# City of London Law Society

# Response to the Draft Regulations

# Coming of Age

***Introduction***

***This response on behalf of the City of London Law Society (CLSS) has been prepared by a working party including partners and senior lawyers from large and medium sized firms in the City. Our members included partners in all the large and medium sized frims in the City and most of the smaller firms.***

## CHAPTER 3 OUTLAWING AGE DISCRIMINATION

**1** The section on validity and revision of contracts and its practical effects is not entirely clear. Whether a term is unlawful by virtue of the Regulations (Schedule 5 paragraph 1) may not be known until a decision by an Employment Tribunal. Is the term valid until that point? If the decision of an Employment Tribunal is reversed on appeal does the term then become valid again? Would it not be clearer to provide that a term becomes void only once declared so by an Employment Tribunal and any appeal process has been exhausted?

**2** Irrespective of this point, there is another transitional issue. If a contract has been entered into prior to 1 October 2006, it would be retrospective legislation to render the provision void on 1 October 2006. We would suggest that the Framework Directive of 2000 (2000/78/EC) does not require retrospective legislation. Furthermore, if we are wrong on this point, would this mean the provision has always been void ie prior to 1 October 2006. This would be very unfortunate particularly as the parties will have (lawfully) conducted their affairs on the basis that the term was valid.

**3** Draft Regulation 3(1)(a) outlaws discrimination “on grounds of B’s age”. By contrast, draft Regulation 6 outlaws harassment “on grounds of age”. Clearly there is a material difference between the two. Is this deliberate? Our reading of the Framework Directive of 2000 (Article 2.3) is that the formula should be the same for both direct discrimination and harassment. We prefer the former formula.

**4** Draft Regulation 3(1)(b) addresses unlawful indirect discrimination. It adopts the concept of “age group”. This is very unclear. For example, does it mean a chronological age group (for example, a group of people aged 50), a defined age band (for example, those between 35 and 45) or an age group defined by reference to another factor (for example, those of marriageable age or those of child-bearing age)? Article 2.2 of the Framework Directive of 2000 refers to persons of a “particular age”. This clearly means one chronological age. We would suggest that the DTI adopts this concept ie chronological age. This will produce certainty.

## CHAPTER 4 - JUSTIFYING AGE DISCRIMINATION

The language used for objective justification is not the same language used in the Framework Directive of 2000.

### Q4b Will our approach give rise to significant practical difficulties?

No strong feelings either way.

### Q4c Do the draft Age Regulations reflect our policy

No strong feelings either way.

## CHAPTER 5 - EXEMPTIONS

### Q5b - Will our approach give rise to significant practical difficulties?

Yes

**1** The exceptions relating to length of service set out in draft Regulations 32 and 33 apply only to "workers", which is defined in draft Regulation 37. The term "workers" does not include "partners" in any firms. The effect of this is that partnerships have not been afforded exceptions in relation to length of service benefits which have been given to employers. There does not appear to be any good reason why partnerships should not be in the same position as general employers for all the reasons set out explaining why employers should have this exemption. If there is good reason for exempting benefits based on length of service then this should be applied to all and not limited to certain personnel. We would suggest that the definition of "worker" as set out in draft Regulation 37 should be extended to cover persons protected under draft Regulation 16 (partners).

**2** Further, a number of professional service partnerships, such as law firms, frequently operate lock-step schemes which may constitute indirect discrimination under the draft Regulations because they are based on length of service. Firms with a lockstep system generally assign interests on an annual basis, based on the number of years each lawyer has been a partner, up to a maximum number of points usually after fifteen to twenty years. It is no exaggeration to say that the lockstep system has been the bedrock of the success of many partnerships, so much so that it is unlikely that the majority of partners would ever want to overturn the system. It would therefore be very unfortunate if one partner could overturn the wishes of a majority. Moreover, as the consequences of this would appear to be that the scheme will have been void from at least 1 October 2006, unscrambling the remuneration paid to, for example 100+ partners would have enormous repercussions. Furthermore, it is incorrect to view professional partnerships in the same way as the employer-employee relationship. Partners are quite different from employees. For example, each partner is an owner of the business and its goodwill. Partners are, in effect, shareholders in the partnership's business. Yet the DTI is not proposing to make it unlawful for shareholders to receive benefits based on length of service. We would urge the DTI to provide a specific provision in the Regulations that exempts lock-step schemes in partnerships.

**3** It is noted that at draft Regulation 31(1)(i) there is a redundant "a". At present it is drafted to read "shall prevent a relevant **a** person …".

**4** At present draft Regulations 32 and 33 only cover benefits awarded solely by reference to length of service. It is not unusual for employers to link length of service with another criterion which is not discriminatory. Benefits might be awarded, for example, based on

length of service and performance, or length of service with some form of restriction. In our view it is illogical for an employer to lose the benefit of the exemption because it uses a criterion that is not discriminatory. We suggest that the length of service exemptions are widened to cover benefits awarded as a combination of length of service and any other non-discriminatory criteria.

