Resolving Workplace Disputes:
Response of the Employment Lawyers Association to a Consultation
by the Department for Business Innovations & Skills – April 2011

i. The Employment Lawyers Association ("ELA") is an unaffiliated group of specialists in employment law including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint.

ii. ELA's Policy and Legislative Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. We set up a working group under the Chairmanship of Richard Fox (Kingsley Napley) to consider and comment on the Consultation Paper "Resolving Workplace Disputes" released by the Department for Business, Innovation & Skills ("BIS") in January 2011.

iv. We organised ourselves into 5 subgroups as follows:

Group 1 – Chair: Peter Frost (Herbert Smith)
Mediation – Questions 1 to 7; Compromise Agreements – Questions 8 to 11; Early Conciliation – Questions 12 to 20; Further information – Question 24; Initial statement of loss – Questions 34 to 41

Group 2 – Chair: Stephen Levinson (RadcliffeLeBrasseur)
Strike out – Questions 21 to 23; Deposit Orders – Questions 25 to 29; Calderbank Orders – Questions 42 to 44; Costs cap – Questions 30 to 33; Entitlement to expenses – Questions 49 to 51

Group 3 – Chair: Robert Davies (Dundas & Wilson)
Witness statement procedure – Questions 45 to 48; Employment Judges sitting alone (unfair dismissal cases) – Questions 52 to 54; Legal officers – Questions 55 to 56

Group 4 – Chair: Fraser Younson (Berwin Leighton & Paisner)
Qualifying period to 2 years – Questions 57 to 60; Financial penalties for employers – Questions 61 to 62; Uprating Tribunal awards and statutory redundancy payments – Questions 63 to 64

Group 5 – Chair: Michael Burd (Lewis Silkin)
The Employers' Charter: The impact assessment

A full list of all members of the working groups, together with additional contributors appears at Appendix 1.

On 6 April 2011 each of our working group chairs (Ellen Temperton substituting for Michael Burd on that occasion) were invited to a meeting at BIS, where also present were representatives from ACAS, HM Courts & Tribunal Service, the Employment Law Bar Association, and the Free Representation Unit. We discussed the views we had by then formed on a provisional basis, since which time we have had an opportunity of finalising our report.

Our views are as follows:

CHAPTER 1: RESOLVING DISPUTES IN THE WORKPLACE

1. MEDIATION

Question 1

To what extent is early workplace mediation used?

It has been assumed that "early" refers to mediation whilst the employment relationship is continuing and before legal proceedings have been issued.

Whilst awareness of workplace mediation is increasing, our understanding is that it is generally not being used widely. This seems to be for several reasons, namely:-

- Line managers think that they have resolved matters and do not need mediation, when in fact issues continue to simmer;

- It is not the first option considered by Human Resources professionals and advisers;

- Where employers have workplace mediators, these are not always trusted by the employees. This is because they are themselves employed by the employer (often at a relatively senior level) and therefore are not seen as sufficiently impartial. In one case we came across employers who operated a reciprocal arrangement to provide mediators to each other to try to deal with this issue. In principle such an arrangement could be encouraged;

- Employers are not convinced that employees will comply with the confidentiality requirements;

- Some trade unions appear to be concerned that such a mediation process could threaten the role that they wish to play in relation to union members and there is a lack of understanding of its nature, some officials seeing it as an adjudicative process;

- It can entail material costs;

- Issues have not become clear yet, nor are the consequences fully appreciated by either party, and so parties are reluctant to enter into a sufficiently binding agreement.

We have experience of workplace mediation being deployed in the context of a grievance or a contractual dispute or in the public sector. However, the parties have to be willing to work together and look to the future, rather than being determined to prove who was right or wrong in the past. While early workplace mediation may be seen primarily as a way of resolving disputes such as to preserve the working relationship, in the rare instances where we have come across workplace mediation, in our experience, early mediation has resulted in severance terms and a compromise agreement being introduced shortly afterwards.

Question 2

Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?

Mediation can be particularly helpful in cases where one of the parties, often the Claimant, feels particularly strongly about the issues such that the opportunity to confront the employer can be cathartic. This is often the case involving litigants-in-person. The benefits of a

negotiated settlement can be explained to the litigant-in-person by an independent mediator in objective terms. The mediator can also assist the litigant in person, (who may feel that no one has been listening to him or her) to put their side of the story across to the employer.

Mediation is similarly particularly helpful in cases where both parties have a keen interest in preserving confidentiality, for example, in discrimination or whistleblowing cases. Finally, it is also particularly helpful in disputes that are in need of a bespoke solution which could not be achieved as part of tribunal proceedings, for example, a step to be taken by the employer which a tribunal would not have the power to order. This is particularly so where the employee remains employed as can often be the case in discrimination claims; irrespective of whether the employee or employer is successful in the Tribunal claim, there will remain problems for the former in integrating back into the workplace and problems for the latter in effectively managing the employee on an ongoing basis. The wide variety of solutions available from mediation can be particularly effective in dealing with such issues.

In general mediation may not be a useful method of dispute resolution where the relationship between the parties has broken down to such an extent that each side is too entrenched in its own position to consider settlement or where there is an insurmountable gulf in settlement positions. More specifically, mediation is unlikely to result in a resolution of a test case or when there is a multiplicity of parties.

Question 3

In your experience, what are the costs of mediation?

There are a number of different costs involved in a mediation: there are the fees of the mediator, which in the case of experienced mediators in London can be in the region of £3,000 to £5,000 (plus VAT) for the preparation and conduct of the mediation (in the provinces the cost seems to be in the region of £800 to £2,000). There are the legal fees for advisers on both sides which may include barristers' fees (when the amount will depend on the type of firm used and the complexity of the issues). There is also the expense to the employer's business in the sense of the time taken up by the employers' staff that prepare for and attend the mediation. The costs for the venue should also be borne in mind, although solicitors for one of the parties often agree to bear these costs in return for having the mediation on "home turf".

Even though the starting point in commercial mediation agreements is that the mediator's fees will be split between the parties, it is often the case that the employer ends up paying these costs as part of a settlement.

Question 4

What do you consider to be the advantages and disadvantages of mediation?

We consider the advantages to be as follows:

- Mediation offers flexibility of outcome in contrast to the usual win or lose outcome of litigation and so there could be some element of 'victory' for each party. It also gives parties more control over the process and the outcome than litigation. Solutions can range from agreed references, employers agreeing to undertake certain health and safety checks and reports at their business premises, and concessions on the part of the employer that the former employee's disciplinary record would be expunged.

- The fact that mediation can be without prejudice and confidential in nature, combined with the presence of an independent, skilled, facilitative third party, often results in a less combative, stressful and disruptive process than either court/tribunal proceedings or (for the most part) direct negotiations between the parties and their advisers. It can thereby maintain the employment relationship (where this still exists) far more effectively than an adversarial process.

- It enables Claimants in particular to "have their day" and feel that they have been heard, while also allowing Respondents an occasion to "vent".

- The saving of costs and the time-saving potential of mediation, both for clients and in terms of management time, can be significant advantages. Many mediations are arranged within a few weeks, and can be arranged more quickly even than that. A mediation also usually lasts for just one day.

- Finally, mediation has a high success rate – some 75%, and so there can be considerable confidence that it is a proven way of resolving disputes.

We consider the disadvantages to be as follows:

- Mediation is not always commercially viable in relation to low value claims. Many see the saving of costs as an advantage of mediation, but others see cost as a factor holding back the use of mediation. On occasions the costs of preparing for mediation are comparable to those incurred in preparing for a tribunal and thus it is too risky, particularly in smaller or more straightforward cases, to participate in mediation if there is any doubt about the likelihood of a successful outcome.

- The fact that either party can walk away at any time during the mediation and the non-binding nature of mediation, are seen by some as significant disadvantages. The fear of some parties is that having committed the time and resources to the process of mediation, the other side could still refuse (however unreasonably) to agree a settlement, and continue the process in the employment tribunal. Best practice is to sign off a mediation agreement and/or compromise agreement on the day.

- Some parties are nervous about being seen to be in a weaker bargaining position if they are the party suggesting mediation. There is also the fear that mediation may be used, cynically, as a dress rehearsal for trial, although in ELA's experience, litigants who voluntarily agree to mediation usually enter into the proceedings in good faith.

- Where mediation is forced upon the parties, through fear of adverse costs orders, as can occur in High Court litigation, then a successful outcome is less likely. There is a risk that the process then becomes a box ticking exercise and the parties do not genuinely engage.

- The process is heavily dependent on the quality of the mediator. The best and most experienced mediators are able to secure the trust and confidence of all the parties, a vital factor. A mediator who lacks experience or training can cause more damage and hinder, rather than promote, a settlement. This is particularly important given that the mediation process involves each party surrendering a degree of control to the mediator.

- Perhaps most importantly there is still a degree of ignorance about mediation; those who have not actually been involved in a mediation (including some advisers) are often reluctant either to promote it or agree to it as a means of dispute resolution.

Question 5

What barriers are there to the use of mediation and what ways are there to overcome them?

As stated above, a lack of awareness about the benefits of mediation and a lack of mediation experience among professional advisers are seen as barriers to mediation, but this is changing at an increasing rate. There is also a lack of recognised and recommended mediators specifically for employment disputes. Many lawyers who are trained mediators offer their services but have relatively little experience of being mediators and mediation is seen simply as an adjunct to their core skills. The main way to deal with these difficulties is to continue to "educate" all users of the tribunal system in the process of mediation, to encourage employment judges to promote its use as part of their case management functions and possibly to encourage commercial providers of mediation services to publicise the details of those mediators with particular experience of employment cases.

There are also doubts about mediation's effectiveness and a perception exists among those advising employees and trade unions that mediation can be used by Respondents as a delaying tactic and a convenient way of allowing employers to bury their bad practices in a confidential setting. There is no ready panacea for this but we are aware of joint mediators being appointed in disputes which involve trade unions and this may assist in removing this suspicion about the process.

Some litigants are put off by the costs of mediation. This particular issue to some extent can be met by the use of *judicial* mediation where there are no mediators fees and where the judge can clearly be seen as being independent. There has of course been such a process in existence for some time. While it has a number of benefits, criticisms of which we are aware include the restrictions on time in that at a certain point in the day the mediation has to come to an end, whereas with a commercial mediation, the parties can continue for far longer. Similarly, the experience and qualities of the judicial mediators were seen as varying considerably. There were case examples noted where the judicial mediation process had broken down entirely (after, say, 2 hours) as the parties were pushed too quickly to their bottom line and a more experienced private mediator would have kept the parties in play. Inevitably in any mediation there will be a time during the course of the day where one or other of the parties is threatening to walk out. A good mediator recognises this and strives to stop this happening. More time for a judicial mediation and more training for the mediators are seen as essential.

Some of our members are frustrated by a lack of a standardised approach to judicial mediation across the employment tribunal regions. In certain regions if a case was listed for three days or more, judicial mediation would be offered. However, if a case, on similar facts, was listed for two days judicial mediation would not be offered.

Nonetheless, despite its faults, we believe the judicial mediation scheme is generally to be welcomed, and that it is a shame that the current feeling in Government appears to be that the extension of the scheme was not warranted, in view of the additional funding required. We carried out a survey of our members in relation to the then judicial mediation pilot and we sent a copy to the then President of the Employment Tribunals (England & Wales) HHJ Judge Meeran on 27 August 2008. In our covering letter we noted that 43% of those of our members who replied "strongly agreed" that Judicial Mediation had performed well and further 24% "slightly agreed", so that altogether 67% gave their approval for the (Judicial) Mediators' performance.

Question 6

Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)

We are aware of those provided by:

- Organisations such as CEDR, although they appear to have limited numbers of employment mediation experts;
- ACAS;
- Independent operators such as consultants who tend to form the largest category, such as In Place of Strife and Independent Mediators Ltd;
- Lawyers who have been trained as mediators;
- ADR Group;
- Various barristers chambers;

- An increasing number of HR consulting firms who advertise mediation as a solution to pre-litigation workplace disputes.

Question 7

What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)

The advantages are as follows:

- In a limited number of situations, where the dispute has not already broken the trust and confidence between employer and employee, an independent person can assist the parties in resolving matters between them. However there is no data of which we are aware, as to the extent to which this has been successfully done. Anecdotal evidence seems to suggest in-house mediation works better where the dispute is between two employees, rather than the employee and the employer.

- In-house mediations may be quicker to organise than third party mediations, and an in-house mediator will be familiar with the industry specific issues involved. The matter can also be handled confidentially within an organisation. The associated costs should be less than if third parties are engaged to advise or mediate.

The disadvantages are as follows:

- The mediator may not be trusted by the employee. If a member of Human Resources takes on the role of mediator, they could be seen by the employee as being unduly influenced by the company's view. As noted above, it is possible to operate reciprocal arrangements for the provision of in-house mediators if independence is thought to be a particular issue.

- The mediation process remains formal and while being less expensive than other "conventional" mediations, can also continue to be costly in terms of management time. Finally the solutions for in-house mediation schemes are often, in reality, limited because their remit may be limited to considering redeployment or issuing an apology. However, we acknowledge that in principle there is no reason that wider remedies could not be considered.

- At an early stage of a dispute, the mediator may find it difficult to conduct a reality-testing exercise with the parties simply because the issues may not have sufficiently "matured". Also the ability to achieve a settlement with teeth attached to it may be difficult where no litigation has been commenced and may be limited to letters recording agreements which could be broken without real recourse. Nonetheless some intervention here is likely to be better than none at all.

Compromise Agreements

Question 8

To what extent are compromise agreements used?

In ELA's view, at the pre-litigation stage, compromise agreements are very commonly used for middle to senior level employees where one or both of the parties wish to end the employment relationship. However, there are barriers to the use of compromise agreements (see further below regarding “without prejudice” issues).

It is common practice for senior and Board level employees to be offered exit packages through a compromise agreement in circumstances where the employer has lost confidence in the employee, particularly if only a claim of unfair dismissal is involved. Employers will not often go through the usual procedures required by legislation to deal with a dispute with such an employee, largely as the amount of compensation offered under the compromise agreement tends to exceed the compensation which could be gained through a Tribunal claim. In some organisations, it is common practice to pay compensation under a compromise agreement to avoid the employer having to take any procedural steps at all to deal with an employee issue and in those circumstances the compensation would generally be set at a level which discourages the employee from declining the offer.

Compromise agreements are less commonly used for junior employees with lower salary levels, largely for reasons of cost (detailed further below) as against the relatively low value of claims for lower salaried employees. The exception to this would be where a low paid employee has a potentially high value claim, or where the nature of the potential claim could cause reputational risk to the employer. Employers do not generally propose settlement under a compromise agreement where they feel they have a strong defence to a potential claim. This is largely so as to avoid creating the impression for other employees, that they will pay out compensation for spurious claims. A balancing exercise is usually carried out to

take account of the merits of the potential claim and the time and cost involved in defending the claim as against the reputational issues at stake.

