Employment Lawyers Association

Response to call for evidence on Government's review of the default retirement age

## Introduction

The Employment Lawyers' Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent both Claimants and Respondents in the Courts and Employment Tribunals. It is not, therefore, ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by ELA's Legislative & Policy Committee under the chairmanship of James Davies of Lewis Silkin to consider and comment on the proposal to bring forward the review of the default retirement age ("DRA") set out in "*Building a society for all ages*". We attach a copy of that response.

In response to the call for evidence to feed into the Government's review of the DRA, ELA canvassed its members for their views and experiences of the operation of the DRA and received responses both from members setting out their own views and also setting out the results of surveys that law firm members had done with their employer clients.

It is fair to say that the response from our members divided reasonably equally between those who support the increase or removal of the default retirement age and those who don't.

We set out below some illustrations of common threads from the views and experiences of members including those who support and those who oppose the DRA. For the reasons set out above ELA does not have a view on the DRA.

1. In support of the need for a default retirement age (albeit that this contributor suggested that the age should be 70 and not 65) were concerns, based on his experience, that there can be a deterioration in performance which accompanies aging; that the aging worker is not always the best judge of their own performance; and that the aging workers' dignity can be undermined by addressing deteriorating performance arising from age-related physical or mental deterioration. Also, this member highlighted a concern echoed by

others the relationship between disability discrimination and aging will be particularly complex for workers who pass the age at which their performance deteriorates as a result of the aging process (see also the section headed *Removal of retirement ages and labour intensive businesses* in the report appended to this response).

2. Other responses have suggested that the default retirement age has been operating effectively in practice, with respondents suggesting that in some organisations requests to work beyond the normal retirement age are generally being granted.

3. Some respondents who supported the DRA highlighted that it is important for manpower and succession planning. Whilst it seems clear from the relatively few decided cases concerning justifying retirement ages for non-employees (e.g. partners) that employment tribunals are sympathetic to employers' succession planning arguments needs, particularly in relatively small organisations, there is some concern about the uncertainty of needing to justify decisions on a case by case basis.

4. Other respondents supportive of the abolition of the DRA have suggested that organisations who feel that they need to operate a DRA do so at the expense of proper performance management.

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# APPENDIX

## WORKING GROUP ON DEFAULT RETIREMENT AGE

### Introduction

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A sub-committee was set up by ELA's Legislative & Policy Committee under the chairmanship of James Davies of Lewis Silkin to consider and comment on the proposal to bring forward the review of the default retirement age ("DRA") set out in "*Building a society for all ages*". Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

### Summary

We have divided our comments into five sections covering what we regard as the key legal implications of any change in the DRA:

- DRA and employee share plans;
- Insured benefits;
- Removal of DRA in labour-intensive businesses;
- Lawfulness of the DRA post-Heyday;
- Flexible working and the DRA.

Default retirement age and employee share plans

Many employees in the UK benefit from their participation in employee share option plans. Generally, when an employee leaves the employment of their employer, they are treated as either a “Good Leaver” or a “Bad Leaver”. In general, Good Leavers are allowed to retain some or all of the options they have been granted but which have not yet vested and Bad Leavers lose any unvested options. Good Leavers are typically employees who leave employment through no “fault” of their own - usually at either the employer’s instigation or because of the circumstances they find themselves in. However, employees who are dismissed for cause or simply resign voluntarily (although not at “fault”) are typically treated as Bad Leavers and lose their unvested options. The reason for this is, of course, that the objectives behind encouraging participation of employees in employee share option plans include encouraging loyalty, promoting the retention of employees and to rewarding employees for the long-term good performance of their employer.

Typically therefore, Good Leavers are employees who leave employment by reason of:

- ill-health;
- death;
- redundancy;
- sale of the business or subsidiary for which they work; and
- retirement.

Employees who leave in other circumstances e.g. dismissal for misconduct, voluntarily resign etc are treated as Bad Leavers.

As noted above, to date retirement has typically been someone who retires and has typically been regarded as a “Good Leaver”.

Indeed, under the UK tax rules, in order for an HMRC-approved employee share option scheme to benefit from beneficial tax treatment on retirement, the rules have to contain the provision that

people who leave by reason of retirement over the age of at least 55 have to be treated as Good Leavers.

HMRC-approved SAYE share option schemes must include exercise provisions for employees who reach the specified age (between 60 and 75) without leaving employment, and employees who leave at an age at which they are bound to retire in accordance with the terms of their contracts of employment (the latter are Good Leavers).

HMRC-approved Share Incentive Plans must include a provision that shares removed from the SIP trust by an employee who is retiring on or after a specified age (at least 50) are not subject to a tax charge. These employees are Good Leavers.

