

**PHASING OUT THE DEFAULT
RETIREMENT AGE : GOVERNMENT
RESPONSE TO CONSULTATION**

JANUARY 2011

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Phasing out the Default Retirement Age - Government Response to Consultation

FOREWORD

As the structure of our society changes we have to reappraise fundamentally the important role older people will play: as employees, entrepreneurs and in the wider community. A culture change is needed and we believe that removing the default retirement age is a key step in helping that change take place.

Working longer is good for the economy, for society and for individuals. Evidence shows that keeping more people in work helps the economy grow. It is estimated that, if everyone worked a year longer, annual GDP could increase by £13bn.

It is not the case that older people in work block jobs for younger people. We want employers to draw their workforces from the widest possible talent pool and to make decisions based on merit, not stereotypes. We believe strongly in the freedom of people to work on for as long as they want and are able to.

We have listened to the views of those who have responded to the consultation on phasing out the default retirement age. There are many who strongly support the plan that we have set out. Others have expressed understandable concerns about adapting to an ageing workforce.

Our response seeks to address some of these: in particular, concerns about the impact on insured benefits; and the need to maintain an open dialogue between employers and employees to help businesses plan their workforce.

However, there are still many myths about older people's capabilities which must be challenged - in particular, the view that there is a strong link between someone's age and their ability to do a job. For most types of work this is simply not the case. We believe that employers should assess the performance of their staff fairly, whatever an employee's age.

These changes do not mean that individuals can no longer retire at 65 – simply that the timing of that retirement becomes a matter of choice rather than compulsion. The Government is reviewing employment law more widely to ensure that flexibility for both employers and employees is maximised.

The Government will now move quickly to phase out the default retirement age from April 2011. We have worked closely with Acas to ensure that guidance is being published today, alongside this Response.

EXECUTIVE SUMMARY

The Coalition Agreement committed the Government to phasing out the default retirement age (DRA). To this end, the Department for Business, Innovation and Skills and the Department for Work and Pensions jointly issued a consultation document on 29 July 2010 with detailed proposals on how the phase-out should be implemented. The consultation closed on 21 October 2010.

General response

Over 600 responses to the consultation were received, about 41 per cent from individuals, about 32 per cent from businesses and their representative organisations and the remainder from trade unions, Government agencies, charities, legal representatives and others.

Responses to specific questions

A. A small majority of respondents agreed that Schedule 6 of the Employment Equality (Age) Regulations 2006, which provides for notifications of retirement and the “right to request” working past retirement age, should be removed, along with the DRA itself. Those in favour of retaining Schedule 6 were either generally opposed to the abolition of the DRA or argued that it would still be helpful for employers who planned to have an employer-justified retirement age (EJRA).

The Government intends to proceed with removing all the administrative procedures associated with the DRA.

B. A majority of respondents expressed concerns about relying on the legislation on unfair dismissal and age discrimination following the removal of Schedule 6. Concerns were two-fold: that there would be an increase in age discrimination claims; and that dismissals using capability and performance procedures were likely to increase. In addition, legal professionals raised the specific question of whether “retirement” should be retained or removed as a fair reason for dismissal.

The Government does not believe that the DRA should be used as an alternative to fair and consistent performance management, and guidance has been published today for employers on managing without the DRA in order to mitigate the risk of an increase in age discrimination claims. Since retirement is a fair reason for dismissal only by virtue of the DRA (or an objectively justified retirement age) and the application of Schedule 6, the Government has decided to remove it from the current list of such fair reasons.

C. On the subject of retirement discussions, most respondents favoured a statutory code of practice over formal guidance, although the latter was preferred by several major stakeholders. Where guidance was the preferred choice, most respondents identified Acas as best placed to produce it.

The Government believes that formal guidance is preferable to a statutory code of practice. Accordingly, Acas has today published a revised version of its “Age and the Workplace” guidance.