There are circumstances in which compromise agreements are used before matters have reached the stage at which there is any real "dispute" between the parties. For example, compromise agreements are often used in redundancy situations where an employer wishes to offer an enhanced redundancy package to its employees. In those circumstances, employers will often collectively inform and consult with employees/employee representatives in relation to redundancy pay and agree that employees will receive an enhanced redundancy payment in return for signing a compromise agreement. This enables the employer to gain greater certainty that no claims will arise from the redundancy exercise, in return for paying the additional sum to the employee. A barrier to the use of this technique is the perceived additional time and cost involved in employees obtaining independent legal advice on the compromise agreement.

Once Tribunal litigation has been started and the parties have agreed to settle the claim, compromise agreements can be used to formalise the agreement.

Question 9

What are the costs of these agreements?

Many larger employers who have a large or sophisticated Human Resources team or in-house employment advisers will deal with compromise agreements without recourse to external legal advice. They may only get outside advice if the matter is particularly complex or there is a high reputational risk factor. The cost to employers is in terms of the time incurred by their employees in dealing with it.

Where external advice is sought, we believe it would take approximately 3 – 6 hours for an adviser to deal with a standard compromise agreement situation for an employer client. This would include drafting a compromise agreement from a standard precedent, advising on the issues, and dealing with any negotiations with the employee's adviser. Where more senior employees are involved, the time incurred can increase, as more complex advice may be required on issues such as tax, how the package is structured, share schemes, director's duties, and dealing with ongoing restrictive covenants or the duty of confidentiality.

Employers will invariably make a contribution towards the legal fees of the employee when they have offered a compromise agreement. This contribution is usually limited to between

£250 and £500 plus VAT. For more senior employees, the contribution can be larger upon negotiation, in some cases up to several thousand pounds. The purpose of the restricted limit is to enable the employee to obtain the requisite legal advice on the effect of the compromise agreement, whilst ensuring that if the employee wishes to take legal action against the employer or enter into protracted negotiations with the employer over the terms of the agreement, the employee would need to pay for that legal advice from their own funds. In most cases, this is a strong deterrent to employees against entering into negotiations with their employers on the terms of the compromise agreement and against declining the offer of the compromise agreement in order to take legal action against employers.

In ELA's experience it usually takes approximately 2 – 4 hours to advise an employee in relation to a standard compromise agreement. This includes reviewing the compromise agreement itself and the employee's contract of employment, meeting with the employee to discuss any issues and taking the employee through the terms of the compromise agreement, negotiating minimal amendments to the compromise agreement with the employer and dealing with the administrative tasks of completing an Advisor's Certificate and sending copies of the agreement to the parties for signature. For employment specialists in the larger law firms, it is unlikely that they are able to provide this level of advice to employees within the fees contribution made by employers. Many such law firms are reluctant to take on such work for this reason. Regional advisers are more likely to be able to provide the advice within the employer's contribution, but clearly the extent of the advice provided will take account of the size of this contribution. Some advisers cap their fees at the level of the employer's contribution so that employees do not need to contribute. In other cases, where the contribution has been exceeded, the adviser will seek any additional fees from the employee.

Where there is a large scale redundancy exercise involving the use of compromise agreements, some employers will collectively consult with employees and agree for a single firm or several firms to provide independent advice to employees. This can be more cost effective from both the employer and employees' point of view.

Question 10

What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?

The advantages are:

- the “clean-break”;

- receipt of legal advice by the employee (which may only cover the minimum required advice as to the terms and effect of the compromise agreement in those cases where a small sum is offered as a contribution towards legal fees); and

- the ability to agree exit terms as part of a binding agreement, in particular post-termination and confidentiality restrictions, announcement wording and provision of references.

The disadvantages are:

- the cost to employers (who in almost all cases pay a contribution to the legal expenses of the employee);

- the inability to use "blanket" waiver of claim wording and the consequential need to list all potential statutory claims until the relevant statutory provisions because of the requirement that a compromise agreement must compromise "the particular proceedings" and accordingly, flagging potential claims to employees;

- the inability to waive certain types of statutory claims, for example, claims in relation to failure to inform and consult with appropriate representatives on collective redundancies;

- confusion around the perceived drafting error of section 147 of the Equality Act 2010 i.e. whether independent legal advice excludes advice by an employee’s lawyer; and

- the uncertainty as to when the first move to initiate settlement discussions is such as to attract the protection of "without prejudice" privilege (*BNP v Mezzotero* [2004] IRLR 508) in cases where it is unclear whether a "dispute" has yet arisen, and the circumstances in which the contents of without prejudice conversations regarding discrimination claims can be admitted in evidence where alleged discriminatory comments in those conversations are alleged to constitute "unambiguous impropriety";

- potential issues around the tax treatment of the legal costs contribution. We are aware of instances where under the tax concession for legal fees on termination of employment (Extra-statutory tax concession A81) HM Revenue and Customs have been reluctant to agree that the concession applies, particularly where the level of fees is very high. This could be a further barrier to the use of compromise agreements in certain circumstances. A clear statement from HM Revenue and Customs on how they approach the various types of payments in compromise agreements would be helpful in this regard. (The extra-statutory concession is currently in the course of being given legislative effect by way of the Draft Enactment of Extra-Statutory Concessions Order 2011).

ELA does not consider that the advantages and disadvantages vary materially between types of case.

Question 11

What barriers are there to the use of Compromise Agreements and what ways are there to overcome them?

The barriers to use are listed as disadvantages in the response to Question 10 above. ELA's view as to the ways to overcome them are as follows:

- retain the requirement to obtain independent legal advice but abolish the technicality of listing all potential statutory claims and relevant statutory provisions, thereby permitting a blanket waiver of all statutory claims, as for waiver of contractual claims. It would be open to an employee to carve out any particular claims and it is envisaged that the practice of carving out latent personal injury claims and accrued pension rights would continue; and

- permit a waiver of all types of statutory claims.

ELA's view is that the cost of compromise agreements to employers, while potentially a barrier, is a necessary circumstance. Also, and importantly, ELA believes the issue with Section 147 of the Equality Act ought to be clarified and resolved as soon as possible, and if so, will no longer prove to be a concern.

ELA recognises that the current uncertainty in relation to the application of the "without prejudice" rule, although sometimes unhelpful in terms of resolving disputes before a clear

dispute is in existence, may not be easy to fix via a workable drafting solution. It is also noted that the EAT has in practice narrowed the area of that uncertainty[1]. However, one idea might be to provide that the contents of an initial approach to an employee (where a "dispute" will not at that time, strictly speaking, exist) will attract “without prejudice” privilege if certain conditions are met (e.g. a written request is made to an employee in a prescribed form followed by a meeting, which is in turn followed by a written confirmation of the proposal).

Early Conciliation

Question 12

We believe that the proposal for early conciliation will be an effective way of resolving more disputes before they reach an employment tribunal. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

Our view is that early conciliation of claims as proposed would not in fact be an effective way of resolving more disputes at the pre-tribunal stage, and would create problems. Our reasoning is set out below.

Unfortunately in our experience the service provided by ACAS is currently of variable quality. We believe this is likely to be a reflection of the level of their funding arrangements. A number of us have experience of clients seeking guidance from ACAS which has not been helpful. (For example, clients are sometimes advised by ACAS to resign, without knowing the legal implications of doing so.) Prior to bringing a claim, Claimants require advice on their options; the likely prospects of success; the likely award in their particular case; and the costs and timescale of bringing a claim: anything less is not likely to progress the interests of justice. We question whether ACAS presently has the skills and resources to provide this information on anything like a sufficiently consistent basis.

One point to be verified is whether ACAS would have professional indemnity insurance in the event that their advice were found to be negligent. No mention is made in the proposal of liability issues around the nature of the advice from ACAS.

[1] *Woodward v Santander UK Plc* [2010] IRLR 834

The proposal seems to suggest (in the final paragraph of page 21) that ACAS will have an advisory role to supplement its conciliation role and that it would be advising primarily Claimants; this, if true, would be unfortunate. Unrepresented Respondents would be at disadvantage in the process, in particular SMEs who already struggle in the current economic recession. Additionally, if ACAS are seen as primarily Claimant advisers this will undermine the impartiality of the conciliation process which is vital if it is to succeed. In fact we were told by ACAS at a meeting at BIS on 6 April 2011, that it is not proposed that ACAS will have such an advisory role at all. If this is indeed the case this ought to be clarified, so that all parties – including ACAS officers themselves – understand their roles.

The proposal for ACAS to provide prospective Claimants and Respondents with statistics has the potential to be particularly misleading. The median award may have no relevance to the individual case at hand. Inevitably, the median award will be much lower than might be awarded in many high value claims, and therefore people who could potentially receive significant awards of compensation could be dissuaded from bringing their case. Conversely, people with poor or low-value claims could be encouraged to bring them, and may refuse to settle, because they are similarly ill-informed. Indeed the introduction to this section states that, following contact with ACAS, fewer than one third of those identified as likely to lodge a claim went on to do so; we have a concern that in a significant number of cases this could be because people with perfectly good claims were given an overly negative prognosis.

There are likely to be problems regarding limitation, leading to further litigation (as with the now repealed statutory grievance and disciplinary procedures). For example, such issues could well arise if an employee came to ACAS on the last date for issuing a claim.

We believe that the way to alleviate the burden on the ETS is firstly for Tribunals to act more robustly in managing claims. We believe there are efficiencies to be made even in a relatively efficient Tribunal such as Bristol. For example, case management discussions could be used in all but straightforward claims; and parties could be required, with judicial assistance, to identify and clarify the claims and the issues. We can also see merit in requiring parties to write to the Tribunal and confirm that all orders have been complied with, or if not, the reasons for non-compliance. However, we believe this requirement would either need to be mandatory only where parties are legally represented, or a formal document would need to be sent to all parties setting out their obligations to the Tribunal. Secondly we believe that resources would be better invested in promoting the use of mediation, including judicial mediation, rather than expanding the conciliatory role of ACAS.

More generally we see significant advantage for parties and practitioners in standardising the management of claims across all Tribunal regions. At present there are wide variations, and this does nothing for the reputation of the Tribunal system as a whole. Standardisation could be achieved through the issue of a Practice Direction by the President of the Tribunals, although this would no doubt require a consultation process to achieve the optimum result.

Question 13

Do you consider that early conciliation is likely to be more useful in some jurisdictions than others? Please say which you believe these to be, and why.

Early conciliation is likely to be more useful in the very straightforward claims such as failure to pay wages. There the only required remedy sought is financial. We consider that it is unlikely to be useful in resolving discrimination, unfair dismissal, equal pay, and whistleblowing claims where the facts (and in some cases the legal issues) can be complex, and where declaratory relief can be an important potential remedy for the Claimant.

Conversely, unlike mediation, conciliation (including early conciliation) could have some success in resolving cases where there are multiple parties on account of ACAS' existing arbitration function in resolving trade union disputes, where some officers will have a level of knowledge and experience of dealing with such cases.

Question 14

Do you consider ACAS' current power to provide pre-claim conciliation should be changed to a duty?

It is not easy to see how such a change would work in practice. On the assumption that what is meant is that, if its assistance is sought, ACAS is *obliged* to provide conciliation services, then the primary requirement here would seem to be the need for adequate funding to enable it to discharge the obligation. If that is in place then ELA would regard it as a positive development to see the services of ACAS being made available to parties at a stage before litigation has been commenced, and expressing that as a duty to respond positively if its assistance was called upon, would be desirable. The current requirement for the claim to be one which could be the subject of employment tribunal proceedings, should be sufficient to ensure that if ACAS is to be under such a duty, it will not have to concern itself with claims outside this category. If financial constraints militate against this, ACAS could make use of its fee charging powers.

Question 15

Do you consider ACAS duty to offer post-claim conciliation should be changed to a power?

This change would inevitably mean a reduction in the available means of resolving disputes otherwise than through the Employment Tribunal. If the policy direction is to encourage early resolution of claims without the need for a hearing before the Employment Tribunal, then as presently framed, ELA would want the duty to offer conciliation to be retained in the same format as it is currently limited. To alter its function to a power would not appear to offer much in the way of positive development in this respect.

Multiples

Question 16

Whilst we believe that this proposal for early conciliation will be an effective way of resolving more individual, and small multiple, disputes before they reach an employment tribunal, we are not convinced that it will be equally as effective in large multiple claims. Do you agree?

Whilst recognising there are some logistical problems in conciliating large multiple claims, these, we would suggest, are primarily an issue for the Claimants' representative(s), in terms of communicating and obtaining instructions. We can see no reason in principle why the issues raised in claims involving large numbers of Claimants should be inherently more difficult or complex than those involving smaller numbers. ACAS has a long history of successfully deploying its services speedily and effectively in large scale industrial disputes and there would appear to be few reasons why this should not also be the case in cases such as these. Even if conciliation did not bring about a pre claim settlement, it may still have been useful in terms of helping the parties to refine the issues between them and identify areas of common ground.

Forms

Question 17

In relation to the proposal to have a shortened version of the ET1 form submitted to ACAS with key details of the case, we would welcome views on:

- **the contents of the shortened form**
- **the benefits of the shortened form**

- **whether the increased formality in having to complete a form will have an impact upon the success of early conciliation**

In our view the primary requirements for the short form should be:

- that it sets out the full extent of the claim;
- that it identifies all of the parties; and
- that it provides sufficient factual detail to enable the ACAS officer to evaluate whether it is a claim that may form the basis of employment tribunal proceedings and, if it is, a general idea of the strength of the claim.

It will be important to ensure that, if conciliation is successful, it is effective to address all the issues between the parties so as to ensure that litigation is avoided.

Overall we see the requirement as beneficial and probably essential if pre claim conciliation is to be manageable in terms of time. It would impose some discipline on the parties to think in reasonably clear terms about their case, and insofar as it has an impact on conciliation it is likely to be only positive.

Complete Claims

Question 18

In relation to "complex claims" which can involve a number of elements covering more than one jurisdiction, we would welcome views on:

- **the factors likely to have an effect on the success of early conciliation**
- **whether there are any steps that can be taken to address those factors**
- **whether the complexity of the case is likely to have an effect on the success of early conciliation**

Factors likely to have an effect on the success of early conciliation

The key factor affecting the likely success of early conciliation is the expertise of the ACAS appointed conciliator and his/her ability to give appropriate advice (and time) to the parties in the conciliation. The conciliator should also have access to sufficient information about the dispute.

Steps that can be taken

In order for the conciliator and the parties to have access to sufficient information about the dispute, early conciliation should take place after the ET1 and the ET3 have been submitted (see the response to question 19 below).

Ideally the ACAS officer would be appropriately trained to be able to ask each party some pertinent questions about their case, perhaps to instill a note of realism when this might appear to be lacking.

The complexity of the case

As the consultation paper appears to accept, complexity is not necessarily related to the number of jurisdictions under which a claim is brought. Rather, it is a function of the facts of each particular case.

More complex cases are less likely to be able to be settled via early conciliation because it may be more difficult:

- To ascertain the merits at an early stage because disclosure will not have occurred, and the strength of the employer's defence may well be unknown;
- To quantify any losses; and
- To conciliate such claims, particularly claims involving allegations of discrimination, which can be more emotive.