As noted above, other types of employee share plans providing unapproved options or free shares, also often provide for a retiring employee to be a Good Leaver.

The introduction of the Employment Equality (Age) Regulations 2006 ("the Age Regulations") resulted in employers questioning the treatment of people who retired as Good Leavers. This was because, inevitably, employees who were leaving by reason of retirement were on the whole, older than those employees who left for other reasons. Employers were therefore concerned that younger employees who were leaving for reasons other than retirement may bring age discrimination claims. However employers felt relatively comfortable about retaining the benefit of Good Leaver status for retiring employees because:

- in relation to tax approved plans, they were required to do so by law; and
- the UK regulations included a default retirement provision. That meant it was quite easy for employers to identify which employees were retirees and which were employees who had simply voluntarily resigned. This was because under the default retirement provisions, although the employee has a right to request to stay in employment beyond what would otherwise be his/her normal retirement date, there was an element of compulsion in the manner of termination. Provided the employer had a good reason to turn down the request to continue working, an employer can require the employee terminate his or her employment.

If the DRA is abolished altogether, then it will be much more difficult to distinguish between employees who are retiring and those who are entirely voluntary leavers. Employers may try to regard those individuals who resign but are eligible to draw either a company or a state pension, as falling within the definition of those who "retire" for the purposes of their employee share options plans. However, this would be an entirely age-based criteria which may be difficult to justify. In addition, it is of course entirely possible that such an employee may take up alternative employment once they have left their employer and to that extent, would be in a similar position to a younger employee who had left but was not entitled to draw any form of pension.

Alternatively, if the employer tried to introduce a concept of a "retiree" as someone who was eligible for a pension and was not leaving to take up alternative work, this would also be fraught with difficulties as:

- the employee could conceal an intention to seek alternative employment in order to benefit from Good Leaver status (or simply change their mind after their employment had terminated); and

- it would be difficult to in those circumstances to deny Good Leaver status to employees who were voluntarily resigning, with no intention to take up alternative employment for other reasons e.g. employees who were leaving to become homemakers or care for children or elderly relatives.

We would therefore ask the Government to consider whether:

- it will retain the requirement for tax exempt share plans to treat those who "retire" above a certain age as Good Leavers. If this requirement is retained, to consider providing a definition of retirement given the fact that in many cases, a retirement will, from a legal point of view at least, be indistinguishable from a voluntary resignation particularly if the current age of 50 or 55 is retained (depending on the plan) as few company pension schemes allows and the state pension scheme does not allow an individual to draw a pension until much later; and

- if the Government does not intend to retain the requirement and, in relation to non tax-approved plans, whether it should consider allowing employees who "retire" in the

common sense rather than legal sense of the word to be permitted to retain Good Leaver status under employee share plans and providing some guidance as to what "retirement meant in such a context.

Our concern is that unless this issue is addressed, employees may well lose what would otherwise be a valuable benefit on retirement as employers may simply regard those who retire as being in the same category as those who voluntarily resign.

Insured benefits

A review of the DRA should take account of the interrelation between insured employment benefits and age.

These insured benefits include:

- Life assurance;
- Medical cover;
- Income protection schemes;
- Critical illness cover.

Many employers chose to provide group schemes under which all employees are eligible to benefit from schemes.

With the introduction of the Age Regulations in 2006, employers had to address any benefits not provided equally to all ages.

Historically, many employers have and continue to place age limits or age-related conditions on entitlement to insured benefit schemes. Normally these limits arise from age limits, conditions (e.g. a requirement for medical underwriting beyond a particular age) or added cost of extending cover to older workers imposed by the insurers.

Whilst insurers have adapted somewhat to the Age Regulations, it is still, as far as we are aware, not possible to get group life assurances for employees over 75 and medical underwriting will be required for these between 70 and 75. With group critical illness or income protection, as far as we are aware, underwriting is usually required after 65 and no cover is possible after 70.

Employers remain uncertain as to the extent that imposing such limits on benefits for their employees remains lawful.

Excluding older workers where the insurer refuses to extend cover beyond a set age or maing cover subject to underwriting may be easier to justify than excluding age groups on account of added cost.

However, even where an insurer restricts cover to employees below a certain age, the employer might be expected to seek out alternative suppliers or even to self-insure.

Where cost is an issue, an employer is on more difficult ground as it is generally thought to be the case that added cost alone cannot be a justification for age discrimination (i.e. employers should not be able to discriminate merely because it is cheaper to do so).

Following the introduction of the Age Regulations, many employers are reported not to have allowed employees to remain on after age 65 on account of such uncertainties.

