



Response to
**Equality and Diversity:
Age Matters**

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**For further information contact
Gay Moon, Head of the Equality Project
Email: gmoon@justice.org.uk Tel: 020 7764 6436**

1. JUSTICE is a British-based law reform and human rights organisation concerned to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE works both on issues relating to equality and human rights. It has very much supported the government's commitment to the extension of rights in the discrimination field. We recognise the enormous difficulty of the challenge of changing culture and 'bringing rights home' and we believe that the challenge of eliminating age discrimination is an integral part of this process.
3. JUSTICE welcomes the Government's commitment to 'prohibit[ing] unfair practices based on discriminatory attitudes or inaccurate assumptions in order to remove the barriers which people of all ages face...' We believe that it is important that people are enabled to make employment choices, without being penalised, that are appropriate to their needs whether these entail retiring early, working until the age of 65 or 70 or beyond, or adopting more flexible work patterns or working part time. When objective criteria are used for selection, appraisal and capability systems employers will not only ensure that they are recruiting and retaining the best people for the job in question, but also that discrimination on any ground, whether age or the more established grounds of sex or race, is avoided.

Scope (Chapter 3)

4. JUSTICE notes that Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Directive), in Article 1a, defines its scope as extending to 'conditions for access to employment, to self employment **or to occupation...**' We are therefore surprised to note the specific exclusion in paragraph 3.4 of the consultation document 'unpaid voluntary work will not be covered'. It is clear that the inclusion of 'occupation' by the European Council in addition to 'employment' intentionally expanded the scope of the word 'employment'. Occupation is 'the state of being employed or occupied, that which occupies or takes up one's attention; habitual employment, profession, craft or trade...' and plainly it is wider than 'employment' alone (see Chambers dictionary).

5. The current discrimination acts on sex, race and disability cover situations where a person is employed 'under a contract of service, or of apprenticeship or a contract personally to execute any work or labour'. The contract does not have to be in writing. It is possible for a 'volunteer' to be treated as in employment for the purposes of these acts if it can be shown that there was a legally binding contract/agreement whereby an individual would receive training and/or expenses and in return agreed to carry out a minimum amount of work.
6. In *Murray v Newham Citizens Advice Bureau Ltd* [2001] ICR 708, a Disability Discrimination Act 1995 (DDA) case involving an application from a volunteer, it was not questioned that the potential volunteer in question was subject to the DDA. In this case, the potential volunteer had to sign an agreement to work for 2 days per week for an agreed period and in return would receive training and expenses for travelling to work.
7. In other EC Directives, where they are intended only to apply to paid employment, the Directive itself specifies this; see Article 1 of the EC Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (also EC 92/85/EEC on pregnant workers etc).
8. JUSTICE therefore considers that any new provisions should use the wording of the Directive to ensure that both 'employment' and 'occupation' are covered.

Permissible Justifications (Chapter 3)

9. The consultation document proposes five possible aims that might justify differences of treatment in exceptional cases. JUSTICE considers that any recognised justifications should be narrowly construed bearing in mind the Directive's criteria that they should be 'objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary.'
10. Health and safety: we note that health and safety requirements are already a valid justification for fair dismissal under the heading of 'some other substantial reason'. We cannot see that any additional provisions need to be made. We consider that where necessary medical tests and examinations should be used to assess

capability but it should not be assumed that before or after a fixed age assumptions can be made about health and safety, care should always be taken to ensure that age is not being used as a proxy for capability

11. Employment planning: we are concerned that this criterion is open to abuse or misuse. If it is to be included we believe that it should be very narrowly construed.
12. Training : JUSTICE recognises the need, in some circumstances, to link training requirements to the need for a reasonable subsequent period of employment, whether until retirement, or as is perhaps more common, before someone moves on to another job. However, we consider that this can be achieved in an age-neutral way. If an employer provides on the job training, or subsidises training, we can see no reason why the employer cannot set a minimum period for which he will expect the employee in receipt of that training to continue to work for the employer. If the employee then decides to leave, or to retire, they can be subject to an agreed financial penalty to reflect the costs of the training given. We therefore do not accept that 'the need for a reasonable period of employment before retirement' should be a statutory justification for age discrimination.
13. Encouraging and rewarding loyalty: JUSTICE is conscious that such schemes can be very useful in encouraging staff retention and the costs of replacing staff are significant both in staff time and resources. However, we consider that all the circumstances need to be carefully scrutinised as traditionally such schemes have sometimes been used to mask discrimination whether against women, ethnic minorities or people with disabilities. However, on balance, we consider that such terms and conditions should be viewed as not being objectionable and open to justification providing that they are not discriminatory on another ground.
14. Need for a reasonable period of employment before retirement: please see the comments on training provision in paragraph 12 above.
15. This is an area which would greatly benefit from a clear and legally binding Code of Practice with a number of clear examples to guide employers and their staff in the day to day application of these provisions.

