age” after which mandatory retirement in employment contracts would be allowed. These first arose out of the consultation published on 2 July 2003, entitled *Equality and diversity: age matters*, on the previous Government’s proposals for implementing the anti-age discrimination provisions of the Directive.³⁰ This announced that legislation banning age discrimination in employment would come into force in the UK on 1 October 2006. Mandatory retirement ages would then become unlawful, but the Government has been consulting on a “default age” of 70, after which employers would be able to require employees to retire without justifying the requirement. A decision has since been made in favour of a default age of 65 (announced in a Ministerial Statement on 14 December 2004 - see above).

²⁹ Education and Employment Committee, Seventh Report 2000-01, *Age Discrimination in Employment*, HC 259, 21 March 2001, evidence, p 8

³⁰ Department of Trade and Industry, *Equality and diversity: age matters: age consultation 2003*, July 2003

The summary consultation (July 2003) said:

14. *Retirement age*: retirement ages that employers set for employees will be unlawful under the Directive, unless objectively justified. We are seeking views on whether the legislation should provide for employers, exceptionally, to be able to justify mandatory retirement ages. They would be able to do so only by reference to the specific aims listed above and only if their particular circumstances made it appropriate and necessary. We are also asking for comments on a default age of 70 at or after which employers could require employees to retire without having to justify their decision. Employers would be free to continue employing people beyond the age of 70. We will not make a decision about retirement age until we have considered the outcome of this consultation.

The circumstances which could be used to justify age discrimination, including a mandatory retirement age were summarised as:

- a. health, welfare, and safety – for example, the protection of younger workers;
- b. facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;
- c. the particular training requirements of the post in question – for example, air traffic controllers, who have to have high levels of health and fitness and concentration, and who have to undergo extensive theoretical and practical training at the College of Air Traffic Control, followed by further on the job training;
- d. encouraging and rewarding loyalty;
- e. the need for a reasonable period of employment before retirement – for example, an employer who has exceptionally justified a retirement age of 65 might decline to employ someone only a few months short of 65 if the need for, and the cost and length of, training meant that the applicant would not be sufficiently productive in that time.

In terms of justifying a default age under the terms of the Directive specific reasons for such a policy will need to be spelled out in order to defend against legal challenges on grounds that the Directive has not been properly implemented. The reasons for the justification will need to fall within the terms of Article 6(1) which allows that

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, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

It is important to stress that the “retirement age” and the “pension age” are not synonymous. The retirement age is the age at which one can be required to leave work. The pension age is that age at which one can start to draw an unreduced pension. The consultation document did not, therefore, imply that the pension age should be increased to 70.

It says:

Pension scheme ages

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

4.14 We shall take advantage of the Directive's provisions³¹ that allow occupational pension schemes to set ages for admission or entitlement to retirement benefits. A normal pension age – that is, the date from which full scheme benefits are payable without actuarial reduction or enhancement³² – is necessary for the operation of defined benefit schemes. It is not the same as a mandatory retirement age. Indeed, the Government has separately announced its proposal to allow people to draw their occupational pension while continuing to work for the same employer.³³

Nevertheless, many commentators expected a default age of 70 to encourage occupational schemes to raise their normal pension ages in line. Bob Sherwood, writing in the *Financial Times*, said:

The laws will scrap mandatory retirement ages, at least below 70. Many suspect that will force employers to shift their standard practices so that employees are expected to work an extra five years and will be entitled to full pension benefits only at 70.

That could dash dreams of early retirement deals, says Andrea Nicholls, employment head at Howard Kennedy. "A lot of people hope to be given an early retirement pay-off at 55 to 60. Now that will be much more expensive because you will have to compensate people who might have worked on until they were 70.

"I think this will force people to work longer."³⁴

An article in the *Sunday Times* asked: "Will you have to work until 70?":

Experts fear that the government's plans to outlaw age discrimination will give firms the green light to increase the retirement age of company pensions, writes David Budworth.

Many companies will see it as a way of cutting costs because they won't have to pay the benefits for as many years. Some people will be happy to be given the opportunity to work longer. But many will be disappointed that they may now have to delay their retirement plans.³⁵

The *Independent* quoted a string of critics:

But critics seized on the most controversial element in the document, which would create a "default" retirement age of 70, with groups from Age Concern to the TUC highly critical of the idea. They complained that the proposals would not solve the country's pensions crisis, could undermine occupational pensions and compel more people to work into their late 60s.

Bob Crow, general secretary of the Rail Maritime and Transport union, said the Government should be encouraging people to retire earlier. "We are all for an end to age discrimination, but we don't want to see people forced to work until they are 70. This could undermine occupational pension arrangements, which could lead to people working until they were 70, even if they don't want to," he said.

