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Consultation response

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Phasing out the Default Retirement Age

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This consultation follows the Government's announcement of 29 July 2010 that they intend to abolish the Default Retirement Age, examining how this will be achieved and what measures are needed in its absence. The consultation document poses five main questions on:

- Removing Schedule 6 (the process through which an employer can force an employee to retire)
- How age discrimination and unfair dismissal will operate in the absence of Schedule 6.
- Discussions on retirement plans between an employer and employee
- The timescale of the Government's plans
- Insured benefits and share option schemes

In our response we will not re-visit areas that were covered in the call for evidence earlier this year.

Key points and recommendations

Age UK warmly welcomes the decision to abolish the Default Retirement Age. This will have a positive impact on individuals, employers and the UK economy by helping many people who want or need to work remain in employment.

We support the timescale for phasing out the Default Retirement Age suggested by the Government, and believe it strikes the correct balance between rights for employees and giving employers ample time to adjust.

Age should only be used as a proxy for capability in exceptional circumstances, such as where there are clear public safety risks, evidence of significant age-related deterioration is available and the employer can prove there is no better measure. There should therefore be very few cases where an employer can successfully objectively justify continued use of a mandatory retirement age.

We believe the Government needs to clearly state that some reasons outlined by the judge in the Seldon v. Clarkson Wright and Jakes case are not legitimate reasons for objectively justifying a mandatory retirement age for employees. Clarifying the distinction between State Pension Age and retirement could help adjust expectations of what constitutes objective justification.

The Government should investigate what measures can be taken to prevent partners and some office holders being subjected to continued mandatory retirement. We acknowledge, however, that this may in some cases be a more complex issue.

We agree that Schedule 6 can be removed, although the Government must be mindful of rights for employees who may be subjected to mandatory retirement in the future. This could necessitate additional guidance to clarify an appeals process and where the right to request to work on should apply.

We believe the discussion between employer and employee on retirement options should ultimately be absorbed into the right to request flexible working. As the Coalition Government has already committed to this, making this into a 'future working plans discussion' requested by the employee appears to dovetail neatly. The discussion as suggested in this consultation document would therefore be a first step towards this right to request.

Holding a discussion between employer and employee to discuss future working and retirement plans is a positive move for both parties. However, in order for it to be effective, this discussion must be centred around the individual needs of the employee, and not triggered by the employee reaching a certain age. Therefore the employee alone should be able to request it. In preparing this response we discussed the issue with our local partners, and it was strongly felt that flexibility must be at the discussion's core.

Employers can already talk to their employees on this subject, so no action is needed from this perspective. However, the Government needs to make clear what constitutes good practice (and conversely what would be considered discriminatory behaviour) to ensure they are confident on approaching the subject.

As the discussion should be part of interim arrangements before introducing a right to request flexible working, we believe the Government needs to introduce formal guidance to support the process at this stage. Both parties need to understand what constitutes discriminatory behaviour in order to avoid it and make discussions as productive as possible.

There is insufficient evidence on the issues that may affect insured benefits and share options. However, we feel that removing the Default Retirement Age alone will have minimal impact.

1. Introduction

Age UK warmly welcomes the Government's decision to phase out the Default Retirement Age (DRA) from April 2011. The Government's impact assessment makes clear that the costs to businesses of adjusting to a post-DRA employment market will not be substantial, and that the pros easily outweigh the cons. We support the argument that it is a win-win-win situation for individuals, employers and the UK economy.

In the context of the Government's objective to extend working lives, it is only reasonable that each person should be given every opportunity to work for as long as they need or want to. An increasing number of people over State Pension Age are remaining in employment, clearly demonstrating that many older people want to continue working, whatever the reason. Many employers appear to recognise the benefits of employing older workers, but there are equally as many negative stereotypes that still prevail.

Removing the DRA, however, is only one part of the solution. The Government must continue to advocate the benefits of employing older workers and create the right incentives for employers to invest in proactive career management, for example providing high quality training to their older employees.

Age should not be used as a proxy for capability, and there are only exceptional circumstances in specific occupations relating to public safety where it may be justified. As such, we continue to believe that other groups not covered by the Employment Equality (Age) Regulations 2006, principally partners and office holders, should also cease to be subject to continued mandatory retirement.

However, for some office holders, in particular the judiciary, we recognise that there are complexities with their performance management structure which may make removing mandatory retirement impractical without substantial changes elsewhere.