We believe these potential difficulties can be obviated by, in particular:

- a clear statement from the Claimant about the facts underpinning his or her claim, and the allegations being made; and
- an early indication from the Claimant as to his or her current employment status and a rough idea of what compensation is being sought.

We consider that this information ought to be required as part of the proposed early conciliation mechanism envisaged in the consultation paper.

ELA does not believe that any claim, however complex, ought automatically to be taken outside whatever early conciliation mechanism is adopted.

We would also note that we are concerned about the impact that removing employment advice from the scope of services that are currently eligible for legal aid may have on the early settlement of claims, whether by early conciliation or otherwise.

In our experience good quality legal advice from sources such as law centres can assist Claimants by ensuring that Claimants have realistic expectations, and that they receive advice on the merits of their claims. This thereby ensures effective deployment of tribunal resources. Our concern is that should funding in relation to employment advice be removed from these centres, there may be an increase in unmeritorious claims.

"Stop-the-clock" mechanisms

Question 19

In relation to the proposed "Stop-the-Clock" mechanism, do you consider that the period of one calendar month is sufficient to allow early resolution of the potential claim? If not, please explain why.

One calendar month should, in ELA's view, be sufficient either to resolve the potential claim or for the parties to be in a position to know whether conciliation is likely to be achieved.

If a longer period is desired by the parties, and the ACAS conciliator agrees, then ACAS should be empowered to extend the time for conciliation to a maximum of two months. We would suggest that guidance should be issued to ACAS officers that this power should be used sparingly and only where there is a real prospect that the extension would result in settlement.

We strongly recommend that the one month period for early conciliation commences after the ET1 and the ET3 have been submitted, and not before. This will enable both parties, and the conciliator, to be clearer about the claims and the issues and thereby increase the chances of success. It would also avoid both the need for a short form claim form and the inevitable issues that will arise with the current proposal as to whether a claim has been

submitted in time where Claimants confuse the process of contacting ACAS to ask them to conciliate, with the process of lodging a claim with the Employment Tribunal.

We also consider that the Tribunal Service has valuable experience in the administration of claims being submitted, and that this is to be preferred over the proposed mechanism whereby ACAS receives a short form claim form and time-stamps it.

We further recommend that, during the one month period, case management discussions should continue to be listed so that they can occur at any time after the expiry of the one month period. This would avoid unnecessary delays in the event that conciliation is unsuccessful, and should help avoid potential abuse of this mechanism.

We were concerned, in this regard, to hear at the BIS meeting we attended on 6 April 2011, that the one month period is apparently intended to operate as a "cooling off" period irrespective of whether both parties wish to settle. Given the delays in achieving resolution of claims that already exist, we feel that this will only exacerbate this issue.

Question 20

If you think the statutory period should be longer than one calendar month, what should that period be?

We consider one month is sufficient, with a possible extension to two months if agreed by both parties and the ACAS conciliator.

Question 21

What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable at hearings other than pre-hearing reviews?

In our view, the benefits of being able to strike out at all stages of the litigation process outweigh the risks. In particular, there is considerable benefit in such a power being available at a Case Management Discussion ("CMD"). We believe there is considerable anecdotal evidence that effective case management is being stifled by the current rules in this respect as they require a separate hearing to be listed to consider a strike out application. This is particularly so where the Claimant has not had the advantage of legal representation and may have brought claims that are inapposite or unsustainable.

A further advantage would be the availability of strike out as a sanction where a party has disregarded orders or case management directions. There is currently an unwillingness to strike out claims. In our view, making this power more available, would help redress the balance as currently there is too much tolerance of delay and non-compliance with orders which wastes the time and costs of the parties and the Tribunal.

The principal risk of the greater availability of the power of strike out is that a party, particularly an unrepresented party, could find itself having to defend an oppressive strike out application or ambushed by an application made without notice. A party may be subjected to this risk by the Tribunal acting of its own motion. However, in practice, the Tribunal tends to be reluctant to strike out any but the clearest cases and Employment Judges are accustomed to ensuring that the Tribunal procedure is accessible to unrepresented parties and where necessary explaining the relevant legal principles. Further, this could be prevented by use of an appropriate safeguard whereby the party threatened with strike out is given notice in advance that the other party has sought such an order.

A further risk is that the Tribunal may strike out a case where the Claimant cannot show there is a fair prospect without disclosure from the Respondent. However, there are numerous opportunities for Claimants to obtain information in advance of disclosure, for example the questionnaire procedure (although this does not apply to unfair dismissal, which is still the most common claim), but it is considered unlikely that many unrepresented Claimants will make use of such procedures. It is also considered that, as a matter of practice, Tribunals are astute to consider the burden of proof provisions in discrimination claims and the neutral burden in unfair dismissal cases.

There is also a requirement to provide, upon request, written reasons for a decision. This would include a decision to strike out a party's case or part of a party's case. This means that the Employment Judge has to be able to justify his or her decision and the parties can review the reasoning. It is preferable that the power of strike out is made more widely available provided application of the rule has to be justified rather than that a party is leant on at a CMD to withdraw part of its case or a head of complaint to circumvent the current non-availability of strike out at that stage.

Under current rules (Rule 18(9)) the Employment Judge who conducts a Pre-hearing Review ("PHR"), at which a deposit order is made, may not sit at the full hearing. This is to ensure that his or her impartiality is not called into question because a preliminary view has been

taken at a PHR. We do not consider that this principle should apply if a strike out order could be made at other hearings such as CMDs otherwise it will probably place an additional administrative burden on the tribunals.

Question 22

What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable without hearing the parties or giving them an opportunity to make representations?

In our view, such a power could confer a benefit in permitting the Tribunals to filter, at an early stage, cases which are clearly hopeless. This would not only save the other party the expense and time of litigating their case and attending hearings; it would also free up the Tribunal's stretched resources to deal with more meritorious cases.

An example of a situation where such a power might save time and expense is a claim for unfair dismissal which is significantly out of time, or where the Claimant lacks one year's service. Currently, such a claim would be accepted and the Respondent would have to file a response. A CMD may be listed and the parties would have to attend. A PHR may be ordered on the point of jurisdiction; however it is possible that if a full merits hearing would last only a day so that little time would be saved by a PHR, the matter would be ordered to proceed to a full merits hearing. In these circumstances, the greater availability of the power of strike out may save significant Tribunal time as well as the costs (in this example) of the Respondent.

However, the principal risk we identify is of a diminished access to justice. Because of the importance of this principle, we consider that adopting such a rule would be a step too far.

Another disadvantage of the power being exercised without a hearing is that it may result in an overwhelming demand for reviews, where the affected party seeks to have the strike out varied or set aside. On balance, although the availability of such a power would help to reduce the extent to which parties to unmeritorious cases are forced to incur substantial cost, set out their cases and attend hearings with all attendant loss of confidentiality, we prefer the view that the issue is better addressed under the procedural revisions suggested under Question 24.

Finally, there is a risk that such a power might be challenged as being incompatible with Article 6 of the ECHR and the Human Rights Act.

Question 23

If you agree that the power to strike out a claim or response (or part of a claim or response) should be exercisable without hearing the parties or giving them an opportunity to make representations, do you agree that the review provisions should be amended as suggested or in some other way?

We do not agree that the power to strike out a claim or response (or part of a claim or response) should be exercisable without hearing the parties or giving them an opportunity to make representations. We considered whether the review procedure should be available where the parties have made representations. However, the right of appeal is sufficient to safeguard access to justice while preventing the procedure from simply adding a layer of litigation.

We would add that the tribunals should be proactive to make sure that the strikeout powers do not fall into disuse. They also need to be alert to the possibility that unscrupulous employers might use the strikeout option to unreasonably delay a claim.

We would also point out the potential issue with regard to Article 6 of the ECHR - as referred to above (in our reply to Question 22).

Question 24

We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: the frequency at which Respondents find that there is a lack of information on claim forms, the type/nature of the information which is frequently found to be lacking, the proposal that "unless orders" might be a suitable vehicle for obtaining this information, the potential benefits of adopting this process, the disadvantages of adopting this process, what safeguards should be built in to the tribunal process to ensure that Respondents do not abuse the process, what safeguards/sanctions should be available to ensure Respondents do not abuse the process?

In our experience the lack of information and detail contained in the ET1 is not a particularly big problem. Also, given the ability of a Respondent to file a response subject to a request for further particulars, the concern would be that the proposed ability to defer filing an ET3

pending those particulars could be used as a means by which Respondents could put pressure on Claimants, particularly those who are not represented.

Information is most often lacking where an ET1 is submitted by a litigant-in-person who has not had the benefit of professional guidance. In these cases, there is often a lack of detail provided in the current box 5.2 of the ET1 or, where detailed information is provided, this may not provide key or relevant information that would enable the Respondent to provide a full response in the ET3. Similarly, litigants in person may well not know what their cause of action is.

For example, in a case involving one of the members of this working party, where a large number of employees were made redundant, many of the ET1s simply said "failure to consult". No further clarification was provided as to what relief was being sought. By way of further example, if such a Claimant has identified their claim to be one of 'discrimination' there is often no detail to establish whether the Claimant in fact falls within one of the protected characteristics. Having ticked the relevant box at 5.1, they then fail to include details of their race/religion/belief etc making it difficult to determine whether the Claimant is actually entitled to bring the claim. Other examples are details of the provision, criterion or practice relied on in indirect claims and key or specific dates in discrimination claims.

However we do not believe the use of 'unless orders' is necessary to resolve the problems highlighted. We assume that this proposal would involve the introduction of a new power aimed specifically at rectifying incomplete ET1s, with the threat of the defaulting party being debarred from prosecuting their claim if they do not comply. Given the existing case management powers of tribunals such a power in fact already exists, albeit it would be very unusual to deploy it at this stage of the proceedings. That apart, details are also often lacking in ET3s filed by Respondents and often the lack of information, whether by Claimants or Respondents, is not an intentional omission, but arises from perhaps a lack of guidance and assistance.

There are other means of ensuring key information is provided on the ET1, by making simple amendments to the form itself. These are as follows:

- We suggest better guidance notes be provided on the form itself. At the moment the guidance states only "*Please set out the background and details of your claim in the space below*" and gives only two examples. A more comprehensive description of what information was required from the

Claimant would assist in ensuring key information is not omitted by the Claimant.

- We would prefer to see the format of the ET1 changed, in particular that of box 5.2. By way of suggestion, perhaps the use of tick box options, or a questionnaire format would assist Claimants to know what information was needed.

- There are also parts of the ET1 that currently can be left incomplete, for example the details required at box 3 and 4. By making it compulsory to include all the information requested here, further key information would be provided to the Respondent. However, we do not propose that a failure to provide this information would render an otherwise valid claim invalid.

Were these changes to be made there would still be the option for either the 'innocent' party or the tribunal to use the existing case management rules to seek production of appropriate particulars with the use of "unless orders" as a last resort rather than (as appears to be contemplated) as a first resort.

Any new process should, in ELA's view, contain obligations on both Claimants and Respondents, with sanctions for both defaulting Claimants and Respondents. Just as a lack of information provided by a Claimant can cause difficulties for the Respondent, equally a lack of information or a failure to provide a detailed response can cause problems for the Claimant. We are concerned that, unless the requirement (and any sanctions) apply equally to Claimants and Respondents, the use of the suggested unless order could be abused and could be used disproportionately as a threat against Claimants.

As envisaged in the consultation paper, this process could also be used as a delaying tactic by Respondents. If such a process is introduced, there needs to be clear guidance about when and how such a process can be implemented and enforced against a Claimant. Secondly, we would suggest that there should be cost implications for any Respondent who is considered by the tribunal to have abused the process, either (at the discretion of an employment judge) in the form of an immediate costs order or in the form of a warning from the tribunal that it considers that the Respondent's behaviour is unreasonable and could be taken into account in any future discussion on costs following the conclusion of the main hearing. We appreciate that it will quite a step for a Tribunal to make an immediate costs order, particularly in the context of the current position whereby Tribunals appear fairly

reluctant to use their powers under the present regime to award costs, however we believe that there may be some instances where such an order is justified.

CHAPTER 2: MODERNISING OUR TRIBUNALS

Part A – Tracking

Question 25

Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

Yes.

We can see that there is some merit in this proposal as there is no particular reason why such an order can only be made at a PHR and it may be more convenient for the parties for the matter to be dealt with at a Case Management Discussion. However, if this were to be added to the list in Rule 10 of the 2004 Rules, there would have to be appropriate safeguards. For example, the party threatened with a deposit order would need to be given notice in advance that the other party was seeking to apply for such an order. At present notice of a PHR must be sent to every party at least 14 days before the date of the hearing, and they must be told that they have the opportunity to submit written representations and to advance oral argument (Rule 14(4)). Such procedures ensure that the party against whom a deposit order is being sought has adequate time to defend the application.

A change in the rules may also cause another difficulty for Employment Tribunals. At present, under Rule 18(9) of the 2004 Rules the Employment Judge who conducts the PHR may not sit on the substantive hearing. The reason for this is that the Employment Judge's impartiality may be called into question if the Judge has already formed a preliminary view at a PHR. This principle would have to apply if a deposit order could be made at a CMD or some other hearing. This may place additional administrative burden on Employment Tribunals, which would be contrary to the policy underlying the proposals.

Question 26

Do you agree that employment judges should have the power to make deposit offers <u>otherwise than at a hearing</u>? If not please explain why?

No. We consider that this would be a step too far. By its very nature, a deposit order requires the Tribunal Judge to form a view on the facts of a case. In order to do this, the parties should be given every opportunity to present oral and/or written arguments in relation to their position. In addition, before making a deposit order, a Tribunal Judge is required to consider a party's ability to pay a deposit order (Rule 20(2) of the 2004 Rules) and at the very least this would require the Employment Judge writing to the relevant party. This would increase rather than reduce the administrative burden on tribunals and involve further delays. Further, such a decision may be considered to amount to a preliminary judicial determination of the matter and may open up the possibility of challenges being made under Article 6(1) of the Human Rights Convention, even if the party against whom the Order was made could apply to have it revoked by way of review. In addition, such an approach could put unrepresented Claimants at a disadvantage, as they may not fully understand the reasons for or the significance of such an Order.

<u>Question 27</u>

Do you think that the test to be met before a deposit order can be made should be amended beyond the current "little reasonable prospect" of success test? If yes, in what way should it be amended?

General Thoughts/Considerations

The procedure in relation to deposit orders has remained broadly unchanged since 2001 when the test changed from "no reasonable prospect of success" to "little reasonable prospect of success". That change imposed a lower threshold for making such orders and, in our view, sensibly made a distinction between the test of deposit orders and that for striking out a claim. The new rule under Rule 20(1) was introduced in 2004 and followed from the case of *HM Prison* v *Dolby*[2].