D. Respondents were evenly split on the question of whether the proposed transitional arrangements for phasing out the DRA strike the right balance between the policy aim and the needs of employers. Most of those who disagreed with the proposed arrangements argued that the phase-out was happening too quickly, with some arguing for it to be delayed.

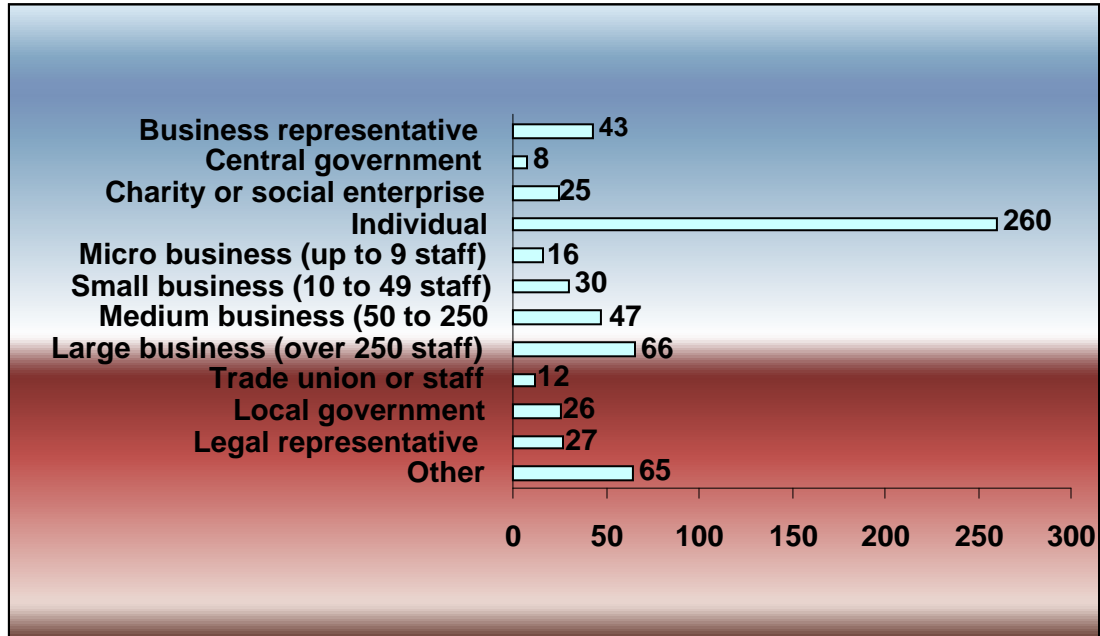
The Government remains of the view that 6 months is the optimum time period that will ensure fairly balanced transitional arrangements. While it recognises that many businesses would appreciate further time to prepare for the change, given the costs of transition, the Government believes these costs will soon be offset by the benefits to be derived from removal of the DRA and associated procedures. The Government will therefore proceed to the timetable proposed in the consultation document.

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. On employee share schemes, the concern was that abolition of the DRA would lead to uncertainty, making it harder, for example, for companies to decide whether particular individuals should be treated as “good” or “bad” leavers.

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. The Government has no plans, however, to amend the current legislation on employee share schemes.

RESPONSES RECEIVED

Total number of responses: 625 (Note: not all responses responded to all of the consultation questions)



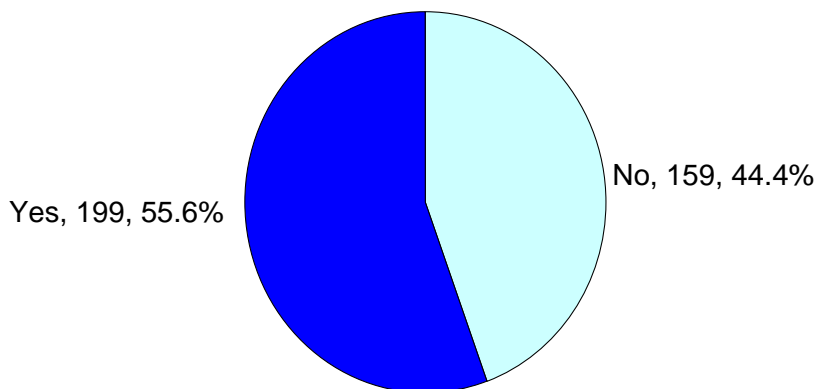
ANALYSIS AND GOVERNMENT RESPONSE

QUESTION 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?