The judgement in *Seldon v Clarkson, Wright and Jakes (A Partnership)* [2010] EWCA Civ 899 (Seldon) that was recently heard by the Court of Appeal potentially undermines the policy intention. In his ruling, Sir Mark Waller found some arguments in favour of Seldon being forced to retire that cause us concern: notably, that he accepted 'maintaining a happy workforce'; the 'dead men's shoes' argument for workforce planning; and that limiting the need for performance management were

legitimate reasons for forcing Mr Seldon to retire. All these are diametrically opposed to what should be considered good employment practice. Although Mr Seldon was a partner, the judgement appears to make no distinction between partnership and employees in reaching these conclusions.

We are concerned that Seldon may have implications for a post-DRA test case. It is vitally important that the draft Code of Practice on Employment which applies to Part 5 of the Equality Act 2010 is amended to provide greater clarity about the limited circumstances in which use of a mandatory retirement age could be objectively justified, post removal of the DRA.

2. Consultation questions

A) The Government intends to remove the Default Retirement Age. Do you agree that Schedule 6 of the Age Regulations (which deals with notifications of retirement and the 'right to request' to work past retirement age) should also be removed?

We agree that Schedule 6 as it currently stands can be removed. We are concerned that if it remains then it will provide an incentive for employers to misuse the process as a means of encouraging employees to leave their business. Also, we believe that the continued existence of such a process could be taken into account by the courts in deciding whether a particular employer can objectively justify an employee being forced to leave their business.

We believe there are very few, if any, circumstances in which age can be considered a proxy for capability. To avoid employers trying to force people from their workforce it is important the Government continues efforts to encourage employers to adequately manage their staff throughout their careers. Section 98 of the Employment Rights Act 1996 which covers capability is, we believe, fully sufficient for employers to manage any issues they have with underperforming workers. In most cases age is arbitrary and irrelevant (see final paragraph of this question).

Furthermore, employers should proactively manage their entire workforce, regardless of age. Many employers already have good performance management systems (the Government's own figures state 79% conduct such appraisals) and the Government factors in the costs of others introducing these in its impact assessment. However, merely having such a system in place does not necessarily mean that employers do manage employees effectively. The Government needs to continue its efforts to encourage employers here, and could investigate whether producing any guidance would help.

The Government should state clearly that they are not expecting employers to be able to routinely justify maintaining a Mandatory Retirement Age. There may be some confusion among employers who may be under the false impression they can continue to operate such a system – ensuring that this does not happen will help businesses manage a smooth transition to the post-DRA system, and prevent more

individuals being forced from their jobs. It should continue in tandem with other efforts to eradicate age discrimination, for example the Age Positive programme.

However, in the event that there are a small number of safety critical occupations for which employers can objectively justify continuing to operate a mandatory retirement age, the Government should be aware that removing Schedule 6 – the process by which people are forced to retire – could leave some employees vulnerable. Robust guidance for these employers setting out a process akin to that currently outlined in schedule 6 would help to mitigate these risks. It is imperative that employees are not left even more vulnerable than under the present situation.

B) If Schedule 6 is removed, the laws on unfair dismissal and age discrimination will still apply. Do you have any concerns about how these laws would operate in the absence of Schedule 6?

We are encouraged by the Government's view that employers objectively justifying the continuation of mandatory retirement will be extremely rare. Where employers do not objectively justify forced retirement decisions, which we believe will be the vast majority of situations, we do not foresee any conflicting issues arising between the remainder of the Equality Act 2010 relating to employment. This will continue to operate independently and be unaffected by the removal of the DRA.

Concern would arise, however, if any employers are able to objectively justify maintaining a Mandatory Retirement Age. It could then become unclear as to the relationship between unfair dismissal and age discrimination in the context of occupationally-specific mandatory retirement ages within an employer. This could create inconsistencies on application of the law across industries and organisations. The Government may need to clarify how this would operate.

C) Thinking about retirement discussions between an employer and an employee, do you think it would be useful to have:

1. **Formal guidance on how to discuss retirement in a mutually beneficial way**
2. **A statutory code of practice, including guidance, which covers retirement discussions**
3. **None of the above**
4. **Something else**

C 3) If you believe that additional guidance or a code of practice would be helpful, what topics do you think should be addressed? For example, flexible retirement options, changes to duties and working hours etc.

We believe that introducing such a discussion is a first step towards a right to request flexible working. The proposals looked at by this document should therefore be an interim measure, and our preferred choice is option one [formal guidance], which could be use until the right to request flexible working is implemented, as referred to in the Coalition Agreement. At the present time a new 'right to request' specifically for this discussion is not essential. However, the Government should investigate whether some form of statutory footing is necessary to ensure the arrangements achieve the

positive change desired, and consider this on an ongoing basis. The guidance should set out clearly the aims of the discussion and explain how it can be beneficial to both parties.