The Equality Bill, in its current form, addresses in part these issues. The Bill expressly permits insurers to rely on actuarial data to discriminate under several strands of discrimination but, interestingly, not age. Once this becomes law, insurers will have to justify age-based restrictions or pricing or risk being guilty of discrimination themselves.

If employers are to employ staff beyond 65 following any abolition or increase in the default retirement age, thought should be given to extending the exceptions within the Age Regulations to clarify when employers can stop cover, require medical underwriting or pass the increased cost on to the employee.

Income protection policies (aka permanent health insurance) also create age-related issues in that they traditionally pay a proportion of salary until retirement age. Many employers are moving to policies which pay out for a fixed maximum period often on account of concerns that they may break age laws (e.g. 3 or 5 years – a much reduced level of comfort and presumably consequential additional burden on state benefits. Many, however, still operate policies which pay out till retirement age. These schemes provide less comfort for those approaching retirement age (who might argue that they were expecting to work beyond retirement age until prevented by ill health or injury) and no benefit for those beyond retirement age. Adding to the Age Regulations' exceptions to cover this would be helpful.

If amendments to the Age Regulations are considered to address these areas of uncertainty, a related issue relating to the age-related cost of benefits and flexible benefit schemes could be covered at the same time. The employment tribunal decision in *Swann v GHL Insurance Services UK Ltd* addressed this but the decision is not very satisfactory and significant uncertainty remains.

Removal of retirement ages and labour intensive businesses

Serious consideration needs to be given to the impact on labour intensive businesses when considering the removal or increase of the current statutory DRA if their workforce were to remain in employment to much older ages than 65 where performance can decline and safety risks increase. There are a number of business sectors which are labour intensive, that is where a larger portion of total cost is due to labour as compared with the portion of costs incurred in purchase, maintenance and depreciation of capital equipment, for example the agriculture, construction, mining, distribution and transport sectors to name a few. The impact that the removal or any substantial increase of the DRA could impact greatly on labour intensive businesses, particularly with regard to:

- the health and safety burden on business becoming greater and adding further cost for these business as more frequent assessments for older workers will be required to assess employees' capabilities due to increased risk of accident and injury or as a result of a general deterioration of health in many older workers;
- a likely increased need and cost to business of making reasonable adjustments (under disability laws) in the workplace for older workers to accommodate health complaints more commonly experienced by older people;
- an increase in the demands of capability and performance management; and
- higher and increasing insurance cost (see above).

There is therefore a need to consider how the impact of the removal or increase on these industries might be mitigated. This would recognise that there are certain business sectors where there is an increased risk to the welfare and health of older workers of working for an indefinite period of time and that the cost and burden to these types of businesses might, in some cases, outweigh the benefits of allowing older workers to work to an indefinite age.

Thought could be given to extending the exceptions in the Age Regulations to minimise the uncertainties these employers might face in dismissing older workers where, for example, there might be health and safety or performance concerns or where deteriorating health means that age overlaps with disability discrimination and the duty to make adjustments.

Some are concerned that dismissing employees when they become unable to carry out their roles for performance or capability issues could be extremely demeaning for exiting employees, who have previously been highly valued in these businesses.

Heyday and the default retirement age

In reviewing the DRA, the government will have regard to Council Directive 2000/78/EC, the EU Equal Treatment Framework Directive. Consideration will have to be given to the legality of the principle of a compulsory retirement age. If the legality of the principle is accepted, consideration will have to be given to the minimum age at which such compulsory retirement can lawfully be set.

Following the ruling of the European Court of Justice in *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (the Heyday case) on 5th March 2009, it is clear that in principle a default retirement age can be lawful. The ECJ held that national rules allowing compulsory dismissal at retirement age were not contrary to community law provided that they were justified by legitimate social policy objectives and were appropriate and necessary for achieving those objectives.

The Heyday case was remitted to the High Court for a determination of the issue of whether or not the UK government can justify the DRA by legitimate social policy objectives, and if so, whether the DRA is an appropriate and necessary means of achieving those objectives. The High Court considered the remitted Heyday case in July 2009, and delivered its judgement on 25th September 2009. The High Court preferred the term “designated retirement age” to the term “default retirement age”, and held that the government had shown to a high standard that the concept of a designated retirement age was based on a legitimate social policy aim. The High Court went on to hold that the decision to adopt a designated retirement age was a proportionate way of giving effect to the government’s stated social policy aim. The UK government’s decision to adopt a DRA when introducing the Age Regulations was thus held by the High Court to be both legitimate and proportionate.

The Heyday Judgement went on to make it clear that while the designation of the age of 65 for retirement was proportionate on the adoption of the Age Regulations in 2006, a designation of the same age would not be proportionate if it had been introduced today. In giving his judgement, the Hon Mr Justice Blake said that, "If Regulation 30 had been adopted for the first time in 2009, or there had been no indication of an imminent review, I would have concluded … that the selection of age 65 would not have been proportionate."