Number of responses: 358

Yes 199 (55.6%)

No 159 (44.4%)



Summary of responses

A majority of respondents agreed that Schedule 6 should be removed, alongside the removal of the DRA. Supporters of the proposal felt that Schedule 6 was bureaucratic and administratively burdensome. Some acknowledged that elements of Schedule 6 were useful, in particular around the retirement discussion, and should be covered in guidance.

Most respondents who disagreed with the removal of Schedule 6 were generally opposed to the DRA being phased out. The arguments presented by these respondents were therefore less to do with retaining Schedule 6 and more concerned with putting forward a case for retaining the DRA.

In brief, the concerns about removing the DRA centred on: potential difficulties in workforce and succession planning; a perception that there could be a negative impact on younger workers; and the need for increased use of capability measures.

Specifically regarding Schedule 6, a number of respondents argued that the notification and right to request procedure had provided a mechanism through which employers and employees could discuss retirement plans. Requests were also made for guidance on the requirement for (and potential design of) an alternative to Schedule 6, for organisations where a retirement age (objectively justified by the employer) was retained.

Government Response

We will proceed with removing all of the statutory administrative procedures associated with the DRA and retirement ages below 65 that were formerly contained in Schedule 6 to the Age Regulations (now contained in the Equality Act). Once the DRA is removed, the procedures will be redundant in the majority of cases and an unnecessary administrative burden.

The Government recognises that some employers have found the procedures useful in triggering a discussion of retirement with employees. However, we believe that a more flexible framework for managing such discussions can be provided through guidance. Employers should be confident in having discussions about an employee's retirement plans if they are conducted openly, consistently and without prejudice. Indeed, good workforce and succession planning can be better achieved through open dialogue between employers and employees of all ages, particularly as only a small proportion of workforce turnover comes from retirements. We believe that conducting such discussions will help employers to plan and manage their workforce without relying on a compulsory retirement age. Many already do this effectively. In the limited cases where retirements are an essential part of succession planning or necessary for health and safety reasons, it will remain open to the employer to retain a retirement age if this can be objectively justified.

The Government does not believe that the abolition of the DRA will have a negative impact on opportunities for younger workers. As set out in the impact assessment, the effect on economic activity and labour supply of removing the DRA is likely to increase economic activity in the economy as a whole. Furthermore, it is not often the case that younger and older workers are direct substitutes. Where there are genuine succession planning considerations (perhaps involving particular training requirements) employers could consider retaining a retirement age if it can be objectively justified.

We agree that there is likely to be some limited increase in the use of capability procedures, which in turn is likely to lead to a number of Tribunal cases, as quantified in the impact assessment. However, the removal of Schedule 6 will eliminate the current risk of cases being brought against employers on purely procedural grounds. The Government believes that performance management of staff should be carried out consistently and objectively for all staff, irrespective of age.

We also agree with views expressed that some form of retirement process is likely to be necessary where employers retain an objectively justified retirement age. However, our view is that guidance - rather than rigid statutory procedures - is a more appropriate and flexible way of dealing with these circumstances.