The Gibbons report recognised that there is a generally held external view that Employment Judges are reluctant to use the deposit and strike out powers available to them and they are

[2] [2003] IRLR 694

not applied consistently[3]. The Gibbons Report recommended that existing mechanisms including deposit orders should be used effectively and consistently wherever possible[4]. The Report went on to say that further consideration should be given to how consistency in this context can be encouraged, for example through the wider use of practice directions. We endorse this approach.

There is little doubt that if this test were adopted there would be a significant increase in the number of deposit orders made by Employment Tribunals because it would mean that a deposit order would become the norm unless the Claim or the Response was pretty strong. This would mark a radical departure from the present position and it may be felt that the adoption of such a test may be considered unfair compared to the existing test given that the determination is based on a party's pleaded case.

With regard to the possibility of amending the test, in interim relief cases, the relevant test is whether the application is "likely" to succeed (s.129 (1) ERA). This relatively high hurdle may be justified on the basis that the outcome of a successful application is that the Claimant is temporarily reinstated to his or her old job and it is therefore understandable that the Employment Tribunal should be satisfied that the complaint is likely to succeed. Case law has established that likely means a "pretty good chance of success" (*Taplin* [1978] ICR 1068 confirmed in *Raja* v *Secretary of State for Justice* UKEAT/0364/09).

Turning to the question of whether there should be a list of criteria which an Employment Judge should have regard to when applying the existing test, under the existing Rule 20(1), there is no limit on the factors which an Employment Judge may take into account in determining whether the contentions have little reasonable prospect of success. For example in an appropriate case, there is no reason why the Employment Judge should not take account of the fact that the Claimant repeatedly brings speculative or ill-founded claims. The fact that a particular Claimant has simply brought claims in the past, however, in itself is of little relevance to the merits of the current claim. Similarly the value of the claim or the costs of defending or bringing the claim (bearing in mind that the existing Rule 20(1) applies to both parties) is unlikely to be a relevant factor in determining whether the claim itself stands a reasonable prospect of success. We also believe that the identification of specific criteria might encourage applications for review, which would create an unnecessary

[3] Paragraph 4.26

[4] Paragraph 4.39

additional burden for Employment Tribunals. We should also point out that there are circumstances in which it is entirely legitimate for Claimants to pursue a number of claims (e.g. individuals with a number of public sector jobs in respect of each of which they wish to bring an equal pay claim).

In relation to (i) where a claim is vexatious or frivolous, there is already a mechanism for having the claim struck out; and (ii) the importance of a claim is a subjective matter and the process of weighting costs against such a subjective matter is, in our view, not an appropriate task for a Tribunal Judge. We believe the strength of the claim pleaded or the response to it should remain the key criteria underpinning the test on the basis that it is clear and relatively easy to apply.

Question 28

Do you agree with the proposal to increase the current level of the deposit which may be ordered, from the current maximum £500 to £1,000? If not, please explain why.

Yes.

Deposit Orders were introduced in 1989 and could be ordered up to an amount not exceeding £150. In 2001 the maximum amount of a deposit order was increased from £150 to £500. Over roughly the same period the minimum wage was increased from £3.60 (1999) to £5.93 (2011); this is an increase of 81.3%. An equivalent increase for the maximum deposit order would amount to just over £900. There is therefore an argument that the maximum deposit order should be increased (in the same way as the Employment Protection payments have been increased) and should in future be index- linked. Similarly, looked at another way, the value of £500 in 2001 is just under £600 in today's money, i.e. a "real" increase to £1000 represents an 80% uplift.[5].

It should be noted that a deposit order can be made up to a maximum of the given figure, so if the maximum is increased to £1,000, Employment Judges will still retain a discretion as to whether this or some lesser sum should be ordered taking into account the means of the party.

[5] http//www.whatsthecost.com/cpi.aspx (Accessed 15th March 2011)

Question 29

Do you agree that the principle of deposit orders should be introduced into the EAT? If not please explain why.

No, we do not consider such a procedure should be introduced into the EAT.

Under Section 37 of the Employment Tribunals Act, appeals to the EAT can only be made on a matter of law. Since 1997, there has been a filtering process which has weeded out cases that do not raise a question of law, known as the sift. This is referred to in Rule 3(7) of the EAT Rules and Paragraph 9 of the current Practice Direction. A case that has reached the EAT must first have gone through a number of stages at Employment Tribunal level. There would therefore have been ample opportunity for a case with little prospect of success to have been the subject of a deposit order. To illustrate the point, in the year 1 April 2008 - 31 March 2009, there were 1,794 appeals received by the EAT and 927 were rejected under the sift process as having no reasonable prospect of success.[6] In the year 1 April 2009 - 31 March 2010 there were 1,963 appeals received by the EAT and 839 were rejected under the sift process, as having no reasonable prospect of success.[7]

Under Rule 3(7), where it appears to the Registrar or a Judge that the stated grounds of appeal do not give the EAT jurisdiction because there is no question of law to be determined (Rule 3(7)(a)) or because the appeal is an abuse of process or otherwise likely to obstruct the just disposal of proceedings (Rule 3(7)(b)), the appeal may be dismissed at a preliminary stage. Such power in itself is sufficient to dispose of "weak" or "vexatious" cases without the need for a further or additional requirement to make a deposit order.

Furthermore, if a deposit order system is introduced at EAT level, safety mechanisms would need to be introduced in order to ensure that all parties have the opportunity to submit written representations or appear and present oral argument. Ensuring that such additional stages and safety mechanisms are introduced into the EAT procedures would lead to

[6] Tribunal Services' Employment Tribunal and EAT Statistics (GB) 1 April 2008 to 31 March 2009 at table 13.

[7] Tribunal Services' Employment Tribunal and EAT Statistics (GB) 1 April 2009 to 31 March 2010 at table 13, published 3 September 2010

increased complexity and cost, which is the antithesis of what the current proposals are seeking to achieve.

Question 30

Do you agree with the proposal to increase the current cap on the level of costs that may be awarded from £10,000 to £20,000? If not please explain why?

Although it is not widely appreciated, an Employment Tribunal *can* make an award of costs in excess of £10,000 (see Rule 41), but any such order must be subject to detailed assessment by a County Court (i.e. the Employment Tribunal can make a general award, but the calculation of the precise amount to be paid is done under the CPR Rules and practice on costs assessment). Alternatively, an Employment Tribunal may order a sum in excess of £10,000 with the agreement of the parties.

With this in mind, we do not agree with such a proposal.

We have pointed out that there has been a reduction in the value of money of approximately 20% since 2001, and therefore this is a "real" increase of 80%. The circumstances in which an Employment Tribunal can make a costs award is restricted by the existing rules and the average and median awards currently awarded are modest, at £1,000 and £2,288 respectively. In our view tightening up the current costs regime and reliance on other measures proposed in the consultation document, such as *Calderbank* offers, will be more effective and less controversial.

The perception is that Employment Tribunals are still reluctant to use their costs powers despite these having been substantially increased over the years. Costs are still not the norm. In reality, there are very limited circumstances in which the Employment Tribunal has jurisdiction to make an award of costs (where a party in either the bringing or conduct of the proceedings has acted vexatiously, abusively, disruptively or otherwise unreasonably or where the bringing or conducting of the proceedings by the paying party has been misconceived)

According to the latest full Employment Tribunal and EAT statistics 2009 - 2010, out of 112,400 claims disposed of, costs were awarded in only 412 cases. Where costs were awarded, they were predominantly awarded to employers: 324 compared to 88 Claimants. Unfortunately, there are no Employment Tribunal statistics available on the number of

preparation orders made, which would have given a more accurate picture on costs as most Claimants are not legally represented and therefore not entitled to costs awards.

According to the consultation document, doubling the amount of costs available is intended to make the parties think carefully before initiating or pursuing employment tribunal proceedings. Even with the cap at £10,000, however, it is important to note that the average award was £1,000 with the median being £2,288 and that in only one claim did costs exceed £10,000, which was awarded against two Respondents. Consequently we believe it is unlikely that increasing the costs cap will be any real deterrent. It may therefore be more appropriate to concentrate on other measures to deter weak claims.

The issue of costs is also likely to be highly contentious. Employers and employees will have different views on the desirability of increasing the costs cap. Claimants are unlikely to derive any benefit from the change, particularly as it does not appear that the costs cap on preparation time orders will be doubled at the same time.

In our view it is much more important to ensure that costs are controlled and that any new proposals facilitate early resolution. It seems sensible therefore to explore and rely on opportunities elsewhere for deterring weak claims. Calderbank offers, for instance, are much more likely to be effective in encouraging acceptance of reasonable offers and are likely to be much less controversial. Moreover, this would be more in line with the consultation document's stated aim of resolving disputes in the quickest and least painful way, and bringing them swiftly to conclusion.

Question 31

Anecdotal evidence suggests that in many cases, where the Claimant is unrepresented, Respondents or their representatives use the threat of cost sanctions as a means of putting undue pressure on their opponents to withdraw from the employment tribunal process. We would welcome views on this and any evidence of aggressive litigation.

In our view, there are occasions where 'costs warning letters' from Respondent representatives to unrepresented Claimants are appropriate and do not constitute 'undue pressure'. Where a Respondent's representative considers that an unrepresented Claimant's case has poor prospects of success, it is appropriate that they write to the Claimant to outline what they consider to be the shortcomings in the claim and warn him or her that if the claim is unsuccessful, they may seek costs (expenses in Scotland). Such letters should be

written in plain and accessible language, and often include a recommendation that the Claimant seek legal advice or consult ACAS in respect of the claim and the content of the letter.

We consider this approach to be reasonable in those circumstances. An unrepresented Claimant with a fundamentally flawed claim is, in fact, at risk of a costs award and will frequently be unaware of this risk. Moreover, it is in the interests of the Respondent that both the legal analysis and the comments on costs in the letter are clear and accurate. The letter, if it transpires to be an accurate summary of the factors that lead to the Claimant's claim being unsuccessful at the Employment Tribunal, can be presented to the Employment Tribunal in support of the application for costs. If it transpires that the letter is inaccurate and the Claimant wins the case, the Respondent in those circumstances may find the letter being used against them as evidence, for example that the conduct of the case was unreasonable.

We have heard of evidence, however, of some Respondents taking a more aggressive approach, specifically in instances where the unrepresented Claimant's claim has merit. At a special meeting of the Employment Tribunal Users Group in Glasgow on 25 February 2011 the use of 'cost warning letters' was discussed by a cross section of employment lawyers. Lawyers representing both Claimant and Respondent firms reported instances of aggressive correspondence regarding expenses being sent to unrepresented Claimants as a tactic principally intended to intimidate and induce withdrawal of the claims notwithstanding their merits. We obviously do not consider this to be appropriate conduct.

Question 32

Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on:

- **what evidence will be necessary before those sanctions are applied,**
- **what those sanctions should be, and**
- **who should be responsible for imposing them, and for monitoring compliance – for example regulatory bodies like the Solicitors Regulation Authority and the Claims Management Regulator, or employment tribunals themselves.**

In our view, there is a common perception on the part of unrepresented Claimants that virtually all case management correspondence from Respondents is intended to apply 'undue pressure'. This is a common consequence of Claimants being required to manage

litigation without legal representation. There is a high risk that the creation of a remedy for unrepresented Claimants in these circumstances would lead to regular and excessive applications by Claimants. We anticipate the very subjective question as to what constitutes 'undue pressure' would in itself result in extensive litigation. This would result in a further slowing down of the Employment Tribunal process, and an increased legal spend for Respondents. We consider that these outcomes would be contrary to the stated aims of the proposed reforms, and disproportionate having regard to any benefits.

In the event that specific sanctions are considered, we are of the view that it would be appropriate for such sanctions to be within the jurisdiction of the Employment Tribunal rather that the Solicitors Regulation Authority. This is on the basis that the application of 'undue pressure' in the context of litigation is a matter of subjective assessment and does not constitute professional misconduct.

An alternative to the creation of sanctions would be for ACAS to issue guidance for Respondents' representatives on best practice in corresponding with unrepresented Claimants. Another approach would be to require the insertion of balanced text in any cost warning letter, setting out the basis on which costs are awarded and recommending that the Claimant seeks advice or consults ACAS.

Question 33

Currently Employment Tribunals can only order that a party pay the wasted costs incurred by another party. It cannot order a party to pay the costs incurred by the employment tribunal itself. Should these provisions be changed? Please explain why you have adopted the view taken.

No.

This is a radical suggestion and we do not believe there is sufficient data on which to reach a decision. It requires a more coherent proposal with a full impact assessment before a view could be taken. There are currently no statistics available on the number of wasted costs orders made or the amount. Also, there would undoubtedly be administrative costs in introducing this measure.

Unlike the proposal to introduce financial penalties on employers, this proposal appears to have no relation to resolving disputes. It appears to be a tax on using the Tribunal services; this would be additional to any proposed fee to bring a claim. We believe that if the

Government wishes to proceed with this proposal, it should be explored as part of the Ministry of Justice's consultation on the introduction of fees in Employment Tribunals.

Such a proposal is also likely to lead to a call for the circumstances in which parties can bring claims against the Tribunal Service where there has been a failure to administer cases properly, and where this has led to wasted expense, to be clarified. In this respect, presumably sauce for the goose is also sauce for the gander. Given the increasing level of discontent with the service provided by Tribunals evidenced by our survey of members (which is known to the Department), this does not seem to be a fanciful outcome, if this proposal is pursued.

Part B: Encouraging settlements

2. The provision of information

Question 34 and Question 35

Would Respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could subsequently be amended) in the ET1 form of benefit? If yes, what would those benefits be?

ELA considers that there are competing factors to be balanced. Some of us felt that the information already requested in this area is sufficient, that at the early stages of an action a Claimant would often not be able to provide much additional information that would be of use to Respondents (particularly in complex cases) and were wary of imposing too many requirements on Claimants at the initial stage of proceedings for fear of unfairly deterring them from pursuing perfectly justifiable claims. Others felt that provided guidance was given such that only the basic information available to a Claimant was required (so that, for instance, complex calculations of future loss were not required) then this could only help rather than hinder and that in a significant number of cases (particularly the less complex ones) this could well assist in promoting settlement.

Question 36

Should there be a mandatory requirement for the Claimant to provide a statement of loss in the ET1 Claim Form?

Whilst we do not consider there should be a mandatory requirement for the Claimant to provide a statement of loss, we do believe the information required at section 4 of the current ET1 Claim Form should be made mandatory. It is our view that, if there were standard

directions and a standard approach across all regions, this would resolve many of the issues which have led to a lack of confidence in the tribunal system. By way of example, if there were standard directions, then all parties would know at which stage of proceedings they could expect to receive the Claimant's statement of loss, and this would add certainty to the process.

Question 37

Are there other types of information or evidence which should be required at the outset of proceedings?

ELA considers that the information required in the current ET1 Claim Form is adequate. However, where a Claimant is claiming discrimination, as noted above, fuller particulars of the precise feature of the protected characteristic and any relevant provision, criterion or practice would be of assistance, as this is not always included.

