

Private Pensions Policy and Regulation

Flexible Retirement and Pension Provision

Government Response to the Consultation, and Draft Regulations

16 December 2008

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1. Introduction

1.1 This document contains both the responses to the consultation document “Flexible Retirement & Pension Provision”, published on 1 October 2007, and seeks views on the next steps, including the possibility of further regulations to facilitate the provision of flexible retirement practices.

1.2 This document is on the Department’s website at:
<http://www.dwp.gov.uk/consultations/2008/>

Responding to the Consultation

1.3 This consultation period will run until 10 March 2009. Please send your responses, preferably by email, to:

flexibleretirementconsultation@dwp.gsi.gov.uk

or by post to:

Angela Perera
Department for Work and Pensions
3rd Floor
Adelphi
1-11 John Adam Street
London WC2N 6HT

1.4 When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of a larger organisation please make it clear who the organisation represents, and where applicable, how the views of members were assembled. We will acknowledge your response.

1.5 We have sent this consultation document to people and organisations who have already been involved in this work or who have expressed an interest. Please do share this document with, or tell us about, anyone you think will want to be involved in this consultation.

1.6 The information you send us may need to be passed to colleagues within the Department for Work and Pensions and published in a summary of responses received, and referred to in the published consultation report.

1.7 All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

1.8 If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Charles Cushing,
Department for Work and Pensions
Adjudication and Constitutional Issues
Information Policy Division
Freedom of Information Unit
The Adelphi
1-11 John Adam Street
LONDON, WC2N 6HT
Tel: 020 7962 8581,

charles.cushing@dwp.gsi.gov.uk or carol.smith14@dwp.gsi.gov.uk

More information about the Freedom of Information Act can be found on the website of the Department of Constitutional Affairs.

Feedback on this consultation

1.9 We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Roger Pugh,
Department for Work and Pensions' Consultation Coordinator
Room 2A
Britannia House
2, Ferensway
Hull, HU2 8NF
Tel: 01482 609571

roger.pugh@dwp.gsi.gov.uk.

1.10 In particular, please tell us if you feel that the consultation does not satisfy Cabinet Office Code of Practice on Consultation. Please also make any suggestions as to how the process of consultation could be improved further. If you have any requirements that we need to meet to enable you to comment, please let us know.

What will we do after the consultation?

1.11 A Government Response to the consultation will be published. We will aim to publish this summary within three months of the consultation closing. The summary of responses will be available on the Department's website:

<http://www.dwp.gov.uk/consultations/2008/>

2. Responses to Consultation

2.1 The consultation document “Flexible Retirement & Pension Provision”, sought views on key issues raised by industry since the implementation of Schedule 2 to the Employment Equality (Age) Regulations¹ (the Age Regulations) in December 2006. The main cause for confusion is the application of the regulations in relation to flexible retirement and pensions.

2.2 The consultation was technical in nature and was aimed at trustees, administrators and managers of pension schemes, employers, HR departments, and pensions lawyers. We received 64 written responses - a list of respondents can be found at Annex C.

2.3 This Chapter provides a broad overview of issues raised rather than a detailed account of who said what. Some respondents are identified where it seemed appropriate and where the respondent had not requested confidentiality but responses have not in every case been identified with particular respondents.

Question 1: We would welcome your views on what you believe might constitute direct or indirect age discrimination in relation to flexible retirement.

2.4 The **NAPF** thought that issues of age discrimination were inevitable “*if the decision to continue working while drawing a company pension is made by anything other than employee election*”.

2.5 **PMI** considered employers were acting lawfully provided they offered members who continue working after NPA: “*the simple choice:*

- *to be treated as a pensioner and to receive their pension (in full) and to cease providing any further accrual of benefits;*
- *to be treated as an active member and to continue to accrue pension benefits (up to a maximum number of years of pensionable service); or*
- *to be treated as a “deferred pensioner” and postpone payment of a pension (often actuarially uplifted) until a later date and to cease providing any further benefits”.*

Meyer Brown expressed a similar view.

2.5 Several thought employees should not be barred from accruing pension rights on age grounds, and that it should be unlawful for an employer to stop funding a pension because of an employee’s age (for example by refusing to continue contributing where an employee works on past normal pension age (NPA) and defers their pension).

Wragge gave the following examples: “*Not allowing older workers to continue to accrue further benefits after drawing down pension... allowing them to accrue less generous benefits, or pay more due to their age ... retention of existing exemptions for maximum years of service, further waiting times...*”

2.6 **TAEN** spoke for many respondents: “*we have yet to see any valid example of ways in which flexible retirement and pension drawdown could constitute direct or indirect*

¹ SI 2006/1031

discrimination”, many also expressed the view that **not** offering a flexible retirement option would be discriminatory.

2.7 **Ford’s** external pension advisers thought that it was not discriminatory to pay retirement benefits only to non-active members on the grounds that . . . *“active members are a different category than retired members, so... could only claim discrimination relative to the treatment of another active member comparator (none of whom are in receipt of retirement benefit). It is not discriminatory ... to set a minimum age for entitlement to a particular benefit (hence all active members should wait until age 65)”*

Question 2: It would also be helpful if you could indicate practices which you believe should be exempt or which could be easily objectively justified under any new provision.