Retirement Age: A Default Retirement Age? (Chapter 4)

16. We welcome the Government's confirmation in the consultation document that it will 'increase the financial incentives for those people who want to defer receipt of their State Pension' and that the Government is consulting on 'proposals to change tax rules which currently hinder flexible retirement by preventing people from drawing an occupational pension whilst working for the employer paying the pension'. We believe that more provisions should be put in place to enable those reaching the end of their working life to reduce their hours, or taper their work commitments, without being financially penalised for doing so. JUSTICE considers that all hindrances to part time working whilst drafting a pension should be removed and that provisions should be put in place to actively encourage the option of the progressive reduction of a person's working hours.
17. We believe that the Government is right to seek to send a clear and unambiguous message that age discrimination is not acceptable. We note that the last Government consultation exercise found that 'the majority of organisations ... were clear that people want the flexibility to choose when they retire or to retire gradually'. To impose a default retirement age would not send out this clear and unambiguous message.
18. The consultation document suggests a default retirement age of 70 'at or after which employers could require employees to retire without having to justify their decision'. We agree that chronological age 'is not a reliable indicator of ability or risk, and that inclusion of a default age could help perpetuate age discriminatory beliefs' so that a default retirement age of 70 is as likely to be discriminatory on grounds of age as 65 or 60.
19. Although the Government have endeavoured to draw a distinction between retirement age and State Pension eligibility age, the link certainly remains in the public's perception and is likely to continue to do so. In our view this would continue to amount to discrimination, since once the default retirement age is reached the employee will not have access to compensation for unfair dismissal or redundancy pay.
20. The Directive provides that discrimination can be 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'. Even if the provision of a default retirement age could be shown to be a legitimate aim we would doubt whether such a blanket provision could be shown to be 'appropriate and necessary'.

21. The proposed changes are intended to prevent unjustifiable age discrimination in employment; they should not be used as an excuse to increase retirement age.

Unfair Dismissal (Chapter 5)

22. For the reasons set out above, we do not believe that a default retirement age would be an appropriate, or lawful, implementation of the Directive. This would not prevent individual employers setting a normal retirement age, if they could, exceptionally, justify doing so.

23. JUSTICE welcomes the proposal to reduce the age-related aspects of the unfair dismissal compensation award so that all unfairly dismissed staff receives the same amount in respect of each year of employment. However, we are concerned at the suggestion that this should be reduced from one and a half weeks pay per year of service to one weeks pay per year of service for those over 41 years of age. This appears to us to be in breach of Article 8(2) of the Directive:

The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by member states in the fields covered by this Directive.

Small employer provisions.

24. There is a suggestion that the age discrimination provisions should be subject to an exclusion in respect of small and medium sized employers. Small employers are usually defined as those with fewer than 50 employees and medium sized ones as those with less than 150 employees. There are about 1.18 million businesses in GB, of which 1.14 million are small employers.

25. Such provisions have been used in other areas in the past, for example :-

- **Sex Discrimination Act 1975**, section 11 excluded partnership arrangements involving less than 6 people. Section 6(3) excluded employment in a private

household. Both of these provisions were repealed by the Sex Discrimination Act 1986.

- **Race Relations Act 1976**, section 10 excludes partnership arrangements involving less than 6 people. Section 4(3) excludes employment in a private household. This have now been repealed by the Race Relations Act 1976 (Amendment) Regulations 2003, **but only in respect of the grounds of race or ethnic or national origin not on the grounds of colour or nationality.**
- **Disability Discrimination Act 1995**, section 7 excludes the provisions of the act from employers with fewer than 15 employees (prior to December 1998 it was 20). The Government is committed to repealing this by October 2004.

These types of provisions have been widely criticised, and, as can be seen from these illustrations, have largely been repealed.