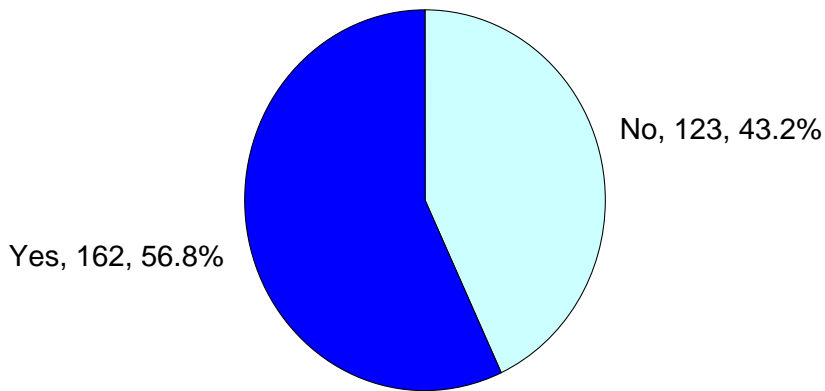
In addition, we want to make clear that the removal of the DRA will also involve the removal of the current rule which allows employers to refuse to employ an applicant for a job vacancy who is aged 64 years and 6 months or more. This provision was put in place to give employers certainty and to avoid circumstances where somebody might be recruited and then immediately subject to a retirement process through the DRA. As the DRA is being removed, this provision is also unnecessary. Employers will need to objectively justify any maximum recruitment ages, including where these relate to an objectively justified retirement age.

QUESTION 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?

Number of responses: 285

Yes 162 (56.8%)

No 123 (43.2%)



Summary of responses

Over half of respondents to this question identified concerns, which were generally centred on two associated issues: a view that the removal of Schedule 6 would increase age discrimination claims and the likelihood of increased use of capability and performance procedures to dismiss underperforming older workers.

Arguments put forward largely mirrored those recorded for question A. Respondents suggested that the increased use of capability and performance proceedings would lead to increased age discrimination claims.

A number of counter arguments were presented by others, who felt that existing mechanisms in place to deal with capability and poor performance were satisfactory. They argued that employers should not use retirement ages as a substitute for effective performance management.

A specific issue highlighted by some members of the legal profession in response to the consultation is the question of whether 'retirement' should be removed or retained as a fair reason for dismissal.

Government Response

As set out in the impact assessment accompanying this document, the Government acknowledges the risk that, in the absence of the DRA, some age discrimination claims are likely to arise where performance measures are taken against an individual who

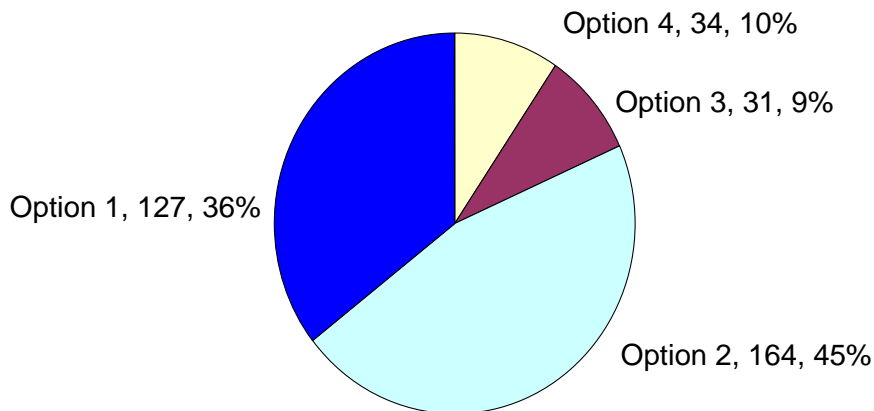
under the current DRA would be retired. The Government considers that this risk is balanced by the removal of the administrative procedures associated with the DRA, which will also remove the existing risk of employers being subject to age discrimination claims on purely procedural grounds. Furthermore, guidance is being provided for employers on managing without a DRA, which will help to mitigate this risk. The overall impact of removing the DRA and the procedures on age discrimination claims has been estimated in the impact assessment. As already set out above, the Government does not agree that the DRA should be used as an alternative to fair and consistent performance management.

We have decided to remove retirement as a fair reason for dismissal, as it is only currently a fair reason by virtue of the DRA (or an objectively justified retirement age) together with the application of Schedule 6. We consider that retaining it would risk creating an impression that retirement remains a potentially fair reason for dismissal on an ad hoc basis, when in fact this would only be the case where a retirement age is objectively justified. We are therefore making clear through guidance that retiring an individual where a retirement age is objectively justified amounts to 'some other substantial reason' and is a potentially fair reason for a dismissal.