2.8 **PMI** offered the following:

- “1. permitting members to have the option of taking their full pension at NPA or deferring their pension with actuarial uplift as an alternative to accruing benefits on the basis that applied to them prior to NPA.*
- 2. as in 1, but allowing employers to offer individuals who take their full pension at NPA additional accrual after NPA on the same or different basis;*
- 3. permitting employers to offer modified death benefits to take into account benefits in particular lump sums/spouse/civil partners/dependents pensions already built up before NPA to avoid double counting.*
- 4. to permit employers ... [to allow]... members to take part ... of their pension ... on such terms and ... constraints as the employers/trustees determine to be appropriate ... the employers/trustees should be able – if they wish to offer this “partial flexible retirement” option – ... to specify any restrictions on taking pension (for example, ... a minimum proportion and/or amount that may be taken and ... whether or not further additional partial tranches of pension may subsequently be taken) and to determine the methodology by reference to which residual pension is to be calculated in due course.”*

2.9 **ACA** thought: *“providing flexible retirees with the same accrual as other members, but with no actuarial late retirement factors having to be applied to accrual post NPA, and no active member death benefits payable on death after taking benefits.”*

2.10 **Legal and General** wanted an exemption for the practice of not offering further accrual if the member was already in receipt of their pension. **NAPF** thought employers would be encouraged to facilitate flexible retirement if they had discretion to set a minimum age for the operation of flexible retirement, along with a maximum duration or annual review.

2.11 **Clarke Wilmott** noted that it was *“increasingly common for defined benefit ... pension schemes with a lower NPA of 60 or 62 to raise their NPA for future service to 65, perhaps at the same time as changing the rate of benefit accrual for the future. This gives rise to a number of potential options for those with split pension benefits...:*

- *drawing all accrued pension benefits at the lower NPA, with an actuarial reduction being applied to benefits with an NPA of 65;*
- *drawing all accrued pension benefits at age 65, with an actuarial uplift being applied to benefits with an NPA of 60/62;*

- *drawing pension benefits with an NPA of 60/62 at that age, remaining in service accruing further benefits until age 65, and then drawing the remaining benefits; or*
- *deferred retirement beyond age 65.*

A further set of choices then typically arises at age 65:

- *to remain in service with employer consent and opt:*
 - *to accrue further benefits, subject to any scheme maximum, until s/he leaves active membership or leaves service and retires; and/or*
 - *to cease active membership on or after age 65 and defer his/her pension until the earlier of the date selected by the member, the date of retirement from service, or his/her 75th birthday, with the award of any appropriate actuarial increase; and/or*
 - *to cease active membership on or after age 65 and draw benefits with any appropriate actuarial uplift.”*

2.12 **Allen Overy** thought: *“the balance . . . is in favour of not requiring any additional pension accrual to be provided in circumstances where this would be onerous for the employer.”*

Question 3: We would welcome your views and opinions on the retention of NPA below 65. Do you believe this is critical to the workforce planning and smooth operation of pension schemes?

Question 4: We also welcome your view on the operation of the DRA/NRA [default retirement age/normal retirement age] and NPA when flexible retirement is provided. Do you have any suggestions for change which would provide generic solutions?

2.13 Most respondents thought current arrangements allowing employers or schemes to set NPA below DRA/NRA should remain, several indicating that there was a decline in schemes setting NPA below age 65 in any case. As **ACCA** put it, provided there is no compulsion, an NPA below 65 is neither inconsistent with age discrimination rules, nor efforts to promote flexible retirement, indeed it allows *“... a degree of flexibility ... appreciated by both sides – the employee [has the opportunity to start drawing his or her full pension entitlements before NRA while ... [for the employer] ... NPA provides the legitimate opportunity for individuals to leave employment voluntarily before the regulation retirement age”*.

2.14 **John Lewis** saw the issue as *“more about reduction in pay than age”* going on to state that there was *“no reason why (but good reasons why not) a member who reaches NPA should be able to remain in service full-time and draw their pension. Equally, they should be able to continue to earn pension even though passed NPA. Our suggestion is ... to ignore age except when a member opts for early retirement”*.

2.15 Whilst acknowledging that the costs associated with pension schemes and the impact of reduced mortality rates has limited the availability of earlier pension ages, **Unite** argued that the decision on NPA should be *“a matter of agreement between the parties affected and not be interfered with through statutory legislation”*.

Question 5: We in particular welcome comments on how pension provision is handled over NPA (if before DRA/NRA).

2.16 The general opinion was that this remains an area of great uncertainty particularly as to the effect of the regulations, **Mercers** adding that employers and trustees needed “to be certain that any approach taken did not discriminate inadvertently against younger members.”

2.17 In **Allen Overy’s** experience, many DB schemes allowing flexible retirement do so on an 'all or nothing' basis and do not allow the member to rejoin the scheme, although if a DC section or separate DC scheme is available, a member is usually allowed to join that on normal terms.