It should outline how in practice the discussion should be implemented, and should be governed by the practical needs of individuals. Broadly speaking, the guidance should include details and good practice examples on individuals' working plans, and information on potential issues arising. This could include:

- Flexible working and retirement options – to outline the individual's desired working patterns in the future.
- Career aspirations – research by the Equalities and Human Right Commission shows that nearly three times as many 50-75 year olds still in work want to be promoted than downshift.[i] Business productivity will be maximised if staff are able to work to their desired potential.
- Information for employers on how to act in a non-discriminatory manner – for example, explaining that individuals must not be passed over for promotion or made redundant on the basis of what is discussed at this point.
- Information for employers on how to arrange the discussion and the timescales that must be followed.
- Information for individuals on what to expect from the discussion, and what their employer can and cannot do following what is said.
- A proper explanation of the fact that State Pension Age is not the same as a retirement age. This will help employers accommodate the Government's policy to extend working lives.
- An overview of the Employment Equality (Age) Regulations 2006.

The language relating to the conversation is also important. It must appear to be a positive move, in particular in the eyes of the employee, and make clear that there is no connection to a binding agreement. We believe that referring to retirement may put people off, and so describing it as a 'future working plans discussion' would have a positive impact on both employer and employee.

Flexible working

We perceive this discussion as being an interim measure towards a right to request flexible working, as it appears to have a large amount in common. It will therefore be necessary to demonstrate clearly the benefits to employers of embracing flexible working, including, for example, increasing staff retention and building a 'psychological contract' between the two parties.[ii] A recent survey found that 93% of managers recognise the value that their older employees add to the business[iii], therefore the guidance could act additionally as a mechanism through which to provide advice on employing older workers more broadly.

Age UK recommends the Government fully investigates ways by which the two processes could dovetail, leading to a future combination with flexible working policy. Creating an environment to ease the extension of flexible working would, we believe, be very much in line with the Government's policy objective of extending working lives. The research carried out by the Centre for Research into Older Workers in 2006 shows that 50% of their interviewees would have worked longer if flexible

working options had been available to them.[iv] It seems eminently sensible to use this discussion to facilitate this.

The future working plans discussion
We support in principle the idea of all employees participating in a discussion with their employer about their future work and retirement plans, and recognise that improved dialogue about retirement has the potential to deliver positive outcomes for both parties. Many people currently feel unable to discuss it with their employers for fear of subsequently suffering discrimination (for example, being passed over for promotion).[v] A study carried out by the Centre for Research into the Older Workforce (CROW) in 2006 showed that only one of the 38 interviewees had negotiated flexible working with their employer – the majority said that they would not feel able even to request this, in spite of it being something they would like to do, because they did not feel their request would be well received.[vi]

In formulating plans for such a discussion, the Government must account for the needs of both employer and employee. In order for it to be effective, both parties need to be confident that it is a genuine discussion aimed at matching the individual's aspirations and employer's workforce needs.

We believe the employee should be at the centre of the discussion – without their full and willing participation the discussion is unlikely to achieve significant results. Furthermore, although it should not be mandatory to participate, employees of all levels should be encouraged to do so by ensuring the benefits are clear.

On the other hand, employers will, we believe, want to be clear how to handle the discussion in a non-discriminatory manner, and the guidance produced should reflect this. We would hope that positive discussion in a similar vein would take place in any case, but it will nonetheless be useful to reassure employers on what constitutes discriminatory behaviour. We also recognise that employers want minimal additional bureaucracy imposed, and we believe that a simple discussion at the individual's request will achieve this.

Employees are likely to want assurances that what they say will not subsequently be used against them; therefore it must be clear to both parties what constitutes discrimination on the grounds of age. Communication between Government and employers will be essential for making this work.

We believe the timing of the discussion should not be tied to any particular age. Doing so would continue to stigmatise older workers, and could inadvertently prevent a cultural change among employers' attitudes to older workers. The discussion should therefore take place at the request of the employee, at any point in their working lives. It should be a right and not a requirement. The Government should investigate whether there is a means of encouraging older workers to invoke the discussion which does not seem stigmatising.