QUESTION C: Thinking about retirement discussions between an employer and an employee, do you think it would be useful to have: formal guidance on how to discuss retirement in a mutually beneficial way; a statutory code of practice, including guidance, covering retirement discussions; none of the above; or something else?

Number of responses: 356

1. Formal guidance on how to discuss retirement in a mutually beneficial way	127	35.7%
2. A statutory code of practice, including guidance, which covers retirement discussions	164	46.1%
3. None of the above	31	8.7%
4. Something else (please state below)	34	9.5%



Summary of responses

Supporters of a code of practice believed this would provide greater clarity and certainty as to the rights and responsibilities of employers and employees, thus reducing the possibility of challenge under unfair dismissal and discrimination legislation. In general, they wanted a statutory code to make clear that an employer is entitled to have a discussion around retirement planning without an inference of discrimination. Some legal representatives suggested a specific statutory exception covering this matter would be beneficial.

Others took the opposite view, suggesting that the introduction of a code of practice would increase the likelihood of claims to employment tribunals, on the grounds of employers failing to follow due process. It was also felt by some that a statutory code would be overly complicated increasing the regulatory burden on employers.

Employer respondents who called for guidance wanted the flexibility to interpret elements of the framework to fit with their business needs. It was felt this would promote greater innovation and sensitivity in managing workplace relations following the removal

of the DRA. There was broad support for a short clear guide outlining what actions business should take in order to comply with the new regulations.

There was a concern amongst a small number of respondents that guidelines would be open to misinterpretation and not a robust enough tool for employers to use. Views were expressed that, without a statutory code, some employers would fail to initiate career and retirement discussions with older workers.

The majority of respondents who supported alternative options to a statutory code or formal guidance, wanted to retain the DRA, or reduce the regulatory burden on employers by not having a formal process, allowing employers and employees to negotiate their own arrangements. A number of respondents called for further guidance on objective justification.

Government Response

Although the greatest number of respondents favoured a statutory code of practice, the Government has reached the conclusion that this would not be the appropriate way forward. There are several reasons for this.

First, for most respondents who preferred a code of practice, the reason was that they considered it would provide legal certainty, particularly for employers. However, a code of practice could only clarify the law and set out a fair process for holding discussions about retirement. Following a set process in holding a conversation about retirement might count in an employer's favour in procedural terms but would not protect them if their actions were nevertheless discriminatory. Furthermore, we consider that setting out how to conduct a retirement conversation in a statutory code of practice would be a much less flexible approach than giving guidance on how employers can hold such conversations in a non-discriminatory way. A risk identified by respondents to the consultation is the likelihood that a statutory code of practice would lead to a box-ticking exercise and reintroduce the risk of claims being made on purely procedural grounds. Furthermore, it is difficult to see what an appropriate sanction would be for failing to follow such a code. The current statutory code on discipline and grievance allows for tribunal awards to be increased or decreased, but we believe this would be a heavy handed way of implementing a policy aimed at facilitating open discussions about future plans between employers and employees.

We therefore agree with the view of several major stakeholders, including the CBI, TUC, the Engineering Employers' Federation, the British Chambers of Commerce, the Employers' Forum on Age, Age UK and the Chartered Institute of Personnel and Development that developing guidance is to be preferred to a statutory code of practice. Where expressed, most stakeholders identified Acas as the appropriate body for producing such guidance. We have worked with Acas to ensure that guidance is in place twelve weeks before the legal changes start to take effect on 6 April 2011.