2.18 **The Law Society of Scotland** considered that the legislation could be simplified to make flexible retirement after NPA discretionary

2.19 In **Clarke Wilmott’s** opinion, “In most cases, an employer with an NPA of 60/62 is not able to justify a contractual retirement age lower than age 65. Equally it cannot unilaterally alter its employment contracts to require employees to retire at age 65 if its NRA mirrors its NPA. Its employees should have the choice of retiring at NRA with full pension benefits or remaining in employment until 65. Those who opt to remain in employment should be able to choose whether to continue accrual (subject to any scheme maximum) or draw pension benefits accrued to date and begin to build up a new chunk of benefits in the same way as a new member”.

We are aware that in some cases drawing benefits and continuing to work is not an option.

Question 6: What do you think are the reasons for this?

Question 7: How common a practice do you think this is?

Question 8: Do you or don't you consider such practice discriminatory – and why?

Question 9: What are the specific scheme rules and legislative provisions which create the problems in this area?

2.20 There was an overwhelming call for the removal of scheme rules preventing employees drawing benefits and continuing to work, many respondents pointed out that the tax regime now permitted drawing benefits and working.

2.21 **ACCA** did not believe that “the apparent failure on the part of many schemes to make appropriate modifications to their rules ... to take advantage of the changes made by the Finance Act 2004 indicates a lack of interest by employers or trustees in the idea of flexible retirement ... there are a number of technical uncertainties which stand to be resolved before ... schemes will feel able to take action. Before making changes, employers and trustees will also need to be satisfied that ... members of final salary schemes will not be financially disadvantaged by moving to flexible retirement”.

2.22 The **Employers Forum on Age** acknowledged that it had no direct evidence, but thought there was “a range of inhibiting factors: lack of demand from employees ... coupled with employer conservatism, their unwillingness to act if potential age discrimination issues are unresolved and their desire not to incur additional administrative or cost burdens on the other.”

The reply continued that it would be discriminatory to offer no mechanism for future accrual where an employee draws benefits but remains in employment.

2.23 **Ford** considered it too expensive to provide both, and thought guidance should allow scope for flexibility appropriate to individual needs.

Question 10: Do you, as the employer, trustee or pension administrator offer the same scheme as that offered to new entrants therefore treating everyone in the same way?

Question 11: If there is a waiting period should this be waived?

2.24 **Clarke Wilmott, SPC**, and **the Law Society of Scotland** thought that members should continue in their own scheme, **SPC** concluding that if DWP indicated that offering the same scheme as new entrants once an employee had reached their NPA was a reasonable way in which to proceed, it would become common practice.

2.25 Several respondents stated that, in the case of continued employment, simply continuing in post seemed to indicate the member did not have sufficient income to retire, and provisions that inhibit pension saving for these people would only compound the situation.

2.26 Others thought that where someone changed to a different role, it could be argued that they have the same entitlement as new entrants to the company, although applying a waiting period, if one exists, to someone who is already working for the company seemed unfair.

Question 12: Do you, as the employer, trustee or pension administrator allow the member who has reached their maximum number of years service permitted by the scheme to continue to accrue benefits in that scheme?

Question 13: Do you, as the employer, trustee or pension administrator allow them to continue to accrue up to their maximum and then be treated as above if they still have not reached NRA or above?

Question 14: We'd be grateful to know your reasons for your answer. What are your views on this? Is there a concern that this may continue to promote an early exit from labour market – and why?

2.27 In **Mercer's** experience, once a person had reached the maximum number of years' service permitted, there would be no future accrual, regardless of age. **SPC** agreed with this view.

2.28 **ACCA** did not believe that "*any current restriction imposed by scheme rules on workers continuing to work for their employer after starting to draw their pension is discriminatory, on age or other grounds.*"

Question 15: What are your views on not providing benefits after NPA?

Question 16: Is there any evidence that if this option (allowing part benefits etc) were to be pursued further it would have a detrimental effect on the scheme provision?

Question 17: Please tell us other views or suggestions which you believe should be considered?

2.29 **ACCA** and **Clarke Wilmott** thought not providing benefits after NPA was discriminatory, though **Gissings** thought not. Neither **Legal and General** nor **D&W** saw a problem providing members had a choice.

2.30 Several responses asked DWP if it would be possible to monitor both the extent to which options are taken, and the take up rate over an appropriate time. Most responses also asked that flexible retirement not become compulsory, as this would be counter-productive.

2.31 Several law firms, including **Travers Smith** responded that there is no requirement to offer benefits after NPA, and would be hard to make a claim under discrimination law, mainly because no one would have been allowed part payment of benefits, therefore a complainant could not show a comparator who is entitled to part payment of a pension. But, they did go on to say that it would be helpful to employers if they were permitted by legislation and guidance to put pensions into payment at NPA, with continued accrual thereafter under a different arrangement.