Derek Simpson, joint general secretary of Amicus, said: "Working longer is not the answer. There has to be compulsion on employers to protect pensions." Brendan Barber, the TUC general secretary, said the proposals should help to change

³¹ Article 6.2

³² The minimum age from which benefits can currently be taken is 50 currently. From 2010 this will increase to 55 for all schemes that qualify for tax relief. Pension benefits must be taken by age 75.

³³ *Simplicity, security and choice: working and saving for retirement*

³⁴ "Reaching the difficult age", *Financial Times*, 7 July 2003

³⁵ "Will you have to work until 70?", *Sunday Times*, 6 July 2003

attitudes, but he added: "The proposed regulations must not be used as an excuse to delay or downgrade entitlement to pensions and put pressure on people to work for longer against their wishes. (...)

Dave Prentis, Unison general secretary, said: "The pressure for change should come from employees who want to continue working because of increased job satisfaction, not because the rules of the pension scheme force them to stay."³⁶

The TUC estimated that one in five people would die before qualifying for their pension if the age at which they could receive it was increased to 70:

More than one in five people - and nearly one in three men - will die before they get a pension if the Government increases the retirement age to 70, according to new TUC research published today (Wednesday). This rises to almost half of men and more than a third of the population as a whole in Britain's most deprived areas.

Some commentators have called for the retirement age to increase to 70 as a way of 'tackling' Britain's pensions crisis, but the TUC says that this will mean an unacceptably large number of people - particularly in more deprived areas - will have to work until they 'literally drop'.

Official figures show that in England and Wales one in six (16.7 per cent) of the population die before they reach 65, and a further 7.1 per cent die before they turn 70. This means that one in four (23.8 per cent) would not get a pension if the pension age was raised to 70. As men do not live as long as women, even more men would lose out. One in five (21.6 per cent) men die before they are 65, rising to nearly one in three (30.6%) who die before their 70th birthday.

TUC General Secretary Brendan Barber said: 'Many commentators tell us that we can solve the pensions crisis if we all work longer before we retire. But these figures show that many will have to work until they literally drop if the retirement age is increased to 70. And it is hardly surprising that the biggest losers live in Britain's most deprived boroughs, where only just over half the men would live long enough to claim a pension if the retirement age goes up to 70.

'I suspect many of those who say we should all work longer have good jobs behind desks and their own substantial pension savings. It is simply not an option for many manual workers to carry on working until they are 70. They will either die or be forced on to benefits before they can claim their rightful pension.'³⁷

The government-appointed Pensions Commission responded to the July 2003 consultation document on age discrimination by pressing the Government either to set no default retirement age at all or to set one significantly higher than 65. However, it made it clear that this does not mean that it supported raising the state pension age. The *Financial Times* reported in June 2004:

Adair Turner, chairman of the government-appointed Pensions Commission - and a former director general of the CBI - told the *Financial Times* that the three-strong commission had written to ministers saying: "Either there should be no default age set at all or that, if one is set, it should be significantly higher than the current male state pension age of 65. It should be 70 or something like that."

The reason, Mr Turner said, was that longer life expectancy and a big savings gap meant people would need either to save more or work longer - or some combination of the two - to ensure an adequate income in old age.

³⁶ "Ageism white paper: fears over raised retirement age prompt wave of attacks by unions and business", *Independent*, 3 July 2003

³⁷ TUC press release, *One in five won't get pension if retirement age rises to 70*, 16 June 2004

To set a default retirement age, he said, "would send the wrong signal to society when we should be removing barriers to longer working lives".

Mr Turner stressed that banning a default retirement age need have no effect on when the state pension became payable. "That is a separate issue," he said. "It is a separate issue because you can already claim the basic state pension and carry on working. And already there are arrangements where you can delay taking it and receive a larger amount later.

"That is attractive because more people should be going through a flexible decade of retirement where they move from full-time to part-time work, and where they mix a flow of work and retirement income."

Retaining a default retirement age of 65 would require many people to save much more while at work in order to ensure a decent income for the longer retirements that they now typically faced.

However, Mr Turner underlined that the removal of a default age was "not about making people have to retire later. It simply means individuals who wish to do that can choose to do that," he said.

Mr Turner said the commission was neutral on whether there should be no default age, or a higher figure such as 70. Employers were worried, he said, that without one they could find themselves in industrial tribunals having to prove people were not up to the job in order to get rid of them.