In addition, best practice guidance for employers on managing retirement with an older workforce is already available through the Age Positive Initiative at : [DWP - Age Positive Guides](#) This provides information on how to review retirement practices, manage performance, and flexible approaches to retirement without the use of fixed retirement ages. It provides answers to questions employers have raised during the consultation

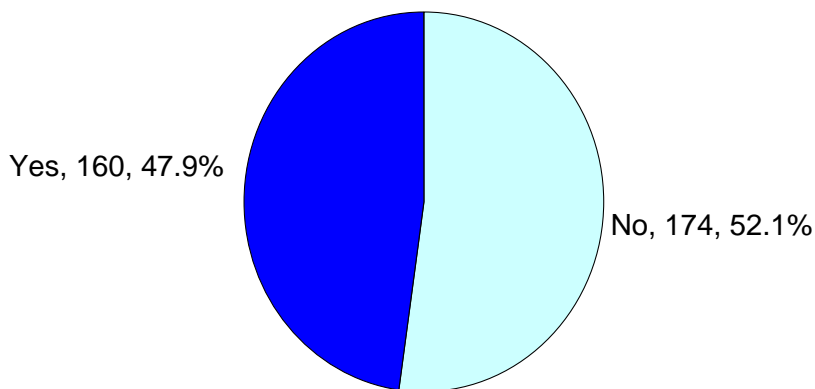
and demonstrates that many employers are reporting increased business opportunities from the employment and retention of older workers as part of a mixed age workforce.

QUESTION 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 position of employers who have already made plans based on its use?

Number of responses: 334

Yes 160 (47.9%)

No 174 (52.1%)



Summary of responses

Most respondents who disagreed with the timescale for the transitional arrangements felt that the removal of the DRA was taking place too quickly. It was argued that businesses needed time to absorb new guidelines and make procedural changes. It was also felt that the proposed timescale allowed little time for internal consultation between employers and employees and their representatives.

Alternative proposals were presented, including increasing the transitional arrangements from 6 to 12 months, commencing the phasing out of the DRA from April 2012 and longer term removal over a period of years.

Some respondents who agreed with transitional arrangements strongly emphasised that it was essential that the DRA was removed as quickly as possible. A small number who disagreed with the transitional arrangements called for the DRA's removal with immediate effect.

Taken together, those who wanted the DRA to be abolished more quickly and those who supported the transitional arrangements outnumbered those who felt that its abolition should be delayed or that it should be retained.

Government Response

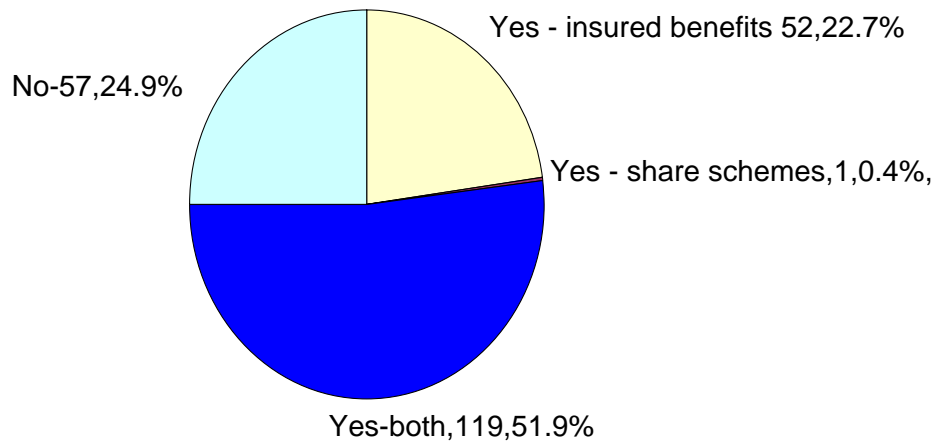
Respondents to the consultation were split quite evenly on the question of whether the transitional arrangements strike the right balance between quickly phasing out the DRA (and realising the benefits of doing so) and the legitimate expectations of businesses that have made plans based on its use. Retirements using the DRA have to be notified no less than 6 months and no more than 12 months in advance of the intended retirement date. The Government remains of the view that the basic 6 months' minimum notification period is the time period that is appropriate to ensure fairly balanced transitional arrangements. In essence, this is because a longer period would mean that two people with identical retirement dates would be treated differently simply because their employer had opted to give a longer period of notice. Employers using a 12 month notice period would effectively have a longer transitional period than those using 6 months.