2.32 **Aquilaheywood** have stated that for their DB benefits, at each chosen retirement date, the member takes a percentage of the total benefit available (where the total benefit available does not take into account any benefits already taken but does take into account any early or late retirement factors applicable for retirement at that date). A record is kept of the cumulative percentage taken to date at each retirement. When this reaches 100% the member has no more benefits left to take. This process applies whether or not the member continues to accrue benefits after the first retirement event and can allow for full-time or part-time work after taking part of the retirement benefits.

The consultation document suggested adding a further “alternative to short service benefits (SSB)” in the Preservation Regulations² to cover cases where a final salary scheme allows members to draw a percentage of their pre-date (NPA) benefits. The addition would ensure that once members took that percentage, they had no further right to have it taken into account for valuing pre-date benefits.

Question 18: Do you agree that this would be the simplest solution?

Question 19: Are there other solutions you could share with us?

2.33 Many, including **Gissings** agreed, although others responded that they did not see an issue with preservation, as the member has reached NPA and so is not entitled to short service benefits, a view endorsed by **Travers Smith**, who went on to note that primary legislation on revaluation and anti-franking would need to be amended.

2.34 **Meyer Brown** also noted that within the parameters of the consultation – that is, drawing benefits while continuing to work beyond NPA, it was difficult to see that there was a preservation issue, but thought, where employers/schemes are minded to offer partial flexible retirement – they may also wish to offer a similar facility to deferred members at NPA, in which case, an amendment to the preservation legislation to make it clear that this would be permissible would seem sensible.

² The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 SI 1991/167

2.35 Trades Union respondents advocated the abolition of remaining abatement rules in certain public service schemes.

Question 20: The provision of death benefits beyond a certain age. What are your views on this? Do you believe there are any occasions where it may be justifiable to not provide death benefits to employees after NPA? And why?

2.36 Many respondents including **the Law Society of Scotland, PWC, Reed Smith Richards Butler**, and **Travers Smith** thought cost was the defining issue, particularly providing death benefits for employees over the age of 70, **Travers Smith** noting that an employer would dismiss employees at NPA or DRA to avoid bearing an uninsurable risk.

2.37. The **ABI** pointed out cover for death benefits may be provided on the basis of the level of cover, and that *“if the retirement date were extended, then a higher premium would be required to cover the greater risk”*. **EFA**’s research indicated that employers had at least *“typically managed to increase [death in service] cover from NPA to DRA at acceptable increases in insurance premiums”*.

Friends Provident believed that *“death in service benefits should be provided to [contractual retirement age] 65, if employment continues after age 60 and not cut off at NPA 60”*. They went on to recommend that *“..... legislation should give the right for the employer to set an upper age of DRA...and any members that die in service after DRA could be provided with death after retirement benefits”*.

On the other hand, the **TUC** believed it was *“direct age discrimination not to provide benefits simply because someone has reached a certain age. Although it may cost more to provide such benefits to older workers, it is well established that cost alone cannot be an objective justification for discriminatory practices”*.

2.37 **Clarke Wilmott** thought that: *“... if employers were obliged to offer death benefits, they would withdraw death in service altogether”* and considered there came a point when it was *“simply silly to be required to insure the lives of employees ... approaching the end of their lives”*.

2.38 On the other hand, **HBOS** continues to provide death benefits after NPA to those who remain in employment.

2.39 **D&W**, amongst others thought cost alone was not admissible as a reason for an age-based employment decision, but conceded there were practical problems where age-based costs or rules related to insurance had a bearing on recruitment and retention.

2.40 **APL, Aquilaheyward, Hyman’s, L&G**, and **SPC** all mentioned the potential for double provision of death benefits which may be payable in respect of an employee both as an active member and as a retired member.

2.41 Whilst conceding it was a highly-valued, low-cost benefit most employers (including themselves) have built into their pension scheme, **John Lewis** thought there was *“no logical reason”* for pension schemes to provide death in service lump sums as

they could be met by personal life assurance, the real need being a replacement income for dependents.

2.42 **TAEN** thought that although: *“it may be argued that there is an enhanced probability of death in service for over 65s... the first step should be a rigorous examination of the evidence, as it is not clear ... that there is a statistically significant shift”* going on to say that to the extent such a shift was proven *“... age-based adjustment of death in service benefits might be a legitimate and proportionate response”*.