Question 38

How could the ET1 Claim Form be amended so as to help Claimants provide as helpful information as possible?

In our view, and as suggested above in our answer to Question 24, section 5.2 of the current ET1 Claim Form could be amended to include tick boxes for the Claimant. This would replace the blank spaces currently provided.

Formalising Offers to Settle

Question 39

Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

Historical context

We note the consultation paper's desire to ensure the civil and administrative justice system (at least insofar as party v party disputes are concerned) is more consistent and coherent. The vision for Employment Tribunals as set out by the Employment Tribunal Taskforce ("ETST") in 2002 was that they should:

"Deal with employment issues referred to it in a just, fair and proportionate manner by being:

- *Even handed and responsive to its users.*
- *Accessible and understandable.*
- *As fast as is reasonably practicable.*
- *Reliable, consistent and dependable, properly resourced and organised in an acceptable fashion."*

It is against this background and with these principles in mind that any attempt to move to a consistent approach on formalising settlement ought to be considered.

We consider that if this proposal were introduced it is likely that there would be an increase in settlement offers being made. However, it is unclear presently whether those settlements would be reasonable or not. To some extent this will depend on how employment judges would decide whether such an offer was in fact "reasonable", and this is presently unclear.

Compensation calculations can often be complex. A good understanding of how compensation is calculated is needed in order to make a reasonable offer. For instance in certain circumstances there can be 'special awards' e.g. union related dismissal, health and safety related dismissals; pension loss calculations which have to be performed by actuaries; and various other factors which may reduce or increase a compensatory award, not least assessments on mitigation which will be relevant to many claims.

In order to make a 'reasonable offer' the party making the offer will also need to have up-to-date information, such as a Claimant's alternative earnings through mitigation. Currently there is no requirement on the Claimant to provide up to date information on this (or other relevant information) to the Respondent during the course of a case. To ensure that the proposal is in keeping with the vision of the ETST a great deal of reliance will have to be placed on the ability of the judiciary to administer the scheme.

Question 40

Do you agree that the impact of this proposal might lead to a decrease in the number of claims within the system which proceed to hearing

We consider that in the short term it is unlikely that such a mechanism would have a significant effect on the number of claims proceeding to a full hearing, if only because such a process would be a new one for many users of the tribunals and would take some time to be established as part of the way in which claims are dealt with. In addition, further information is needed as to how the procedure would work.

Question 41

Should the procedure be limited only to those cases in which both parties are legally represented, or open to all parties irrespective of the nature of representation?

In our view this question involves the balancing of competing factors. Some of us are concerned that litigants in person would be at a disadvantage, particularly in larger claims, because of the complexity of compensation calculations. Others feel that parties who have taken professional advice should not thereby be placed at a disadvantage through having done so. One solution might be to require the tribunal in deciding whether or not to adjust the compensation to take into account, as one of a number of factors, whether the parties had professional assistance and, if not, the reasons why

Question 42

Should the employment tribunal be either required or empowered to increase or decrease the amount of any financial compensation where a party has made an offer of settlement which has not been reasonably accepted? Please explain your answer.

The current position

Under both the current Employment Tribunal Rules and those that preceded them (the 2001 rules) there is already case law to support the proposition that Employment Tribunals can take into account *Calderbank* type offers when assessing whether a party has acted *'vexatiously, abusively, disruptively or otherwise unreasonably',* and when assessing the question of costs (see *Kopel* v *Safeway Stores Plc (2003) unreported - EAT/0281/02/SM* and *G4Services* v *Rondeau (2009) unreported EAT/0207/09/DA*).

However, what there has not been is any case law providing more detailed guidance on the circumstances when a refusal to accept a *Calderbank* offer ought to constitute unreasonable and/or vexatious conduct such that a cost award ought to be made. There is also a perception that Employment Tribunals are reluctant to consider making such orders. Clear guidance on when such orders should be made can only help to change that perception.

Comments on the proposals

We consider for pure 'monetary' claims (i.e. breach of contract and unlawful deduction of wages;) and unfair dismissal claims, the current rules could be revised to give Employment Tribunals the power to award costs out of any financial award where the Claimant has only been awarded a sum that is equal to or less than a financial settlement offered by the Respondent. The rules should possibly allow for a reasonable margin of error for unrepresented parties. Similarly, where a Claimant makes a *Calderbank* type offer to the Respondent which the Respondent rejects, and the Claimant subsequently recovers more than his proposed settlement, the Claimant should recover at least some of his costs, possibly those incurred after the date the offer was refused or after the date when the offer expired. We have given thought about how in order to encourage parties to settle one might (to a degree) put a Claimant at risk bearing in mind the need to retain sufficient accessibility. Rather than be at risk for all costs if there was a failure to beat an offer we thought a cap on the amount might achieve the right result and consider it might be reasonable to cap those costs at the amount of any award made in the Claimant's favour.

Where no award has been made (i.e. the claim is lost), we are of the view that there is no reason to change the current powers of the Employment Tribunal to consider whether the Claimant had pursued the case *'vexatiously, abusively, disruptively or otherwise unreasonably'*. However, we consider that the Government ought to provide further guidance and, in some circumstances, specific direction to Employment Tribunals on the circumstances when a cost award should be made. We believe that without such guidance, particularly if *Calderbank* type offers in financial cases are to be given similar status to *Calderbank* offers in the Courts, there will be a period of uncertainty, during which the Employment Tribunals, appellate Tribunals and Courts seek to work out what the Government means by these changes. This would result in a piecemeal and disjointed reaction from Tribunals (already criticised for excessive inconsistency), which would be unsatisfactory. Alternatively there is also the risk that, without additional guidance, the

judiciary will continue with its existing approach to awarding costs in Employment Tribunal cases i.e. that they are awarded very rarely.

Further, given that a very significant proportion of parties are unrepresented, adequate resources need to be put in place to ensure that any rules on formalising offers to settle are clearly explained to unrepresented parties. (This could be done using the services of ACAS).

Question 43

What are your views on the interpretation of what constitutes a 'reasonable' offer of settlement, particularly in cases which do not centre on monetary awards.

The situation is not straightforward when considering discrimination cases where a Claimant may be seeking satisfaction that is not exclusively financial e.g. that the Respondent provide some form of diversity training for its managers. It would be unreasonable to penalise a Claimant who pursued a claim where the Respondent only proposed a financial settlement, even if that financial settlement exceeded what the Claimant could reasonably expect.

For example, in a discrimination case where the Claimant (who is unrepresented) has not suffered any loss of earnings but injury to feelings are worth £6,000, a Respondent may make a formal *Calderbank* type offer of settlement of £10,000. The Claimant responds by stating that he agrees to this financial offer but the Respondent should also agree to provide diversity training to all line managers, including his line manager(s). The Respondent is not prepared to do this and the case goes to a hearing where the Claimant recovers only £6,000. If the Tribunal also exercised its power to make recommendations for the Respondent to follow, it would be unreasonable for the Claimant to be at risk of a costs order against him simply because he did not receive more than was offered by the Respondent. Perhaps more importantly, there is a real danger that the Claimant could feel pressured into settling his case for fear of a costs award being made against him, even though it might be perfectly reasonable for him to request diversity training for the Respondent's line managers. Similar issues arise where a Claimant seeks a declaration, particularly where they remain in employment.

Sight should also not be lost of the long-established principle, recently reaffirmed in the Court of Appeal in *Gibb* v *Maidstone & Tunbridge Wells NHS Trust* [2010] All ER (D) 229, that it is legitimate for a litigant to bring proceedings and reject a settlement if the employer did not concede that the dismissal was unfair. The same must apply to discrimination cases unless this case law is to be reversed by statute.

Question 44

We consider that the adoption of the Scottish Courts judicial tender model meets our needs under this proposal and would welcome views if this should be our preferred approach.

No. Whilst the Scottish system is reasonably successful in encouraging parties to resolve matters before a hearing, this has to be seen in the context of a regime in which expenses (costs) tend to follow success or failure. The Scottish system works on the assumption that there are expenses incurred at each stage of the court process and that tenders are submitted in order to put a party on notice that if they proceed and fail to meet the tender, they will be responsible for all expenses from the date of the tender.

Employment Tribunals do not operate on this very specific expenses (costs) basis and therefore the Scottish tender system as it currently applies could not simply be applied to the current Employment Tribunal Rules and would not meet the needs in that regard.

PART C – Shortening Tribunal Hearings – Witness statements taken as read

Question 45

Anecdotal evidence from representatives is that employment tribunal hearings are often unnecessarily prolonged by witnesses having to read out their witness statements. Do you agree with that view? If yes, please provide examples of occasions when you consider that a hearing has been unnecessarily prolonged. If you do not agree, please explain why.

No, the experience of the members of the Working Party does not reflect the anecdotal evidence referred to.

The time taken to read out a well prepared witness statement which is cross-referenced to the relevant documents does not, in the Working Party's experience, unnecessarily prolong a hearing. However, Working Party members have experienced Tribunal hearings where various aspects of statements are of limited or marginal relevance and have encountered delays caused by the attempt to refer to excessive documentation also of limited or marginal relevance. In the experience of the Working Party, the main and most common reason why hearings are prolonged relates to supplemental questioning due to the drafting of the statements in the first instance. Simply dispensing with reading out the statements would not

resolve this. There are various “pressure points” during a hearing which can lead to time inefficiencies and a primary focus upon taking statements “as read” as an attempt to drive hearings along, is perhaps only part of the overall picture.

We consider it a reasonable assumption that the process of a witness reading his or her statement out loud would not be expected to take much more time than the Tribunal reading it in private, especially as the Tribunal will need to be directed to the relevant documents. The cross-referencing to the bundle is often more readily and effectively achieved in the context of a statement being read out. In particular where only part of a lengthy document is relevant, more time may be taken by the tribunal reading the whole document in private, than is needed for a witness or representative to direct the tribunal to the relevant part in the course of the witness’s oral evidence.

Hearing a statement read out, we would suggest, often aids subsequent recollection rather than simply reading it. Where the statements are lengthy there is a concern of the risk of a perception that the Employment Tribunal members may only scan the statements, whereas having them read through more demonstrably focuses on the issues.

Although the ELA Employment Tribunal Survey 2010 did not indicate widespread support for the use of time limits being applied when statements are being read – indeed only 10% of Respondents were supportive – the Working Party considers that some formal consideration at a CMD should be undertaken to inform a realistic discussion/assessment about the likely time needed for the presentation of each witness' evidence, so that appropriate time is allocated for the hearing. Similarly, more focused guidance could be given to the scope/range of supplemental questions that may be permitted, particularly when all parties in the proceedings are represented.

If hearing time is allocated on the assumption that statements are to be taken “as read” leading to tighter listing, the opposite of the desired effect could occur with more hearings going part-heard. This would increase, not reduce, the eventual time taken for disposal of cases.

Question 46

Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence in chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.

In the light of the experience of the members of the Working Party who are involved in cases where Claimants are unrepresented, we do not agree with the proposal for a general default position as described. This is because, the procedural safeguards described in the Consultation Paper are predicated upon the basis that there are comprehensive written statements in all cases, whereas, in fact the un-represented Claimant may not get to the position of preparing such a comprehensive written statement.

The particular concern is that such an expectation is likely to put the parties on an unequal footing. It would require a degree of formality that most unrepresented parties could not comply with, and may lead to represented parties being able to use the rules to the disadvantage of unrepresented parties, in what would become an unequal contest.

In addition where, as is usual, witness statements are exchanged simultaneously, or (as is all too often the case) additional documents are disclosed after statements have been exchanged, the requirements of a fair hearing may necessitate that witnesses be given an opportunity to comment on the other party's statements or subsequently disclosed documents.

We agree that the guidelines of the EAT in *Mehta* referred to in the Consultation Paper are valuable and may be applied effectively by the Tribunals in cases where all parties are represented, and written statements have been utilised.

The introduction of a default setting, irrespective of procedural safeguards of this type, may have the effect of mitigating against the Employment Tribunals providing open access to parties who wish to use the system given that many Claimants are unemployed and/or unrepresented.

We also assume that it is not intended that the practice in Scotland, where witness statements are not normally used at all, will continue. We question whether it makes sense for a different regime to operate in Scotland in this respect.

Question 47

What would you see as the advantages of taking witness statements as read?

Where statements are comprehensive and cross-referenced to the Bundle then there is a potential to save time. This tends to arise where both Claimant and Respondent are

represented. It may mean that there is a greater focus on clarity of structure and content where a witness knows the statement is simply to be read through by the Employment Tribunal. There may also be a perceived advantage in the adoption of a (more) consistent approach across the individual ET regions.

Question 48

What are the disadvantages of taking witness statements as read?

The principal concerns regarding a universal practice of taking statements as read have been referred to above.

Unrepresented parties are often not able to draft a statement that covers **all** that they wish to say at the hearing so there would still be a need to clarify issues by way of supplemental questioning and by way of further direction to relevant documents.

Many parties have no experience of the Tribunal system and represented parties would have the advantage of limiting evidence of un-represented parties by insisting that if it is not in the witness statement it cannot be used.

Reading the statements is helpful to witnesses and gives them a chance to settle in. It helps with the memory of witnesses and helps overcome the fear of going onto the witness stand, especially where a witness may be under any form of disability. It gives the witness the opportunity to calm nerves prior to cross examination. Nerves may be wrongly interpreted as untruthfulness. It also increases the parties' perception of justice being done.

Reading the statements helps the Employment Tribunal assess whether the witness is giving their own evidence or evidence that has, in effect, been prepared for them without very much (if any) actual input/consideration of the witness. The latter is likely to become readily apparent in cross-examination, but the consideration during evidence-in-chief is also an important opportunity to address credibility.

Question 49

Employment tribunal proceedings are similar to civil court cases, insofar as they are between two sets of private parties. We think that the principal of entitlement to expenses in the civil courts should apply in ETs too. Do you agree? Please explain your answer.

No, we do not agree. The current system should remain as it is. Whilst the parties are both (and/or each of them) private parties, the reality is that the employer will have greater resources and financial power to defend a case. A witness supporting an employer will often be acting within the remit of their employee duties by giving evidence at the Tribunal. They will often be attending the tribunal during working hours, and consequently still be paid their salary by their employer for the period that they attend the Tribunal. Witnesses supporting the Claimant will inevitably not be acting within the course of their employment duties and there is often difficulty experienced by Claimants in getting witnesses to attend and assist. To ask them to attend the Tribunal, and then not to have any access to the repayment of expenses will have an additionally detrimental impact on Claimants' ability to have equality of arms during the Tribunal process. The resulting effect of key witnesses failing to attend the Tribunal for financial reasons will impact on the fairness of proceedings, and consequently impede justice. This must be avoided, as no cuts are worth reducing the cost to society of reducing access to justice.

Question 50

Should the decision not to pay expenses to parties apply to all those attending employment tribunal hearings? If not, to whom and in what circumstances should expenses be paid?

The current system is restrictive enough, so that it is only in certain qualifying circumstances that parties, their witnesses and any voluntary representatives can apply for expenses. The current system should remain as it is.