26. Restrictions of this kind have led to unnecessary litigation as to :

- Who counts and who does not count as an employee for these purposes (cleaners, out workers, contract workers etc) and whether the employees of an associated company are included,
- When the number of employees should be measured.

These problems particularly affect businesses which are on the margin between different categories, the workforce of all businesses necessarily fluctuate from time to time, all businesses need certainty as to the obligations with which they have to comply.

27. Small employers make up a significant part of the UK labour market and they employ 35 per cent of the workforce. Thus, if a small employer exception was put in place over a third of the workforce would not be able to benefit from the Act; this would substantially reduce its effectiveness as an anti-discrimination measure.

28. We are concerned that such an exception could give rise to a breach of Article 6 taken with article 14 of the ECHR.

29. It is, nevertheless, true that small employers have less access to legal and human resource management advice, any new legal provisions should also encompass an adequate means for small employers to obtain advice and assistance on complying with the new law.

Statutory Redundancy Payments (Chapter 6)

30. JUSTICE welcomes the proposal to reduce some age related aspects of the statutory redundancy scheme so that all redundant staff receive the same amount in respect of each year of employment. However, we are concerned at the suggestion that this should also be reduced from one and a half weeks pay per year of service to one weeks pay per year of service for those over 41 years of age. This appears to us to be in breach of Article 8(2) of the Directive.
31. We note that the Republic of Ireland, in implementing the Directive, have recently increased their statutory redundancy payments to two weeks pay per year served, plus one weeks pay. Additionally, of the other EU countries that have a minimum statutory redundancy payments scheme, only France appears to award less than the UK and all the other countries have more generous minimum payments.
32. JUSTICE believes that the only proper and appropriate way to implement the Directive in respect of redundancy pay would be to increase the entitlement for everyone to one and a half weeks pay per year worked.

Recruitment, Selection and Promotion (Chapter 7)

33. JUSTICE recognises the need, in some circumstances, to link training requirements to the need for a reasonable subsequent period of employment, whether until retirement, or as is perhaps more common, before someone moves on to another job. However, we consider that this can be achieved in an age-neutral way. If an employer provides on the job training, or subsidises training, we can see no reason why the employer cannot set a minimum period for which he will expect the employee in receipt of that training to continue to work for the employer. If the employee then decides to leave, or to retire, they can be subject to an agreed financial penalty to reflect the costs of the training given. We therefore do not accept that 'the need for a reasonable period of employment before retirement' should be a statutory justification for age discrimination.

Pay and Non Pay Benefits (Chapter 8)

34. Any pay or non-pay benefits based wholly on chronological age are rare; they will be discriminatory and will rarely be justifiable. However, service related benefits –

extra day's holiday, incremental pay etc are frequent, and concern has been expressed about the extent to which these are indirectly discriminatory on grounds of age. There are costs incurred in every recruitment exercise (the DTI has estimated these as averaging £3,500 per job) and it is understandable that employers may wish to give staff some incentive to stay in their employment.

35. We think that in this area it may be useful to draw a distinction between different categories:-

- Loyalty and length of service payments,
- Incremental grade and pay structures,
- Seniority systems, and
- Changes in terms and conditions at a specific date that may result in differential terms and conditions within a firm, which may have a disproportionate impact on a younger age group.

36. JUSTICE considers that all these circumstances need to be carefully scrutinised as traditionally such schemes have sometimes been used to mask discrimination whether against women, ethnic minorities or people with disabilities (See for example *Crossley v ACAS*, Case no 1304744/98). However, on balance, we consider that such terms and conditions should be viewed as not being objectionable and open to justification providing that they are not discriminatory on another ground such as race or sex.

37. We believe that this is an area where a clear and legally binding Code of Practice, with examples of good practice, could be extremely useful and would help to minimise litigation to clarify the limits of the legislation.

New Equality Institutions (Chapter 11)

38. JUSTICE considers that it is important that provisions are made to set up adequate support and enforcement machinery. We, therefore, support the idea of a Single Equality Commission with Human Rights Act powers to provide this. Additionally, we would recommend consideration be given to setting up a dedicated service to provide advice and assistance to small businesses adjusting to these new approaches to employment practice.

Young People

39. JUSTICE notes that little mention is made of the needs of young people in this Consultation document. We suggest that it is important to distinguish between period when young workers are being trained, when a lesser rate of pay can be justified, and the period after they have been trained, when such a diminution of pay cannot be justified.

Gay Moon,
JUSTICE.
October 17th 2003.