2.43 Other solutions offered included:

- replacing death in service benefits altogether, employers instead providing *“an option of term assurance as part of a flexible benefits scheme... [which would mean]... trustees would no longer need to objectively justify their scheme rules on this point and the employer would be free to offer a benefits package tailored to the preferences of its work force at an appropriate cost”*. (**Clarke Willmott**)
- *“an exemption”* (**ESPS**)
- *“...death in service benefits should be provided to [age] 65, if employment continues after age 60 and not cut off at NPA 60. Given the difficulty and cost of securing life assurance cover after DRA, ... legislation should give the right for the employer to set an upper age of DRA if they so wish, and any members that die in service after DRA could be provided with death after retirement benefits.”* (**Friend’s**)
- offering members the simple choice to be treated either as:
 - *“... a pensioner and to receive their pension (in full) and to cease providing any further accrual of benefits or death in service benefits; or*
 - *... an active member and to continue to accrue pension benefits (up to a maximum number of years of pensionable service) and death in service benefits”*.(**Mayer Brown**)
- *“Ceasing accrual at NRA - if members are only offered continued accrual until NRA, it may be possible to rely on the exemption in the Regulations for a “late retirement pivot age” to cease accrual at NRA and offer a late retirement uplift. The death benefits to be offered would be those to be provided as for a pensioner”*.(**Sackers**)

3. Government Response

3.1 The most obvious conclusion from this exercise is that, a year on from the last set of amendments³, the Age Regulations continue to cause some unease and uncertainty for employers, trustees, professional advisers, members and their representatives alike.

3.2 Many respondents seem to be in a dilemma as to whether (as **John Lewis** put it) the legislation was “... part of a package of measures which seek to combat the worst aspects of discrimination ... [or] ... designed to seek out and address every possible direct and indirect way in which age can affect how a person is treated”. That response went on to hope that “... common sense should prevail.”

3.3 The intention of this legislation is emphatically the former – it would be counter-productive to introduce a regulatory regime that subverted the Government’s wider policy of ensuring that older people have opportunities to carry on working and earning towards retirement. We want to promote fairness, not set impossible standards and we recognise that flexible retirement policies are a vital part of achieving our long-term aim of an 80% employment rate by offering key benefits to employers in retaining skilled productive workers and giving individuals the opportunity to stay active while improving their income for both the short and longer term.

3.4 We accept that many stakeholders are in a quandary as to how the concept of flexible retirement interacts with a general prohibition not to discriminate on the basis of age. This was clear in the responses to the consultation – the following is a representative selection of comments:

- “Government must ... [provide] ... guidance to set out how its rules should apply” **ABI**
- “... there is a need for further clarifying exemptions on flexible retirement, or at the very least for published DWP Guidance” **ACA**.
- “...flexible retirement practices are [not] in themselves discriminatory ... [and] ... should ... be seen as being motivated by ... public policy concerns to encourage flexible working” **ACCA**
- “many firms are waiting for further clarification from the government before they introduce flexible retirement schemes. Without action from government to clarify the legality of flexible retirement, these firms will not offer schemes... “Government should [set] up a broad-based exemption for the treatment of pension accrual and payment where a voluntary flexible retirement plan is in place” **CBI**
- “would be most useful if one of the outcomes of this consultation was to provide clarification for employers” **CIPD**
- “Code of practice – specific examples of what constitutes discrimination” **Connect UK**
- “we feel very strongly that the Government should make clear its position ... by clarifying the legislation and guidance”. **D&W**
- “... helpful to have a clear and authoritative Code of Practice or guidance, addressed to public sector as well as private sector employers... without ... guidance many ... will not benefit from the flexible retirement and pension provision as is the intention”. **FBU**
- “[there is]... doubt and confusion over a) what is discriminatory, b) what exemptions cover and c) what will be a satisfactory objective justification... is leading to ... employers removing

³ The Employment Equality (Age) (Amendment No 2) Regulations 2006, SI 2006/2931

provisions and not engaging with ... flexible retirement because this approach is perceived as the safest course of action. There is a perception that the potential benefits of having flexible retirement are less than the potential risks of having provision that may be challenged on the grounds of age discrimination . . . there is a widespread ... inertia with flexible retirement ... being off the agenda until ... employers can be confident in their ability to comply with legislation". **GMB**

- "... it would be extremely helpful to have guidance which indicates ... the types of scenarios where the provision of different benefits post-NRD ... would ... be objectively justifiable".

Hammonds

- "...many employers are hanging back from making immediate changes to see if ... [there is] ... further guidance from Government" **Sackers**

- "... [flexible retirement] practices [should be] exempt from or justifiable under the age discrimination regulations where [they] did not impact negatively on scheme funding or the wider interests of scheme members ... there should be clear statutory guidance advising employers and trustees about which practices may constitute unlawful age discrimination"

TUC

- "... urgent guidance should be given by the DWP and the Age Regulations should be amended to make it clear that flexible retirement policies are exempt". **Unison**

3.5 This desire for further action was not universal - **TAEN** calling for the Government to "reject the proposition that there should be a blanket exemption", and **CMS** considering further guidance unhelpful given: "... the pensions industry has largely formed a view on which arrangements are discriminatory ... and, where necessary, scheme rules have been amended to comply with the legislation".

4 The Way Forward

4.1 We now seek to consult on alternative options for a further exemption in respect of flexible retirement arrangements to mitigate any disincentive effect. The first option would add a wide statutory exemption, for all pensions rules and practices etc. linked to flexible retirement arrangements, to those listed at Schedule 2 to the Age Regulations. The second, more limited option, would allow occupational pension schemes not to provide death in service benefits in respect of members in flexible retirement arrangements. The draft Regulations are in the Annexes to this document.