Question 51

The withdrawal of state-funded expenses should lead to a reduction in the duration of some hearings, as only witnesses that are strictly necessary will be called. Do you agree with this reasoning? Please explain why.

In our experience, the Employment Judges do a reasonable job of ensuring that the hearing is conducted in accordance with the overriding objective, namely ensuring that the hearing is disposed of as quickly as possible. This involves careful management of the amount of time that witnesses are allowed to give evidence. In practice, the length of the time that witnesses are called to give evidence is proportionate to the value of their evidence, and is not relative to the level of expenses that they can claim for their attendance in the Tribunal. The withdrawal of state allocated expenses will not have any impact in the length of hearings,

and consequently will not greatly impact on any savings-drive dependant on reducing the duration of hearings.

Employment Judges sitting alone

Question 52

We propose that, subject to the existing discretion, unfair dismissal cases should normally be heard by an Employment Judge sitting alone. Do you agree? If not, please explain why.

The Working Party has noted that the narrative section of the Consultation Paper does not include any reference to the cost of paying the lay members. Nevertheless, members of the Working Party have considered whether the suggestion is either partially or largely cost-driven. *(The impact assessment does not give any figures for the value of savings to the Employment Tribunals, except for £500,000 saved by not having to run a lay member recruitment campaign in 2011-2. The saving in payment of lay members' attendance fees is stated to be £460 per sitting day, but the impact assessment acknowledges that there are no figures for the proportion of sitting days now involving a full tribunal that would attract this saving.)*

It is essential that changes intended to achieve any savings need to be balanced against the potential disadvantages of the proposed change. The specific saving in time as the result of shorter hearings anticipated by the Consultation Paper appears to be based on anecdotal evidence alone – and it will be readily appreciated that anecdotal accounts of contrary experiences will also be relevant in such context - and on suppositions that in the experience of Members of the Working Party are not necessarily borne out in practice. In the experience of those members of the Working Party who sit as Employment Judges, and those who appear as advocates, lay members generally absorb evidence, read documents, and understand what a case is about, just as quickly as Employment Judges. There has been considerable improvement in the quality of lay members in recent years, and the Working Party's experience is that cases are not being slowed down to allow the lay members to keep up.

The Consultation Paper suggests that listing cases for hearing is easier in front of an Employment Judge, rather than a panel of three members. This is however not necessarily the case in practice. For example:

- This has not been the experience of certain ELA members who have had hearings, particularly in London Central and London East, removed from the list the afternoon before the hearing, not because of the non-availability of lay members, but because there is no Employment Judge available. Experience suggests that it can be easier for the Tribunals Service to arrange for attendance at the last minute of additional lay members than additional Employment Judges. More generally the Working Party has seen no evidence that initial listing of cases for hearing is adversely affected by the need for a full tribunal; delays in securing a listing (which have become very serious in some regions) appear rather to reflect a shortage of judges and tribunal rooms.

- As for difficulties caused by the requirement to co-ordinate between panel members for the listing of hearings, that only really arises for cases that go part-heard, and difficulties in re-listing in such cases are by no means only, or primarily, down to lay members' availability. Even full-time Employment Judges are often pre-booked for lengthy equal pay cases, and the availability of witnesses, representatives and tribunal rooms all have the potential to affect listing. In most cases the risk of further delay through lay member non-availability does not materialise in practice. Given that, in our experience, cases do not go part-heard <u>because</u> of lay-members' involvement in the Tribunal (see 52.2 above), it is suggested that a more productive approach is to ensure active case management is pursued to minimise the scope for cases to go part-heard.

The logic behind the present selection of jurisdictions and categories of case that can be heard by an Employment Judge sitting alone appears to be that the issues are not particularly heavily dependent on facts. This is demonstrated by:

- The nature of the claims listed in section 4(3) of Employment Tribunals Act 1996 that are heard by an Employment Judge sitting alone. In practice, the most frequently occurring are claims for breach of contract, unlawful deductions from wages, claims against the Secretary of State in insolvency cases, and claims for holiday pay under the Working Time Regulations 1998.

- The discretion conferred by section 4(5) of the Employment Tribunals Act 1996 on Employment Judges to hear claims with a full panel which section 4(3)

otherwise mandates Employment Judges to hear alone. Section 4(5) clearly indicates that issues of **fact** point to the use of full panels, whereas if the issues are of **law** the Employment Judge should sit alone, subject to the views of the parties.

- Rule 18(3) of the Employment Tribunal Rules of Procedure, which provides that an Employment Judge can exercise discretion to have a full panel in a pre-hearing review when it is considered "that one or more substantive issues of fact are to be determined at the pre-hearing review, [and] that it would be desirable for the pre-hearing review to be conducted by a tribunal".

The proposition that it may make sense for Employment Judges to sit alone if deciding points of law, or applying the law to broadly undisputed facts is reasonable and understandable. However where the facts are in dispute, it is felt by the Working Party that the quality of decision making is likely to be higher if judgments on such matters as witness credibility, and assessments of factual evidence, are made by a panel of three rather than the Employment Judge alone. This has in particular been the experience of an ELA member who has several years' experience sitting as a fee-paid Employment Judge.

The point that lay members are likely to make a greater contribution on issues of fact than of law could suggest that unfair dismissal is not the optimal jurisdiction to consider. For example, if there is to be any increase in the scope for Employment Judges to sit alone it seems to us that the most obvious category of claim is equal pay, where in many cases the facts are both complex and relatively uncontentious, and what is most needed from the employment tribunal (apart from good case management skills) is an ability to understand and apply very complex and often mutually inconsistent authority to often very complex factual situations.

The Working Party is, furthermore, acutely conscious of the question of public confidence in the Employment Tribunal system. It is the Working Party's experience that the Employment Tribunal system generally works as well as the increasingly complex body of employment law allows, in providing a forum which parties can access without having the need to have legal representation, and to which people are not afraid to resort.

A major contributor to these confidence levels is the fact that lay members with experience of a range of workplaces are part of the panel: it is not the same as a civil court with just an Employment Judge. People may respect the independence and integrity of Employment

Judges but that does not dispose many to volunteer to appear in front of one to argue a case. Employment Tribunals have, perhaps only narrowly, retained a different image of accessibility. Removing lay members from the cases most associated with them clearly runs the material risk of a reduction in the confidence of potential Claimants that they can invoke the system, and, even if to a lesser extent, of small employers that they can expect a reasonable hearing if taken to an Employment Tribunal. In addition, the absence of lay members is likely to result in those Claimants representing themselves feeling increasingly alienated and intimidated as cases progress, especially at hearings where the Respondent is represented by counsel, which is commonly the position. This is at odds with the ethos of the Employment Tribunal system.

As the Consultation Paper appears to recognise, typical unfair dismissal cases involve the application of well-established principles of law to the particular facts. What the paper appears to recognise to a lesser degree is that in a large proportion of unfair dismissal cases the facts are in dispute. The results of the ELA Employment Tribunal Survey 2010 showed an overall lack of support for the suggestion that unfair dismissal claims should be heard by an Employment Judge sitting alone where the facts were in dispute. Moreover, it is in the application of concepts such as reasonableness that lay members may have most to contribute. There may be concerns over the currency of the knowledge or awareness of particular employment practices if a lay member has been "out of the workplace" for a lengthy period of time. But, where there is recent connection with the workplace, they can speak with experience and knowledge that Employment Judges may or may not share (and as to which they receive no training) of what steps a reasonable employer would be expected to take before dismissing for poor performance, or whether conduct is serious enough that dismissal could be a proportionate response. They also have an invaluable role in assessing whether a Claimant has done enough to try to mitigate loss, and how long it is likely to take for the Claimant to find another job; or how seriously contributory conduct should be rated. The fact that they may need careful guidance on complex points of law does not detract from that value.

The proposal that there should be discretion to order a full panel makes it likely that there will also be a problem over inconsistency as between cases; whether a particular Employment Judge is an enthusiast for sitting with lay members will perhaps inevitably affect the frequency with which they use the discretion. In the absence of primary legislation, only the existing power to designate jurisdictions under section 4 of the Employment Tribunals Act 1996 can be used to effect the proposed change. That section requires that consideration be given in each case to whether a full panel is to be convened **whether or not any**

application has been made by either party. The alternative option, canvassed in the impact assessment but not put forward for comment in the Consultation Paper, of having all unfair dismissal cases heard by Employment Judges sitting alone with no discretion to convene a full panel (unless there is also another claim for which a full panel is required) would require primary legislation to disapply this provision.

Therefore, consideration of using the discretion under section 4 of the Employment Tribunals Act 1996 to order a full panel to hear an unfair dismissal claim will not be dependent, as it is for pre-hearing reviews, on timely application for a full panel by a party. Rather, each case will have to be considered, adding to the existing demands on Employment Judges' time. However, in practice, it is the Working Party's experience that the requirement to **consider** whether to refer cases to a full panel is not applied with any regularity (unless a party applies for a full panel). The relatively low incidence of orders for pre-hearing reviews to be held before full panels suggests that unless parties apply there will be little use of the discretion (however some Employment Judges may be more liberal with their use of discretion because of a preference for sitting with lay members).

There are two particular disadvantages to be mentioned here:

- The first is that whether a full tribunal is ordered for a particular case may depend on whether a reasoned application for a full panel is made. That gives an advantage to parties with good professional representatives since they can be expected to weigh up the advantages of a full panel as part of their preparation for a case. Unrepresented litigants (Claimants and Respondents) will often not understand that they can, or should, make such an application.

- The second is that, in practice, it is rarely possible to identify which are going to be the cases with significant conflicts of fact just by a perusal of the claim and response. The exercise of discretion will therefore have an element of randomness which is inconsistent with the Employment Tribunals' objectives of providing consistent standards of justice.

These factors lead us to oppose the proposed change. However there are undoubtedly some unfair dismissal cases which it would be sensible to be heard by an Employment Judge sitting alone, and the parties may prefer this option (in practice that is more likely if both sides are represented, but if there is a litigant in person who wants a full panel, the point about confidence in the system would apply). This can be achieved under existing

legislation: section 4(3)(e) of the Employment Tribunals Act 1996 already caters for the possibility of an unfair dismissal case being heard by a Employment Judge sitting alone, **if all parties agree in writing**. In addition, section 4(3)(g) allows for cases which are not contested to be heard by a Employment Judge alone, and this has been held to include cases where there has been no response (or the response has not been accepted) so that the Respondent is debarred from defending the claim: *Parfett v John Lamb Partnership* UKEAT/0111/08.

It would be open to the Tribunals Service to include standard paragraphs in acknowledgements of claims and notifications to Respondents drawing attention to the possibility that the case could be heard by an Employment Judge sitting alone with both/all parties' written consent. The issue could become a standard item on the agenda for those cases which are referred for a case management discussion. Provided there is no unfair pressure on any party to agree, this would surely not be objectionable, and would meet the concerns of those parties who fear over-long hearings, subject only to protecting the right of the opposing party to a full panel if desired.

Question 53

Because appeals go to the EAT on a point of law, rather than with questions of fact to be determined, do you agree that the EAT should be constituted to hear appeals with a Employment Judge sitting alone, rather than with a panel, unless a Employment Judge orders otherwise? Please give reasons.

The logic of lay members in a forum that only decides issue of law is clearly not readily apparent, but it was not logic that led to the creation of the tripartite EAT: rather it was a recognition that this was necessary to ensure political acceptance, particularly from the trade union side. The first tripartite appellate body was the National Industrial Relations Court, set up under the Industrial Relations Act 1971. Both it, and for many years the EAT, always sat as a full tribunal of three except for interlocutory hearings.

Having been established in this way, the EAT has, arguably, defied logic by demonstrating that it works well in practice, and most Employment Judges who have sat in the EAT have commented warmly on the value of the lay members' contributions, perhaps particularly because of the context in which issues of law arise for decision:

- Judges who are not familiar with the industrial context in which issues of law arise are often 'educated' by their lay colleagues. This is undoubtedly due in large part

to the very high calibre of most of the lay members of the EAT, nearly all of whom have served in very senior positions (including for instance several General Secretaries of major unions and HR Directors of major employers).

- While the EAT's jurisdiction is limited to points of law, the three most frequent grounds of appeal are inadequacy of reasons, perversity and procedural improprieties, in each of which the judgment of experienced lay members is likely to have a particular value.

There is also a concern that the loss of lay members will lead to EAT Judges developing a more employer-orientated mentality. Whether that is a fair assessment of contemporary judicial attitudes is not really the point, since it is the perception of the parties that is of importance. However illogical the present arrangements, they are important to the maintenance of all parties' confidence in the system, and make a real contribution to the understanding shown by Judges of the EAT of the context in which the law is to be interpreted and applied. Any financial saving would be negligible by comparison with the damage to confidence in the fairness and accessibility of the appeal system.

We note that the tripartite constitution of the EAT is expressly provided for by section 28 of the Employment Tribunals Act 1996, save in cases of an appeal from an Employment Judge sitting alone. We are not aware of any provision of the Act which would enable ministers to remove the requirement for lay members by Order. So, while any move to have unfair dismissal claims heard by an Employment Judge alone would be reflected in the composition of the EAT hearing appeals in such cases, primary legislation would be needed to remove the lay element, or to permit the EAT to sit without lay members in cases where the Employment Tribunal has sat as a full panel. A much more compelling argument would be required to justify to Parliament that the basic structure of the EAT since its creation in 1975 should be changed in this way. If there was to be amending legislation with regard to the composition of the EAT it would be more sensible to replicate the existing position provided for Employment Tribunals in section 4(3)(e) of the Employment Tribunals Act 1996; that an appeal could be heard by a Employment Judge sitting alone, **if all parties agree in writing**.

Finally, the chair of one of our Working Groups was recently involved in an appeal to the EAT. The lay members played a particularly notable role. In one instance a point was picked up by one of the lay members which was missed by all the lawyers involved (including

apparently the Presiding Judge) because he had come across it in a case in which he had been involved as a principal several years previously.

Question 54

What other categories of case, in the employment tribunals or the EAT, would in your view be suitable for a Employment Judge to hear alone, subject to the general power to convene a full panel where appropriate?

As we have indicated above, in our reply to Question 52, in our view if there is to be any increase in the scope for Employment Judges to sit alone the most obvious candidate is claims for equal pay, where in many cases the facts are both complex and relatively uncontentious, and what is most needed from the employment tribunal (apart from good case management skills) is an ability to understand and apply very complex and often mutually inconsistent authority to often very complex factual situations.

Legal Officers

Question 55

Do you agree that there is interlocutory work currently undertaken by Employment Judges that might be delegated elsewhere? If no, please explain why.

We agree in principle with the proposal but with some reservations.

The main reservations are that:

- delegating work from Employment Judges could potentially lead to more appeals, not least because the rule 10 decision was taken by a legal officer would be seen as grounds for an appeal; and

- a significant proportion of rule 10 applications are carried out by Employment Judges whose cases do not go ahead on the day. It may not be possible to fill their time with other cases once “floating cases” have been allocated. The proposal to give work to Legal Officers may therefore lead to a loss of judicial productivity.