"One should not entirely dismiss that point of view," he said, "so we are not in principle against some sort of backstop. But if there is going to be a backstop it should be something like 70 rather than 65."³⁸

The previous Government accordingly accepted that 65 would remain the normal pension age for most people, and the age at which the state pension becomes payable. However, under the new proposals it would be illegal for an employer to impose a mandatory retirement age, although, they would be able to retire people compulsorily if they could justify their reasons (see above). If however, a default age is to be set at, or beyond, this age employers would be able to retire workers with no justification. Thus the default age is the age at which it is easier for employers to dismiss staff, rather than the age below which staff have to continue working. It is not clear whether fears that a default age will actually become a common retirement date are likely to be realized. The point of the legislation is to allow individuals more choice over the end of their working life and to try and force employers to employ more old people. Since employers are apparently reluctant to recruit and employ older workers it is unlikely that they will voluntarily employ more of them by extending retirement age.

In April 2004, the Financial Times reported a stalemate between government departments over the details of the new regulations:

A decision over whether companies should be able to force British workers to retire at a certain age has become mired in a dispute between two government departments. The government had told business groups and equal rights campaigners it would publish new age discrimination rules by October this year, giving companies two years to change their employment policies before an EU deadline of 2006.

³⁸ "Pensions body wants retirement shake-up", *Financial Times*, 23 June 2004

But the Department of Trade and Industry cannot agree with the Department for Work and Pensions on whether companies should be able to introduce a mandatory retirement age.

Ministers at the DTI, led by Patricia Hewitt, are sympathetic to business groups' arguments for a standard retirement age of 65, unless the employee wants to work longer and the employer agrees. But Malcolm Wicks, the pensions minister, opposes mandatory retirement age, sticking by earlier comments made by Andrew Smith, work and pensions secretary.

The stalemate became clear earlier this month, at a meeting between Whitehall officials and advisers from business, the union movement and age campaigners. Civil servants signalled that no immediate decision was likely.

The impasse partly reflects fear in government that retirement ages could become a big vote-loser at the next general election.

An earlier consultation paper, which raised the possibility of mandatory retirement at 70 or scrapping fixed retirement ages altogether, prompted headlines and union complaints about a "work till you drop" culture.³⁹

3.4 Upper and lower age limits

Before they were repealed by the age discrimination regulations there were upper age limits which applied to the right to a statutory minimum redundancy payment and claims for unfair dismissal. Those under 18 or over 65 were formerly not entitled to the minimum statutory redundancy pay. Under section 211(2) of the *Employment Rights Act* (now repealed) service before a person's 18th birthday did not count for statutory redundancy pay calculations. This was in contrast to the calculation of the basic award in unfair dismissal claims, which did not have a lower age limit. Similarly, an employee made redundant after their 65th birthday did not qualify for statutory redundancy pay under section 156 ERA.

The DTI guidance on redundancy at the time explained how the entitlement would tail off after the age of 64:

12. If you are aged 64 or over

If you are aged 64 or over, we have to reduce your redundancy payment by one-twelfth for each complete month you worked after your 64th birthday. This means that if you are 65 or over, you are not entitled to a redundancy payment. You may still be entitled to compensation for notice pay, unpaid wages or holiday pay you are owed.

A challenge was launched against the legality of upper age limits in the case of *Harvest Town Circle Ltd v Rutherford*, where a man dismissed at the age of 67 argued that there was no objective justification for the rule prohibiting people over the normal retiring age from claiming unfair dismissal and that it affected more men than women. It was argued that section 109 ERA indirectly discriminates against men and is therefore incompatible with Article 141 of the Treaty of Rome (equal pay for equal work). This argument was supported by the employment tribunal, but appealed to the Employment Appeals Tribunal (EAT). They overturned the decision on the grounds that the Secretary of State should have been consulted. The case was remitted back to an employment tribunal for rehearing where it was joined with another similar case (*Bentley v Secretary of State for Trade and Industry*). Mr. Bentley's case involved a challenge to the upper age limit for statutory redundancy pay in section 156 ERA on the basis that this has a disparate impact on men and women. The tribunal again found in favour of Mr. Rutherford and also found in favour of Mr. Bentley. In

³⁹ "Whitehall rift delays retirement age ruling: Departments disagree on whether employers should be able to introduce mandatory departure dates" *Financial Times*, 24 April 2004

both cases the employers had become insolvent making the Secretary of State liable under the ERA for the amounts claimed.

The Secretary of State appealed to the EAT (*The Secretary of State v Rutherford and Bentley* [2002] IRLR 768). The EAT found that the tribunal had used the wrong statistics for comparison and that the Secretary of State had made out justifiable reasons for maintaining the law as it stood. The case was appealed to the Court of Appeal who gave judgement on this case on 3 September 2004 dismissing the appeal.⁴⁰ A further appeal to the House of Lords was also dismissed.⁴¹

⁴⁰ [Rutherford & Another v. Secretary of State for Trade and Industry](#) [2004] EWCA Civ 1186

⁴¹ [Secretary of State for Trade and Industry \(Respondent\) v. Rutherford and another \(FC\) \(Appellants\) and others](#) [2006] UKHL 19, 3 May 2006