4.2 The exemptions would be permissive, not mandatory. Employers and schemes would continue to consider their individual position (and that of the sector in which they operate) to determine the extent to which they wish to rely on any exemption. In some cases, they may choose not to invoke an exemption at all.

4.3 The draft regulations define a flexible retirement arrangement as an arrangement between a member and the employer under which the member either:

- reduces hours worked, or
- grade held;

after becoming eligible to receive all or part of the age-related benefits under an occupational pension scheme.

Question 1

The definition of 'flexible retirement' excludes members continuing in the same grade with the same hours, but who take all or part of their age-related benefits. Do you (or employers or schemes you advise) enable workers to continue to work after NPA in the same grade and with the same hours whilst taking their age related benefits? If so, does the practice cause significant problems for the scheme and are you (or any of the employers or schemes you advise) considering withdrawing the policy? If not, please explain why the practice has not been adopted.

4.4 The exemption would not apply in respect of members already working under flexible retirement arrangements. In addition, it would not interfere with the rights of a member to all benefits built up in the scheme until the date of the flexible retirement arrangement.

4.5 The exemption will engage at men's state pension age (SPA)⁴, or NPA, if higher. We want to ensure that an employer or the trustees or managers of the scheme could not choose to prohibit further accrual or rights until the worker was in receipt of income from the state pension as well as being eligible for benefits under the occupational pension scheme.

⁴ The link to men's SPA avoids sex discrimination - SPA for men and women equalises in 2020.

Option 1 – Exemption linked to flexible retirement arrangements

4.6 This wide exemption would render lawful any rule, practice, action or decision of an employer or a trustee or manager of an occupational pension scheme that halted the accrual of or entitlement to any further rights or benefits under the scheme during the flexible retirement arrangement.

4.7 In effect, in respect of members working under a flexible retirement arrangement, employers, or trustees or managers of occupational pension schemes would be permitted to stop providing:

- further pension accrual in the scheme;
- an actuarial uplift of pension not taken;
- death in service benefits under the scheme; and
- ill-health benefits under the scheme;

without the need to objectively justify age discrimination on a scheme-by-scheme basis.

4.8 The exemption could be relied upon once the member had entered the flexible retirement arrangement and it would operate whether or not the member chose to take all or part of his pension.

Question 2

As drafted, the exemption could be used to justify stopping further accrual of benefits, but not to provide future accruals at a lower rate than that previously enjoyed. Would you welcome a more flexible approach which would allow accruals at a lower rate?

4.9 Section 7 of the Pensions Act 2008 will provide a right for a jobholder aged between 16 and 75 to require their employer to enrol them into a qualifying pension scheme. This is an important right that will allow a person over state pension age to contribute to a pension arrangement should they wish to do so.

4.10 If the decision was taken to implement the regulations described under the heading 'Option 1', section 7 would enable somebody working under a flexible retirement arrangement, whose active membership of the employer's pension scheme had been halted, to require the employer to re-enrol them into a qualifying scheme.

4.11 It is worth noting that this would not necessarily have to be the same scheme that they had been in before (for example, an employer with an open defined benefit scheme could re-enrol workers falling within the ambit of the regulations into a qualifying workplace personal pension or the personal accounts scheme itself).

Question 3

Given this, do you consider that the implementation of these regulations would meet the Government's overall aim of encouraging employers to provide flexible retirement arrangements?

4.12 We propose this amendment in response to the weight of opinion expressed in response to our previous consultation; in particular, the confusion about what was, or was not discriminatory.

4.13 However, for the exemption to comply with Directive 2000/78/EC, we have to be satisfied that there is robust evidence to suggest that current law gives rise to a genuine barrier to flexible retirement arrangements; and that it is the most proportionate way of meeting our aim of facilitating flexible retirement.

Question 4

We welcome further evidence to determine the extent to which the Age Regulations deter employers from offering flexible retirement arrangements. Do you (or the employers or schemes you advise) currently provide flexible retirement arrangements to staff? If so, are you (or the employers or schemes you advise) considering withdrawing or limiting those arrangements? Why? If you (or the employers or schemes you advise) do not offer flexible retirement arrangements, what is the reason for this? Would an exemption from the Age Regulations lead you (or the employers or schemes you advise) to change your current practice?

Option 2 – Exemption for death in service benefits

4.14 We accept the concern that the survivor of a member in a flexible retirement arrangement may be entitled to benefits that would normally accrue in respect of an active member **and** those that would accrue in respect of a pensioner member.

4.15 Were such a situation to arise, this would put such a survivor in a materially better position than the survivors of other members. We accept that this could create real detriment to occupational pension schemes and intergenerational unfairness. We also note that the purpose of a lump sum death-in-service benefit is to provide an immediate benefit in the event of a member's early death, but the very nature of ageing involves a greater expectation of death.

4.16 If we do not legislate to provide the exemption under Option 1, we propose amending the law to enable the trustees or managers of an occupational pension scheme to treat the survivor of a member who dies during a period of flexible retirement as a survivor of a pensioner member.