Despite these reservations, the Working Party considers the use of Legal Officers may bring a positive contribution to the running of Employment Tribunals in the following ways:

- by reducing the current delays in the system at all levels;

- by providing the opportunity to appoint one legal officer to see the case through to give continuity; and

- by recognising (as outlined in the Consultation Paper) that many of the duties / powers in issue are by and large administrative in nature and do not always require judicial oversight.

However as the use of Legal Officers is untried, we consider that it would be unwise to introduce them across the employment tribunal system as a whole, without first establishing by experience whether the asserted benefits can in fact be realised, what if any savings of judicial time can be achieved, whether any unforeseen practical problems appear, and for what categories of decision the use of legal officers appears to work well and less well. We suggest that consideration should be given to introducing legal officers via a pilot scheme or limiting the type of duties which legal officers initially undertake in order to assess their effectiveness and the impact this has on both ETs and the EAT.

Question 56

We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be grateful for your views on:

- **the qualifications, skills, competences and experience we should seek in a legal officer, and**

The Working Party considers that legal officers should operate in a similar way to county court clerks. To that end, a legal officer would be trained in all aspects of office management, information management, human resources and basic legal duties to undertake the role. Most of this training would normally be conducted “on the job” either informally or through vocational training programs in paralegal studies. Legal officers would not have to be legally qualified and the role should be open to a wide selection of applicants provided they meet a minimum standard of educational achievement or experience.

- **the type of interlocutory work that might be delegated.**

The Working Party does not believe that the role of legal officer should be too prescriptive in the type of interlocutory applications that can be determined; and considers that legal officers can perform all administration tasks not involving an application.

For rule 10 applications, adopting the examples in the Consultation Paper, the Working Party considers that:

- *'*adjourning or postponing hearings' could be delegated to legal officers in respect of unopposed applications. However, the practical and tactical significance of contested requests particularly in respect of merits hearings suggest that such applications should be addressed by Employment Judges;

- 'exchanging documents' in the form of "standard directions" eg non-discrimination cases only could be delegated to legal officers. However, a specific application for disclosure of documents outside the standard directions or a case management order would be referred to an Employment Judge;

- 'expert evidence' could be delegated to legal officers with "standard directions". However, in practice this is more likely to arise in case management discussions;

- 'listing cases' should normally be referred to an Employment Judge to assess the ET1 and ET3;

- 'witness orders' could be delegated to legal officers in respect of witnesses that will only attend if they are ordered to do so and applying set criteria *e.g. the reason why the order is being sought and the relevance of the evidence of the witness;* and

- 'amending pleadings' has prompted much debate within the Working Party. The consensus is that the vast majority of such applications are likely to need to be referred to an Employment Judge.

The Working Party appreciates that some cases may appear at first glance to be relatively straightforward (such as unfair dismissal), but may nevertheless involve complex issues (such as whistle blowing). Consequently, legal officers would be able to refer such matters to an Employment Judge for guidance. This could result in Employment Judges requesting case management discussions rather than legal officers issuing "standard directions".

However, it would really depend on the remit of the legal officer, the training provided and the "on job" experience gained. This would also apply to rule 10 applications and again legal officers would be able to refer such matters to an Employment Judge for guidance.

Parties may not agree with the decision that a legal officer has made and to that end we suggest that an aggrieved party could seek a review of a legal officer's decision by an Employment Judge in the same way that reviews are currently carried out under rule 34 of the Employment Tribunals Rules of Procedure. If after seeking a review, a party was still not satisfied then they could appeal to the EAT (say within 14 days), which is in line with the current practice. We consider that it would be unacceptable not to have a mechanism for judicial reconsideration of contested decisions by Legal Officers, and that the absence of such a facility would lead to applications against the Tribunals service for judicial review as the only alternative means of challenge. This would inevitably diminish the benefits both to the tribunals and to the parties of the use of Legal Officers.

Chapter 4: Businesses taking on staff and meeting obligations

Extending the qualification period for unfair dismissal

Question 57

What effect, if any, do you think extending the length of the qualifying period for an employee to bring a claim for unfair dismissal from one to two years would have on:

- **employers**
- **employees**

General

At face value increasing the qualifying period from 1 to 2 years will inevitably result in a reduction in unfair dismissal claims lodged This should in turn reduce the burden on employers of defending unfair dismissal claims as well as the burden on the Employment Tribunal system having to process and hear them.

We consider that, if the appropriate internal procedures are in place, employers should be able to identify within the first year of service whether there are performance / capability issues or any other potentially fair reasons to dismiss a newly recruited employee and that an additional year for that purpose is therefore unnecessary. In many employers' experiences, issues around capability/conduct tend to crystallise around the 8-11 month

mark, but they say this has nothing to do with the existence of the 12 month qualifying period. Needless to say, lawyers representing employees do not believe that this is just a co-incidence. We suspect that 11th month termination cases probably fall into both situations.

It is noted that there appears to be no evidence to suggest that the proposed change will reduce the number of disputes finding their way to the Employment Tribunal and it is unclear how the estimate of a reduction in claims of 3,700 - 4,700 has been calculated.

We believe the proposed change will not actually meet the objective set out for it in the consultation paper, but will reduce the protection available to employees. Government needs to achieve a fair balance between the loss of unfair dismissal protection for employees for a second year and relieving the burdens on employers.

Effect on employees

Those ELA members who act primarily for employees comment that:-

- The increase in the qualifying period will dramatically impact upon an employee's ability to seek legal redress in respect of unfair treatment during the second year of their employment. They believe that the door will be opened to unscrupulous employers to ignore good industrial relations practice and treat employees unfairly for a longer period without fear of redress.

- Increasing the qualifying period is not necessarily likely to raise the levels of discrimination claims. It was felt that this was not an issue in relation to employees dismissed with under one year's service. However, concern remains about an increase in US-style litigation comprising discrimination / whistle blowing claims where no length of service requirement applies. The impact upon Tribunals could be significant. There is further concern that this would indirectly defeat the object of increasing the qualifying period in the first instance in order to reduce current strains on the Tribunal system.

- Unfair Dismissal claims are also often accompanied by legitimate claims for holiday pay, notice pay, claims of unlawful deductions from wages and claims for compensation following an employer's failure to provide the employee with the required statement of the terms of their employment. These claims are still likely to

be brought and will still take up Tribunal time and resources, albeit potentially less if they are “fast tracked”.

Those ELA members who mainly represent employers believe that if the qualifying period is extended to 2 years employees will look to other remedies instead. For those who turn to litigation, the process of handling claims other than unfair dismissal (discrimination, whistle blowing, etc) is likely to be more complex (for all involved) as compared to defending a simple unfair dismissal claim, more costly, and will potentially take up more Employment Tribunal time.

Effect on employers

Those ELA members who act primarily for employers comment that:-

- If the Government’s consultation proposals to tackle weaker cases are put in place, they should go some way to help weed out wholly spurious claims brought by employees with less than 2 years' service (e.g. “trumped up” whistle-blowing allegations). Accordingly if the qualifying period for unfair dismissal purposes increases in conjunction with the other consultation proposals being put in place, this could have a positive impact on the number of claims being brought.

- Presently there is enormous pressure on employers in having to expend considerable management time, legal cost and resources in dealing with large volumes of Employment Tribunal claims generally. Whilst they do not think that extending the qualifying period to 2 years will influence their recruitment activities, insofar as this may result in fewer claims to deal with, it will therefore positively address the significant amount of management time and legal costs involved in defending claims.

Other measures

Given the terms in which the consultation is framed, we consider that other measures may have more of an effect in enhancing employer’s confidence in taking on employees. For example it is possible that additional investment in the “front end” of the recruitment process and better guidance on recruitment and new staff monitoring and supervision would do more to improve “employment relationships” during the early period of the employment. Ensuring employers of all sizes have ready access to information as to what constitutes a potentially

fair reason for dismissal in law to counter the perception of a system weighted in favour of employees, and encouraging businesses to ensure better management training so managers have more confidence in assessing and dealing with failing employment relationships at an early stage, would, we believe, do far more to improve "employment relationships". Measures such as these would perhaps be more positive, with additional benefits to both employers and employees, than reducing the rights available to employees.

Question 58

In the experience of employers, how important is the current one year qualifying period in weighing up whether to take on someone? Would extending this to two years make you more likely to offer employment?

ELA members who mainly represent employers do not think that increasing the unfair dismissal qualifying period will affect their recruitment decisions or create more jobs. When making their recruitment decisions, employers are more concerned about the immediate operational need for the jobs to be performed, recruitment costs (salary, training etc) and whether the candidate has the requisite skills and experience for the specific job vacancy. They do not make recruitment decisions based on the possibility that the candidate may or may not have to be dismissed in 12 months time. We believe this proposal would neither make any difference to individuals being offered jobs, nor increase the number of jobs being offered.

Employers do already have (and use) the option of contracting with people on a self-employed basis or offering fixed term employment to reflect the intention between the parties.

We do not believe an increase in the qualifying period for unfair dismissal from one year to two would be a relevant factor in meeting the stated objective of encouraging growth.

Question 59

In the experience of employees, does the one year qualifying period lead to early dismissals just before the one year deadline where there are no apparent fair reasons or procedure followed?

ELA members who mainly represent employees report that it is a common experience for employees around the 8 /9 month mark to be dismissed without any apparent fair reason. Employees are also dismissed much closer to the one year mark and paid in lieu of notice.

In contrast those ELA members who mainly represent employers report that employers tend to get a pretty good idea within about 8-10 months on whether a newly recruited employee meets their conduct and performance standards . They say they are not influenced by the 12 month qualifying period in their **decision to dismiss**; although, inevitably, if this assessment is made close to the 12 month point, dismissal will be with pay in lieu of notice, in order to avoid an unfair dismissal claim.

We recognise that even if the qualifying period is increased to two years, there may be a concern that similar dismissals will take place, albeit later in the employment relationship. That having been said one would hope that an employer will have been able to decide whether or not an employee has met the required standards, well before the 2 year mark.

Question 60

Do you believe that any minority groups or women are likely to be disproportionately affected if the qualifying period is extended? In what ways, and to what extent?

The Government's impact assessment [p167] states that the number of women with between 1 and 2 years service is approximately 1 per cent higher than men. However the data does not specifically identify women with young children as a group, although experience tends to suggest that they are more likely to have shorter periods of employment between children and therefore less likely to be employed for between 1 and 2 years. However the maintenance of continuity of service through ordinary and additional maternity leave (of up to 12 months) should minimise this.

It is possible therefore that challenges (along the lines of the *Seymour Smith* litigation) will be mounted against an increase in the qualifying period on the basis that it indirectly discriminates against certain protected groups - although it is certainly arguable that a difference of 1% may not demonstrate a sufficiently disparate impact against women generally. However if the relevant pool is women with children aged under 5, our impression is that the extent of the disparate impact will probably increase. We recommend that the Government takes a careful look at such statistics (if they are available).

Any such challenge would create a lot of uncertainty for employers both in the public and private sectors and would be undesirable. This would be particularly the case if the Employment Tribunal allowed employees with between 1 and 2 years' service to bring unfair dismissal claims and for those claims to be stayed pending the outcome of any challenge. If

that were the case, the benefits introduced by the increased qualifying period would diminish very quickly.

Financial Penalties

Question 61

We believe that a system of financial penalties for employers found to have breached employment rights will be an effective way of encouraging compliance and, ultimately, reducing the number of tribunal claims. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

The Government's proposal to fine employers for breaches of employment rights marks a significant departure from more than 40 years of a regime of employment rights being remedied by compensation. We suspect that penalising employers for breaching employment rights may have more to do with raising revenue for the Exchequer, than reforming employers' behaviour. ELA members representing both employers and employees do not support this proposal.

We believe that the proposed additional financial penalties would not have a significant deterrent effect upon most employers to whom they are applied such as to stop them from breaching the statutory rights of their individual employees. This is particularly so for the sort of factually complex situations which often give rise to claims of whistle-blowing or discrimination and (many) unfair dismissal claims. The reasons for this include the following:

- Many such claims involve employers who are alleged to be vicariously liable for the actions of staff - for example, a manager accused of having a discriminatory motive in a promotion decision, or of engaging in a campaign of harassment.

- Many such claims are also hard for an employer to anticipate: - for example, a whistle-blowing claim based on an allegation that a disclosure about a fairly technical breach of a legal obligation has taken place.

It is unlikely either that staff behaviour would be changed by a system of penalties for employers, or that such a system would make it any easier for employers to "issue spot". In both cases the desired deterrent effect would be minimal.

Further, the financial penalties proposed will make very little overall difference to the financial impact to an employer – they are relatively low and where the value of a claim is low, it is proposed they will be determined by reference to that. In addition, we note that it is proposed that the penalties will not apply to smaller employers, for whom a penalty might represent a more significant deterrent.

The proposal may have more effect in encouraging compliance with more specific obligations and especially legislation designed to enforce minimum labour standards. Examples of this include payment of wages (leading to unlawful deductions from wages claims), provision of pensions and the leave provisions in the Working Time Regulations (which are more akin to a breach of the National Minimum Wage Regulations upon which it is understood this proposal has been modelled). Indeed, such claims often impact on more than one employee in an organisation. If a financial penalty was applied in the case of each employee whose rights had been breached, the aggregate penalty could provide a significant deterrent. In addition, if the actual value of an individual claim was nil or very low, the addition of a small financial penalty per Claimant might encourage the taking of multiple claims by groups of employees who may otherwise see little merit for them in proceeding with a case individually.

We note, however, that the Government's proposal is that the financial penalties would not apply to multiple claims, so the potential merits as described above would not apply. As indicated above, we consider that the deterrent effect of such penalties would be greater if they were specifically applied to multiple claims, as employers would be more likely to take the financial penalties into consideration when planning policies which apply to the workforce as a whole. The same could apply where a large number of dismissals are affected in breach of the TUPE Regulations, TULRCA or the equal pay legislation, for example.

Against this, we consider that there would still need to be provision to allow the Employment Tribunal to adjust any penalty imposed in the event of technical or inadvertent breaches - for example, where there are payroll errors, a genuine misconstruction of a clause in a contract, where there is a minor procedural breach of (say) TUPE legislation or where there are differing interpretations of what the legislation means. In addition, if the Government is minded to apply financial penalties to multiple claims, another option would be to apply a cap to the total penalty applied to any one employer depending on the number of employees affected.

Due to the multiple claims' exception which is part of the current proposal, our overall view is that the addition of financial penalties payable to the Exchequer is unlikely to encourage compliance, any more than the current remedies do.

Question 62

We consider that all employment rights are equally important and have suggested a level of financial penalties based on the total award made by the ET within a range of £100 to £5,000. Do you agree with this approach? If not, please explain and provide alternative suggestions.