Although this question was not consulted on, several businesses and business representative groups called for the removal of the DRA to be delayed to allow more time for business to prepare. However, many other groups, individuals and some businesses supported the current timetable. Clearly, many businesses would appreciate having further time to prepare for change and we acknowledge that there are transitional costs for those businesses that currently use the DRA. However, the Government considers that these costs will quickly be outweighed by benefits to the economy, individuals and business from increased economic activity, increased labour supply and the removal of the administrative costs of the DRA procedures. The Government therefore intends to proceed to the timetable outlined in the consultation.

QUESTION E: Concerns about possible impacts on insured benefits and employee share schemes

Responses: 229

Yes – insured benefits	52	22.7%
Yes – share schemes	1	0.4%
Yes – both	119	51.9%
No	57	24.9%



Summary of responses

A key concern of respondents was increased premiums for providing cover to employees aged over 65. A number of respondents suggested that the benefits for all employees could be reduced, or removed completely, if costs became prohibitively expensive. Evidence was submitted highlighting a trend towards fixed term policies (typically 3-5 years) and a number of employers indicated they have already or are considering removing, the provision of group insured benefits due to a lack of certainty. A number of respondents highlighted concerns about the legality of not providing group insured benefits to employees aged over 65. They were worried that when the DRA is removed, they would be faced with open ended and unaffordable commitments. There was, therefore, support from businesses and insurance providers for an exception from age discrimination legislation for group risk insured benefits. It was argued that this would provide much needed certainty and maintain the economic and social benefits provided by such schemes.

Alternative arguments were presented suggesting that demographic changes require the insurance industry to be more innovative and make better use of medical underwriting and actuarial data when assessing risk.

A smaller number of respondents were concerned that abolition of the DRA would lead to uncertainty, making it harder, for example, for companies to decide whether particular individuals should be treated as “good” or “bad” leavers. Some concerns were also raised about defining normal retirement ages in occupational pension schemes.

Government Response

Respondents have pressed for an exception from age discrimination legislation for group risk insured benefits. Such benefits are provided by employers and include income protection, death-in-service benefits and health insurance. Clearly, employers are not generally obliged to provide such benefits (which provide 70% of income protection cover and 40% of life assurance cover in the UK) and respondents have identified a serious risk that the removal of the DRA could lead to these benefits being withdrawn. The Government believes that it is in the wider interest that these benefits continue and wants to support the inclusiveness of group risk insurance, where the spread of risk allows cover to be provided to individuals who might otherwise be unable to obtain cover or only get cover on unfavourable terms.

We believe that the safest way to guard against these benefits being either greatly reduced or withdrawn for those currently covered is to provide an exception. We therefore intend to introduce an exemption to the principle of equal treatment on the grounds of age where group risk insured benefits are provided by an employer. It will permit such benefits to be withdrawn, will apply initially to employees aged 65 and above and will rise in line with the State Pension Age.

The Government does not believe that sufficient evidence has been provided that the removal of the DRA would have adverse consequences for employee share schemes and we therefore have no plans to make legislative or other changes. We consider that it is for employers to decide whether the circumstances in which a particular individual leaves make them a ‘good’ or ‘bad’ leaver and to satisfy themselves that the rules of individual schemes are compatible with the law. We also consider that the removal of the DRA does not affect occupational pension schemes. The absence of a DRA does not affect the setting of a ‘normal retirement age’ or ‘normal pension age’ for the purposes of occupational pension schemes.

WHAT HAPPENS NEXT

The Government will bring forward regulations shortly to put these proposals into practice. Meanwhile, Acas has put in place guidance on managing without the DRA.

In addition, best practice guidance for employers on working without a fixed retirement age is already available through DWP’s Age Positive Initiative at : [DWP - Age Positive Guides](#). Guidance for individuals is available through Directgov at: [Directgov - Age discrimination](#).