In formulating this consultation response, we spoke to the Wirral Older People's Parliament (WOPP), which agreed that to be effective the discussion must be entirely at the request of the employee. The main concern from this group was that any sudden changes forced on the employee would have a negative effect on their personal lives and reduce productivity in the workplace. A transition to retirement is

therefore needed, and the employee has to be in a position to request the discussion when they want. The group was keen to emphasise that each person has a different view of how they want to end their working lives (if at all), so a formulaic system based on arbitrary criteria will not achieve this. While the WOPP accepted that employers need to plan their workforces, there is little difference between in practice between a younger and older worker who each may leave the organisation with no prior warning. Therefore, requiring this at a certain age is discriminatory.

D) Do the proposed transitional arrangements strike the right balance between the policy aim of quickly phasing out the Default Retirement Age (and realising the benefits of doing so) and respecting the positions of employers who have already made plans based on its use?

We agree that the proposed timescale strikes a realistic balance between phasing out the DRA and giving employers enough time to plan for its removal. Indeed it could be argued that employers have had ample warning of a potential change in policy. When the DRA was introduced it was announced that it would be reviewed in five years time and in 2009 the timetable for this review was brought forward. The announcement to phase out the DRA was included in the coalition government's agreement ahead of this current consultation process being formally launched. If the process were further drawn out then many more people would be forced to retire, and a nine month notice period (July 2010-April 2011) gives employers plenty of time to form alternative workforce plans.

E) Responses to an earlier call for evidence on the Default Retirement Age raised possible impacts on insured benefits and Employee Share Schemes if the DRA is removed. If relevant, please describe any concerns you have.

E 2) Is any action, such as additional guidance, needed to address either of these issues?

Concerns have been expressed that the removal of the DRA could have a negative impact on the current and future provision of insured benefits, such as life assurance, medical cover, income protection schemes and critical illness cover. Currently some employers place age limits (often 65 in line with the DRA) or age-related conditions on entitlements under insured benefit schemes because of providers' requirements for medical underwriting beyond a particular age, or through the charging of higher premiums to insure older workers. It is argued that removal of the DRA will result in a so-called 'chilling effect' that will see firms withdrawing benefits from all employees for fear that maintaining age limits will contravene age discrimination legislation.

In our view the problem here, to a large degree, is at root in the insurance industry rather than in the way that employers are operating insured benefit schemes. It is unacceptable for insurers to be operating blanket age limits or age-based pricing that cannot be justified by evidence of increased risk. It is essential that financial services are fully covered by the Equality Act legislation.

That said, in some areas it may be objectively justifiable for employers to continue to operate an age-limit. For example to limit the time for which a long-term disability income policy would pay out if an employee falls ill or is injured. In such cases we would suggest that an alternative age limit perhaps pegged to the state pension age or occupational pension age might be a justifiable.

Finally, it needs to be recognised that if firms decide to reduce the level of benefits for all their staff this is perhaps more likely to be a cost –saving measure rather than effect of equality legislation. There is some evidence that companies are reducing provision of some insured benefits such as in-force death benefit and long-term disability benefit in response to general economic conditions.[vii] There are also indications that private health insurances costs are rising for firms and that there is a variety of reasons for this including the availability of more sophisticated medical treatments. Age discrimination legislation should not be used as a smoke screen for more general cost –cutting.

In relation to share schemes our position is similar. A number of share schemes have provisions which allow pay outs for 'good leavers', often being those who are made redundant, or retire, and no payout for 'bad leavers' such as those who leave voluntarily. It is argued that removal of the DRA will make it harder to distinguish between retirees and those who leave voluntarily. Again it may be objectively justifiable to continue to operate an age limit here, the SPA or normal occupational scheme retirement age would be ages that could be used.

Guidance for employers on both these issues would be helpful and would guard against any unintended 'chilling effect'.

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[i] EHRC (2010), Working Better: the over 50s. the new work generation, 11% of those surveyed want promotion, 4% want to downshift

[ii] Truss C, Soane E. and Edwards C. (2006) *Working life: employee attitudes and engagement 2006*, Research report. Chartered Institute of Personnel and Development.

[iii] McLeod A et al (2010), Managing an Ageing Workforce, CIPD/CMI research report

[iv] McNair, S, Flynn, M & Owen-Hussey, L (2006) "Older Workers in the South-East". Surrey: Centre for Research in the Older Workforce

[v] Irving, Steels and Hall (2005), Factors affecting the labour market participation of older people: qualitative research, DWP.

[vi] McNair, S, Flynn, M & Owen-Hussey, L (2006) "Older Workers in the South-East". Surrey: Centre for Research in the Older Workforce

[vii] Swiss Re (2010) Group Watch 2010: A report on group death benefit, long term disability income and critical illness insurance business in the UK.