4.17 The effect of the exemption would be that for those working under a flexible retirement arrangement, employers, or trustees or managers of occupational pension schemes could refuse to provide those death benefits from the scheme that are payable in respect of active members, without the need to objectively justify age discrimination on a scheme-by-scheme basis.

4.18 The exemption could be relied upon once the worker had entered the flexible retirement arrangement and it would operate whether or not the worker chose to take all or part of his pension.

Question 5

We welcome views on whether the provision of ill-health benefits during a flexible retirement arrangement should form part of the exemption. Does your scheme currently provide ill-health benefits? What (if any) detriment does the continued provision of ill-health benefits during a flexible retirement arrangement cause?

Guidance

4.19 We recognise that the issues the draft regulations would address are not the only areas of uncertainty. Whatever the conclusion of this consultation, we are keen to bring together interested parties – employers, unions, schemes, practitioners, and professionals – from within both the private and public sectors, to exchange views and explore practical solutions to flexible retirement issues.

4.20 We hope that this commitment, which will be developed as part of the Extending Working Life strategy, will enable us to highlight and share the workable good practice that many employers and their schemes have already developed. This, in turn, would help ensure that Government guidance on flexible retirement more closely:

- meets the needs of employers, from both an HR and pensions perspective; and
- facilitates employees and scheme members having coherent choices - in terms of continuing to save towards retirement or drawing from pension funds - while carrying on working longer should they wish to do so.

Flexible retirement exemptions

5. After paragraph 3A (length of service exemptions) of Schedule 2 insert—

“Flexible retirement exemption

3B.—(1) Subject to sub-paragraph (6), this paragraph applies where a member (“A”) of an occupational pension scheme—

- (a) has reached state pension age or, if higher, the normal pension age of that scheme; and
- (c) has entered into a flexible retirement arrangement.

(2) Nothing in Part 2 or 3 of these Regulations shall render it unlawful for any rule, practice, action or decision of—

- (a) the employer, or
- (b) the trustees or managers of the scheme

which puts A at a disadvantage when compared with another member of the scheme if and to the extent that the disadvantage suffered by A is due to the discontinuation of pensionable service for the duration of the flexible retirement arrangement.

(3) Nothing done by the employer, trustees or managers under sub-paragraph (2) may affect A’s rights accrued or benefits payable in respect of periods of service prior to the date on which the flexible retirement arrangement commences.

(4) Where A dies during a flexible retirement arrangement, A must be treated as a pensioner member of the scheme for the purposes of the calculation of any survivor benefits.

(5) This paragraph does not apply in relation to a member who has entered into a flexible retirement arrangement prior to the coming into force of this paragraph.

(6) For the purposes of this paragraph—

“flexible retirement arrangement” means an arrangement between A and A’s employer under which A reduces the hours worked or the grade in which A is employed after becoming eligible to receive all or part of the age related benefits payable to A under the scheme;

“state pension age” for both men and women to whom this paragraph applies, means the pensionable age specified in the rules in paragraph 1(1) (rules for determining pensionable age) of Schedule 4 to the Pensions Act 1995⁽⁹⁾;

“survivor benefits” means benefits payable in respect of a pensioner member of an occupational pension scheme.”.

Signatory text

Address

Date

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations amend the Employment Equality (Age) Regulations 2006 (“the Age Regulations”) to add a new exemption to Schedule 2 (Pension Schemes).

The exemption may only apply when a member (“A”) of an occupational pension scheme has reached State pension age or the normal pension age of the scheme if that is higher, and has entered into a flexible retirement arrangement.

Subject to sub-paragraphs (3) to (5), the effect of the exemption is that Part 2 and 3 of the Age Regulations will not apply to any rule, practice, action or decision of an employer or a trustee or manager of the occupational

⁽⁹⁾ c.26.

pension scheme which puts A at a disadvantage when compared with another member of the scheme if and to the extent that the disadvantage suffered by A is due to the discontinuation of pensionable service for the duration of the flexible retirement arrangement.

Annex B

Option 2 – Death in Service Benefit exemption

S T A T U T O R Y I N S T R U M E N T S

2009 No.

EMPLOYMENT AND TRAINING

AGE DISCRIMINATION

Employment Equality (Age) (Amendment) Regulations 2009

<i>Made</i> - - - -	***
<i>Laid before Parliament</i>	***
<i>Coming into force</i> - -	***

The Secretary of State, being a Minister designated⁽¹⁰⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽¹¹⁾ in relation to discrimination⁽¹²⁾, in exercise of the powers conferred by that section, makes the following Regulations:

Citation, extent, commencement and interpretation

- 6. These Regulations may be cited as the Employment Equality (Age) (Amendment) Regulations 2009 and shall come into force on [].
- 7. These Regulations do not extend to Northern Ireland.
- 8. In these Regulations—
 - “the Age Regulations” means the Employment Equality (Age) Regulations 2006⁽¹³⁾; and
 - “Schedule 2” means Schedule 2 to the Age Regulations.

Amendment of the Age Regulations

- 9. The Age Regulations are amended in accordance with the following provision of these Regulations.