The Government intends the new regulations to take effect from 6 April 2011. From this date, subject to Parliamentary procedures, employers will no longer be able to issue notifications of retirement using the DRA procedure. Where notifications have already been made prior to 6 April, employers will be able to continue with the retirement process as long as the retirement is due to take place before 1 October 2011. No retirements using the DRA procedure will be possible after 1 October 2011.

We will keep the impact of the removal of the DRA under review through the Government's wider review of employment law. In particular, we will seek to ensure that the guidance meets the needs of business in the light of experience.

ANNEX A: Respondents to the DRA consultation included (where permission has been given to publish):

5050vision - the NW forum on ageing
Age UK
Alzheimer's Disease Society
Anniesland College
Ashtead Plant Hire Company Limited
Association of Chief Police Officers
Association of Consulting Actuaries
Association of Train Operating Companies (ATOC)
Aviva
Batten Solicitors Ltd
Beachcroft LLP
Bedfordia Group Ltd
Birmingham Law Society
British Airways
British Chemical Engineering Contractors Association (BCECA)
Cancer Research UK
Carol H Scott HR and Business Consulting Ltd
Chwarae Teg, Friends Provident
cipd
CIPFA
City HR Association
Convention of Scottish Local Authorities (COSLA)
Cumbria County Council
Department of Physics, University of Oxford
Devon County Council
DWF LLP
East Midlands Ambulance Service NHS Trust (sent on behalf of all English Ambulance Services)
EEF Northern Ireland
Electract Limited
Ellis Whittam Ltd
Employers Forum on Age
Employment Law in Action Ltd
Employment Lawyer's Association
Engineering Construction Industry Association
Engineering Consultancy Company
Equality & Human Rights Commission
Equality & Human Rights Commission
Eversheds LLP
FOX Williams LLP
Freeman Brothers

GMB (Trade Union)
Grampian Housing Association
GRID
Hayes & Finch Limited co no 86040
Hereford Diocesan Board of Finance
Highland Home Carers Ltd
Human Resources, Barts and The London NHS Trust
Iggesund Paperboard
IMPact Coaching & Consulting
Imperial College London
Institute of Payroll Professionals
James W Shenton Ltd
Kodak Ltd
Kuit Steinart Levy LLP
Iascar electronics ltd.
Leeds City Council
Legal & General
London Borough of Camden
London School of Economics (LSE)
Lupton & Place Ltd
MacDermid Autotype Ltd
McAree Brothers Ltd
Mortons of Horncastle Ltd
National Association of Shopfitters
NG Bailey
NHS Employers
NHS Litigation Authority
NIPSA
North West Ambulance Service NHS Trust
North Yorkshire County Council
Norwich and Peterborough Building Society
Nottingham City Transport Ltd
NUT
Open University
Open University
Pensions Management Institute
Plasser UK Limited
Prime ltd
Ray Mallock Limited
RBS Plc Mentor Services
Reed Smith LLP
Rhondda Cynon Taf Council
Road Haulage Association

Robinson Brothers Limited
Ruskin Chambers
SACCS
Saga Group Ltd
Sapphire Claims Management Ltd
SCR Solutions Ltd
Singleportions
SPC
Swallowfield plc
T MASTERS & SONS LTD
TAEN (The Age Employment Network)
The Benjamin Foundation
The British Library
The British Psychological Society
The Bryman Partnership Ltd
The Law Society
The Newspaper Society
TMS Support Solutions Ltd
Toolbank
Travers Smith LLP
TUC
Unison
Unite
Universities and Colleges Employers Association
University and College Union
University of Edinburgh
University of Nottingham
University of Oxford
University of Wales Institute, Cardiff (UWIC)
Unum Ltd
Wellcome Trust Sanger Institute
Whale Tankers
Working Families
worms eye
Zenith Insurance Management UK Ltd
Zurich Assurance Ltd
Zurich Engineering

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URN 11/536