**5** Draft Regulation 22 provides a length of service exception but it is limited to 5 years. If 5 years is legitimate it is difficult to see why a longer period is not. We suggest the exception should not set a maximum length of service.

**6** We would propose that there should be some interim provisions to cover employers who are changing schemes which may be currently age discriminatory but are changing them in line with the legislation. Such employers may wish to preserve existing rights for current employees without facing future challenge. If employers are preserving existing rights (which existed before the legislation came into force) in relation to benefits it is suggested that this should be deemed an objective justification. This would encourage employers not to take away beneficial schemes.

**7** Does "benefit" for the purposes of draft Regulations 32 to 35 include "pay"? We do not think it is clear that it does. In our view it should since we can see no good reason for exempting non-cash benefit but not cash.

## CHAPTER 6 – RETIREMENT

**Q6b - Will our approach give rise to significant practical difficulties?** Yes

**1** It is noted that the provisions relating to retirement in draft Regulation 29 apply only to employees. The planned retirement procedure does not apply to partners. Again there seems to be no significant policy reason for why there should be a higher burden on partnerships in relation to people remaining in the partnership than on employers. If it is legitimate to have a statutory default retirement age for employees it is difficult to see why it is not legitimate to have the same for partners. It is suggested that a provision should be made to allow partnerships to ask partners to retire at the age of 65 but with the same rights in relation to employees in terms of the planned retirement process.

**2** If an employer dismisses an employee at a "planned retirement date" that is not the normal retirement date the employee may well convince a tribunal that "retirement" (whatever this means) was not the reason for the dismissal. If so this will be an automatic unfair dismissal as the employer is unlikely to have followed the statutory disciplinary and dismissal procedure (because it assumed it was a "retirement" dismissal). Because of the risk employers will be advised to dismiss all employees at the normal retirement date. If it is the Government's objective to encourage employers to agree to employment beyond 65 it will have to provide employers with assurances that the subsequent dismissal (at the agreed date) cannot be an unfair dismissal. One way to achieve this would be to provide that a dismissal taking place at a date agreed pursuant to the duty-to-consider procedure cannot be an unfair dismissal.

**3** At new Section 98ZB(2) of the Employment Rights Act 1996 ("**ERA**") it is not clear what the meaning of the word "contemplated" is. This is likely to cause some real difficulties both in tribunals and to employers.

**4** At new Section 98ZB(3) of the ERA the drafting of the reverse of the burden of proof is effectively asking an employer to prove a negative. The effect of new Section 98ZB(3) is that the employer must show that it did not contemplate dismissing the employee at some time in the period of six months that ends with the day of the dismissal for a reason other than retirement. It is difficult to see how any employer could prove that it did not contemplate something. It is suggested that an alternative is drafted or at least Section 98ZB (3) is removed.

**5** It is noted that in new Section 98ZA(6) of the ERA, the six months is in brackets. We are unsure as to why this is in brackets.

**6** It is noted that there are no transitional arrangements in relation to the draft Regulations. It is not clear what will happen to an employee who is, for example, due to retire on 12 October 2006, when the draft Regulations will apply but the employer will not have had time to have followed through some of the processes which require two weeks or six months' notice. The employer would seem to be in breach of the law without having had the opportunity to comply! We would suggest that there should be some transitional provisions. For example, introduction of the planned retirement date and duty-to-consider procedures could be deferred for 12 months.

**7** The duty-to-consider procedure currently proceeds on the basis that this can be triggered by an employee six weeks before the planned retirement date. In practice, employers, having assumed (because an employee has put in no request) that the retirement will go ahead in six weeks' time, will have lined up a successor for the employee. As likely as not, the employer will have entered into a legally binding commitment in relation to the successor. Accordingly, if the employee then triggers the duty-to-consider procedure the employer is almost bound to turn this down because of the arrangements with the successor. This makes the duty-to-consider procedure a fruitless exercise. The way to cure this problem would be to provide that the employee must submit his or her request within a certain period of receiving the employer's notice of the intended retirement date. We would suggest a period of 14 days as this fits in with the general scheme of the duty-to-consider procedure of adopting stages separated by 14 days.

## CHAPTER 7 - OCCUPATIONAL PENSIONS

**Q7b - Will our approach give rise to significant practical difficulties?** Yes

**1** Schedule 2 to the draft Regulations in paragraph 1 defines "Occupational Pension Schemes" that will be exempt from much of Parts 1 and 2 of the draft Regulations. However, this definition excludes partnership schemes. We would submit that there is no policy reason why schemes for partners should be excluded and that this should be changed so as to include such schemes.

**2** For similar reasons we recommend that the exemption should include employer schemes that mirror occupational pension schemes.

**3** We consider there to be uncertainty over whether the exception would catch group personal pension schemes. We assume it is not the Government's intention to exclude such schemes from the exception: indeed it would be illogical to do so. Accordingly, we suggest that the Regulations make plain that group personal pension schemes are within the exception.

## CHAPTER 8 – STATUTORY REDUNDANCY PAYMENTS

We are of the view that the statutory redundancy pay scheme should be standardised to one week for each year of service with no other multiplier.