⁽¹⁰⁾ See the European Communities (Designation) (No. 3) Order 2002 (S.I. 2002/1819).
⁽¹¹⁾ 1972 c.68.
⁽¹²⁾ S.I. 2002/1819.
⁽¹³⁾ S.I. 2006/1031 amended by S.I. 2006/2408 and S.I. 2006/2931.

Flexible retirement exemptions

10. After paragraph 3A (length of service exemptions) of Schedule 2 insert—

“Flexible retirement: death in service exemption

3B.—(1) Subject to sub-paragraph (4), this paragraph applies where a member (“A”) of an occupational pension scheme—

- (a) has reached state pension age or, if higher, the normal pension age of that scheme; and
- (b) has entered into a flexible retirement arrangement.

(2) Nothing in Part 2 or 3 of these Regulations shall render it unlawful for any rule, practice, action or decision of—

- (a) the employer, or
- (b) the trustees or managers of the scheme

which puts A at a disadvantage when compared with another member of the scheme if and to the extent that the disadvantage suffered by A is due to the discontinuation of A’s further eligibility for any death in service benefits under the scheme for the duration of the flexible retirement arrangement.

(3) Where A dies during a flexible retirement arrangement, A must be treated as a pensioner member of the scheme for the purposes of the calculation of any survivor benefits.

(4) This paragraph does not apply in relation to a member who has entered into a flexible retirement arrangement prior to the coming into force of this paragraph.

(5) For the purposes of this paragraph—

“death in service benefits” means any benefits payable by the trustees or managers of an occupational pension scheme in respect of a member who dies in service;

“flexible retirement arrangement” means an arrangement between A and A’s employer under which A reduces the hours worked or the grade in which A is employed after becoming eligible to receive all or part of the age related benefits payable to A under the scheme;

“state pension age” for both men and women to whom this paragraph applies, means the pensionable age specified in paragraph 1(1) (rules for determining pensionable age) of Schedule 4 to the Pensions Act 1995⁽¹⁴⁾; and

“survivor benefits” means any benefits payable by the trustees or managers of an occupational pension scheme in respect of a pensioner member of that scheme.”.

Signatory text

Address

Date

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations amend the Employment Equality (Age) Regulations 2006 (“the Age Regulations”) to add a new exemption to Schedule 2 (Pension Schemes).

The exemption may only apply when a member (“A”) of an occupational pension scheme has reached State pension age or the normal pension age of the scheme if that is higher, and has entered into a flexible retirement arrangement.

Subject to sub-paragraphs (3) to (5), the effect of the exemption is that Part 2 and 3 of the Age Regulations will not apply to any rule, practice, action or decision of an employer or a trustee or manager of the occupational pension scheme which puts A at a disadvantage when compared with another member of the scheme if and to

⁽¹⁴⁾ c.26.

the extent that the disadvantage suffered by A is due to the discontinuation of A's further eligibility for any death in service benefits under the scheme for the duration of the flexible retirement arrangement.

List of Respondents

Association of British Insurers (ABI)
Allen & Overy LLP
Aon Consulting
aquilaheywood
Association of Chartered Certified Accountants (ACCA)
Association of Consulting Actuaries (ACA)
Association of Pension Lawyers (APL)
Anthony Beard
British Airways Pensions Services Ltd
John Champion
Chartered Institute of Personnel & Development (CIPD)
Clarke Wilmott
CMS Cameron McKenna LLP (CMS)
Cobbetts LLP
Confederation of British Industry (CBI)
Connect UK
Department for Children, Schools, & Families
DLA Piper UK LLP
Dundas & Wilson LLP (D&W)
EFG Platts Ffello Limited
Electricity Pensions Services Limited
Employers Forum on Age (EFA)
Eversheds LLP
Richard Fleet
Fire Brigades Union (FBU)
Ford Motor Company Limited
Freshfields Bruckhaus Deringer LLP
Friends Provident Life and Pensions Limited
GMB
Gissings Consultancy Services Limited
Hachette Livre UK Limited
Hammonds
David Harris
HBOS plc
Hewitt Bacon & Woodrow Limited
Loretta Holborn
Hymans Robertson
Independent Pensions Trustee Group
Tina James
John Lewis Partnership
Law Society of Scotland
Legal and General plc (L&G)
Lloyds TSB
Local Government Employers
Mayer Brown International LLP
Mercer Limited
National Association of Adult Continuing Education (NIACE)
National Association of Pension Funds (NAPF)
National Association of Schoolmasters and Union of Women Teachers (NASUWT)
National Grid plc
Pensions Management Institute (PMI)
PriceWaterhouseCoopers (PWC)
Reed Smith Richards Butler LLP
Sacker & Partners LLP
Society of Pensions Consultants (SPC)
Standard Life Assurance Limited
The Age and Employment Network (TAEN)/Help the Aged
Teachers' Pension Scheme
Travers Smith
Trades Union Congress (TUC)
Unite
Watson Wyatt
Wragge & Co