It seems from this decision that if the Government was minded in any review to maintain the DRA at 65, the legality of this decision would be highly doubtful.

If the government retains a DRA, but raises it above the age of 65, this approach may also result in future litigation. As economic, social and demographic changes occur over the coming years, the legitimacy of the government's objectives in retaining a designated retirement age would be susceptible to renewed challenge if employees and their representative organisations believed they could successfully argue that the government's justification defence in relation to the principal of the DRA itself is no longer legitimate, or that it can no longer justify the new designated age of retirement. It is, therefore, likely that any increase in the DRA will need to be kept under periodic review.

Flexible work and retirement

As individuals are to be encouraged to work longer, more flexible opportunities will need to be considered by employers to take advantage of the skills and experience of older workers whilst adapting to the requirements of these employees to prepare for retirement. This will be particularly relevant if the DRA is removed (and along with it the statutory right to request to stay on beyond retirement).

Some employers already provide flexible working policies to the entire workforce. However, could be to provide to employees approaching retirement within a statutory framework, to give some "teeth" to this right for employees.

If a statutory scheme is to be considered which is similar to the current regime, there will need to be supporting guidance for employers and employees on the following: (a) the age when an employee can make such a request; (b) any prescribed timescales for the employee to make such a request and timescales for the employer response; (c) how often such a request can be made by an employee; and (d) the grounds on which an employer can refuse. This will depart from the

existing right to request to work beyond retirement age, for which an employer does not need to provide reasons for refusal. This would presumably be based on the existing right to request flexible working.

If the DRA is increased and not removed, this approach to flexible working would, however, be different for this group of employees, as in essence the employer would be taking decisions about extending employment, rather than changing the work pattern of an existing role. Therefore if a statutory right is introduced, further grounds of refusal may need to be considered, to address this difference in approach. This would have to address consideration of the impact on workforce planning. Employers may face difficulties with the timing of any succession planning, specifically in sectors where the clients stipulate key personnel to be engaged on their services. It will also mean that if employee request are accepted for part time working and/or a fixed term arrangement that employers will need to take into account that employees will also benefit from additional statutory protection, under the Fixed-term (Prevention of Less Favourable Treatment) Regulations 2002 and Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Legislation would have to be introduced to govern this flexible working regime to avoid concerns that employers might have of discriminating unlawfully against younger workers in entertaining requests for flexible work from those approaching retirement.

In order to change the workplace culture, employers will have to consider retirement policies which provide for a phased approach for employees nearing retirement. The issue will be whether such schemes will be effective if they are deemed to be voluntary or whether there needs to be a mandatory framework.

Such schemes may allow employees to plan for their retirement more smoothly and do so in a more structured way, rather than suddenly finishing work on a given date. As a reward for loyalty, employers may, for example, wish to consider providing for a reduction to a four day week during a defined period leading up to retirement, whilst remaining on full pay. In conjunction with working fewer days, employers could also consider providing access to pre-retirement courses, which enable employees to make informed choices about their future planning.

Schemes could also be made available to employees to encourage them to stay after planned retirement by offering them new opportunities to undertake training or mentoring. This could be beneficial to both parties, as the employer will retain key know how and experience gained by the employee which can be distilled to the rest of the workforce, and the employee will benefit from a new challenge in a work environment, they are very familiar with. The issues foreseen with such a scheme are whether such a change in role, will require a new contract of employment and therefore agreement from the employee or it can be enforced by the employer as a reasonable opportunity and/or whether the role is for a defined period or subject to a review process. It may also create employee relation issues from the wider workforce, if other non protected groups, of a younger age group would like to be considered for such roles.

Alternatively such post retirement schemes may encourage take up by offering certain roles on a contractor or consultancy basis. This may, however raise additional risk for employers of receiving a claim of employee status and therefore a challenge for implied employment rights and additional unforeseen liability (for example redundancy costs) which may preclude them from wanting to offer roles on such terms. From an employee perspective, this removes the issue of uncertainty in relation to financial security and also affords the employee the flexibility to take more short term contracts, if they choose to do so. If both parties enter such an arrangement on mutually acceptable terms, it could be viewed as a positive step towards encouraging individuals to work beyond retirement, whilst for the employee it means taking more control of their work/life balance.

In any event, consideration should be given to permitting employers to adopt these flexible working arrangements for older workers without risk of age discrimination claims either by virtue of the non-availability of such schemes for younger workers or that the older workers who work flexibly are unlawfully discriminated against on grounds of age in the terms offered under such schemes.

Members of sub-committee

James Davies, Lewis Silkin Chair

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