The view of many ELA members, particularly those who act for employers, is that to penalise employers on an across the board basis in cases that arise out of such factually complex situations is simply not justified. The overriding principle should be that the employee is compensated for their loss where the Tribunal adjudges there to have been a breach. However, there is a (minority) alternative view that, if an employer breaches employment law and then fails to settle a case, (meaning it goes to a hearing before the Employment Tribunal) the employer should have to pay a penalty for the costs to the Tribunal system of dealing with the case, regardless of the factual circumstances in which it arose. But this is not the majority view.

ELA accepts that, subject to certain caveats, there is a case for the proposition that if an employer gets it wrong and then fails to settle a case such that it then goes to hearing, then it would be right that an employer **in certain circumstances** should pay a penalty for the costs to the Tribunal System of dealing with their case.

However, in considering whether or not a penalty regime should apply "across the board", we would make the following observations:

- Many cases are factually complex and involve different levels of culpability by an employer (and an employee). The principle is that the employee should be compensated for their loss where a Tribunal determines that there has been a breach. In the same way that compensation is assessed case by case, a "one size fits all" approach to penalties may not be justified in many circumstances.

- There is also concern that, for very technical breaches, the penalties which are proposed would be automatic. This would be like a "parking ticket" offence and have no real relationship to whether there was a substantive or technical breach

or just procedural unfairness, and would apply regardless of intention. If the Tribunal had an element of discretion in its award of the penalties this might allay this concern. However, by introducing discretion, this could give rise to additional arguments, litigation and legal costs incurred in relation to the exercise of that discretion, and potential appeals (as any exercise of discretion by the Tribunal would have to be appealable). Based on experience of the sort of litigation which arose as a result of the now abolished Statutory Dispute Resolution Procedures, our view is that this would not be desirable.

We therefore believe that if it is finally decided that a penalty regime is to be introduced, in any case where an employer has made a genuine attempt to settle the case by way of a reasonable offer, which the employee has not accepted (and does not beat at the Employment Tribunal), the penalty should **not** be payable.

We note that one impact that a penalties regime might have is that it may encourage settlement of cases before they come to Tribunal - because the penalty will not be payable if the case has settled. However, employees may use this to their advantage in attempting to seek higher settlements. This risks conflicting with the Government's other objective of reducing the burden of employment law for employers.

Whilst we have not been asked to comment specifically on the proposal as to whom the penalty is payable, we note that the proposal is that the penalty will be payable to the Exchequer, and not the employee who brings the case. Those ELA members who mainly act for employees note that the burden of bringing a claim all the way to Tribunal is on a employee Claimant. There is extremely limited public funding for such claims and an employee Claimant with a good case is often unable to pursue it because the burden of legal costs outweighs the value of the claim. In these circumstances where employees do proceed, at financial cost to themselves, the view of those ELA members representing employees is that the employee should be paid the financial penalty directly, or at the very least that the penalty payment be split between the Exchequer and the individual employee. However, those ELA members who mainly represent employers do not agree with this suggestion. One view is that both parties are capable of acting unreasonably or vexatiously in terms of settling a claim prior to the final hearing which could be reflected in the existing regulation of costs in relation to tribunal claims. Potentially a less onerous way of recompensing the Tribunal system for costs incurred would be to incorporate an additional award/penalty into Costs Orders in the Tribunal, that is paid to the Exchequer.

ELA notes that the rationale behind this proposal is to recompense the Tribunal system for the claim which would not otherwise have been brought. However, the Tribunal will only award it if the individual employee proceeds with the claim to a full hearing. One of the reasons why the Government has suggested making payment to the Exchequer is to avoid providing an incentive for speculative claims. As most employees will factor this payment into their negotiations for settlement, it is unlikely that payment of the financial penalty to the Exchequer will provide any less of an incentive to bring speculative claims, than if some or all of it was paid to the employee directly.

ELA also considers that, if revenue is to be raised in this way, it should be directly ploughed back into improving the administration and operation of the Tribunal system, which has appeared to most employment lawyers to have been particularly under resourced in recent years.

Alternative approaches

One alternative to financial penalties to encourage employers to comply with employment legislation, is to have a public register of Employment Tribunal judgments against employers to which the public at large, the press and Claimants would have access. Unless the names of Claimants were excluded from the register, this could have the downside of making the names of Claimants publicly accessible, with the risk of "blacklisting" during recruitment processes of prospective employees who have brought claims against a previous employer. Those members of ELA who routinely act for employee Claimants have serious concerns about this, and for this reason would not welcome the introduction of a public register which includes the names of Claimants. If the register of defaulting employers approach is adopted, it may be appropriate for the penalty regime to be applied once the employer had lost (say) three cases within (say) a 24 month period and, the penalty "slate" would be wiped clean once the employer had not lost cases for (say) 12 months. This would mean that the penalty regime would only apply to "repeat offenders". However, it is acknowledged that additional administrative costs would be involved in keeping up the register and monitoring the number of employers' breaches of legislation.

Another alternative is to give Tribunals wider powers to make recommendations affecting the whole workforce (such as the powers in the Equality Act 2010) when giving judgment in cases other than discrimination and equal pay cases, but including unfair dismissal. We anticipate many employers would be more concerned about this prospect, than the prospect of a relatively low financial penalty. It would therefore both a) encourage compliance and b)

improve practice in the future (assuming the recommendation was adopted). This would need to be carefully weighed against the Government's other objective of reducing the burden of employment law compliance for employers, particularly given the technical or fact specific basis on which findings of unfair dismissal can often be reached.

If the idea of a recommendation is adopted this could be placed on the register. Alternatively an employer completing an ET3 should be asked whether it has had any recommendations made against it in the preceding [say] 2 years.

Review of the Formula for calculating Employment Tribunal awards and statutory redundancy payment limits.

Questions 63 & 64

Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes:

- **should the up-rating continue to be annual?**
- **should it continue to be rounded up to the nearest 10, £10 and £100?**
- **should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?**

If you disagree, how should these amounts be up-rated in future?

We agree that limits on Employment Tribunal awards and statutory redundancy payment awards should be reviewed annually, but it should not automatically follow that those awards are increased. In conducting the review, there should be scope to determine whether an increase is appropriate in the circumstances, given general market conditions, etc.

To avoid the significant increases described in the consultation paper, we recommend that when an up-rating is appropriate, the limits are rounded up to the nearest £5 and £50, rather than £10 and £100.

Given that tribunal awards and statutory redundancy payment awards are intended to bear some resemblance to earnings levels, in our view the limits should be linked to average earnings increases, rather than either the RPI or CPI.

Response to Impact Assessment of Policy Option 1: Require all claims to be submitted to ACAS in the first instance

1 PROBLEM UNDER CONSIDERATION AND POLICY OBJECTIVE

1.1 The Proposal claims that, "the problem under consideration is the tendency in the current statutory dispute resolution arrangements in Great Britain for disputes to develop unnecessarily into employment tribunal claims."

1.2 ELA has not seen any evidence for this proposition and does not necessarily accept the proposition without seeing such evidence.

1.3 However, in general, the organisation believes that early resolution of disputes should be encouraged in the interests of public policy, cost savings to parties, and good industrial relations. However, in order to maintain good employment relations, parties will need to have confidence in the resolutions which are reached.

2 RATIONALE FOR INTERVENTION

2.1 This is stated to be that much of the cost incurred in pursuing and defending employment tribunal claims could be saved if more Claimants and employers were made aware of Pre-claim Conciliation ("PCC"). Again, we have seen no evidence that this is the reason for parties' use or non-use of PCC.

2.2 It is possible that lack of knowledge might be a barrier for unrepresented parties. However, it is difficult to think that legal representatives are unaware of this procedure. Represented parties should presumably be assumed to be aware of PCC procedures; however there is no analysis in the impact statement of the breakdown between represented and unrepresented parties in the use of PCC procedures. Such an analysis might be useful to establish whether it is simply a lack of knowledge and awareness that is preventing parties from using PCC; or whether there are other reasons as well.

3 CURRENT SYSTEM AND POLICY CHANGE

3.1 There are several brief comments to make on the proposed change, which will be addressed in full in the consultation response.

3.2 Firstly, we would be concerned if any duty was imposed on ACAS to advise Claimants as to the merits of their claims. This would fundamentally undermine the integrity and purpose of ACAS. ELA would be concerned by any change to ACAS officers' powers, duties and discretions in this regard. We understand from a meeting at BIS on 6 April that this might not, in fact, be the case, but the point should be clarified.

3.3 Secondly, ELA is concerned that whatever system is ultimately adopted, the process where conciliation is unsuccessful is very clear to both parties. This will be particularly important where the submission of the dispute to ACAS came very close to the Tribunal deadline.

4 METHODOLOGY

4.1 The impact statement estimates that the effect of pre-claim conciliation can be measured as a potential reduction in tribunal claims by 22.3%.

4.2 This is based on the fact that existing PCC stats show that where PCC was used in the first year of operation of PCC, the number of tribunal claims arising from conciliated cases was 27.7%. By contrast, the number of tribunal claims arising from non conciliated cases (that is those where PCC was un-progressed due to unwillingness of either party to participate, the case was inappropriate or was progressed for other reasons) was 41%. This showed a net effect of 14.2%. But the impact assessment decided to increase the assumption of the numbers of claims lodged on non-conciliated cases to 50% because it was said that a higher proportion of those offered PCC under a policy change would be expected to lodge a claim. This is because lodging a statement of intent with ACAS is a stronger statement than under the current system where intention is expressed verbally to an ACAS Helpline Advisor.

4.3 This logic seems odd in two respects.

4.4 Firstly, we find it difficult to view the “non-conciliated” group as a “control group”, as the impact assessment does. Presumably under the current system, those well disposed to resolving their dispute pre-claim are those who end up in the PCC group. The impact assessment admits that unwillingness to conciliate by either party was a major factor in a dispute ending up in the so-called “control” group. This is not a true control group. Rather, parties (from both sides) have self selected into the group of those who wish to conciliate and those who do not. The composition of one group affects the composition of the other group and therefore neither can be a control group.

4.5 It is therefore fallacious to assume that the ET1 submission rate will fall to 27.7% under a system of compulsory PCC referral to ACAS. Those who do not wish to conciliate, when in the wider compulsory PCC group, will inevitably point the ET1 submission statistics upwards of 27.7%

4.6 The second area of concern is the assumption that the counter-factual (that is, the assumption of the proportion of claims which would be lodged without the policy change) should increase to 50% to demonstrate the marginal effect of the policy change. Two reasons appear to be given for this:

(a) that the “control” group will have had some “treatment”; and
(b) because lodging a statement of intent under the new system is a stronger statement than a verbal indication to an ACAS officer (under the old system) and so it would be expected that a greater proportion of those offered PCC under the new system would be expected to otherwise go on to lodge a claim if the new system did not exist.

4.7 The first point is meant to mean (we think) that if the non-conciliating group had had no contact at all with the PCC system, even on a preliminary basis, then the proportion of claims submitted would be even higher. We note that there is no evidential basis given for selecting 50% even if the assumption is correct. The effect of using 50% instead of the true figure of 41.9% is to increase, at a stroke, the perceived benefit in reduction of ET claims from 14.2% to 22.3%. Given that individuals will presumably still be able to use the ACAS helpline, we find it difficult to understand why the “treatment effect” could be so high.

4.8 We do not understand what is meant by the second point. It seems to also involve a fallacy.

4.9 Surely under both systems, the overall number of people who have a serious intention of lodging a claim is unchanged. If the new system weeds out those who would not have made a claim under the old system either, then how can this be said to have any effect? Yet, it is used as a justification for an assumption raising the counter-factual to 50%. It is difficult to understand how the factor above at (2) could, in reality, reduce the number of claims which are made. The concern is therefore that the percentages are not sufficiently meaningful to draw robust conclusions from.

4.10 We believe that modelling based on overall numbers of claims rather than percentages, would be a considerably more useful and transparent tool for assessing impact.

5 CONCLUSION

5.1 For all of the reasons above relating to methodology, ELA would be cautious about accepting the alleged projected reduction in tribunal cases submitted.

5.2 It is however generally supportive of attempts to reduce tribunal workload and resolve employment law disputes at as early a stage as possible.

Response to Impact Assessment of Policy Option 2: Case management powers for weaker and unmeritorious cases

1 **INTRODUCTION TO PROPOSAL**

1.1 The opening words of the section refer to the Government's belief that more needs to be done to support and encourage workers and employers to resolve workplace disputes before the matter reaches the Employment Tribunal system. It continues: "some cases will inevitably be presented to employment tribunals". The impact assessment takes no account of the possible impact that these pre-Employment Tribunal measures may have on the quality of cases that ultimately result in Employment Tribunal proceedings. In ELA's view, it is at the least possible that if the proposed increased emphasis on pre-Employment Tribunal resolution is successful, that there will be reduction in cases that are perceived to be unmeritorious. These are precisely the type of cases that are susceptible to early resolution. Therefore, there is a risk that the benefits from any proposed changes under proposal 2 will be minor.

1.2 The existing strike out powers of the Employment Tribunal are twice mischaracterised in the Impact Assessment: There is a reference to "weak" cases and to cases "with little or no reasonable prospect of success". In ELA's view is it important to understand the legal test that is currently applied as this goes some way to explaining why there is a perception that these powers are not applied as much as they might be. It also helps to predict the likely response to changes to these powers.

1.3 The test for strike out is that the claim must have 'no reasonable prospect of success'. This was recently explained by the EAT in *Balls v Downham Market High School & College* [2011] IRLR 217, see para 6 per Lady Smith:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed

matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

1.4 It is a high standard. That probably goes a long way to explaining why it is successfully applied in only 2% (see below) of Employment Tribunal 'jurisdictions disposed of'. There is a natural judicial reluctance to strike out cases at an early stage without hearing evidence, particularly in relation to discrimination claims, where Employment Tribunals have been enjoined by appellate courts to remember that much discrimination is not obvious. Furthermore, representatives are well aware that it is a high standard and so will rarely advise clients to make such applications except in the most obvious cases (and clients even so advised are frequently concerned about wasting costs in making what is perceived as a risky application).

1.5 Reference is made to Part 3 of the CPR. However, the strike out test in CPR Part 3.4 is the same as in the Employment Tribunal, namely 'no reasonable prospect of success'. Furthermore, whilst in theory Part 3.1 does allow for a strike out without notice by the Court or without a hearing, the view of ELA is that this would be an exceptional course (if not unheard of) in a civil court as a matter of practice.

1.6 As an aside, one notable and relevant difference in practice between the Employment Tribunal and the civil courts is in relation to the amendment of existing claims. It is well established in a civil court that in order to amend an existing claim, any new claim must be a claim that has a reasonable prospect of success. In other words, prospective amendments that are found to have no reasonable prospect of success are not allowed. In contrast, our view is that in the Employment Tribunal there is a marked tendency to allow amendments to existing claims without subjecting them so thoroughly to this filter. Too many unmeritorious claims get into the Employment Tribunal system by way of amendment.

1.7 The analysis of the statistics in Table 2.1 is, in the view of ELA, probably understated in its conclusion. It is likely that almost all of the cases listed as "struck out not at a hearing" were struck out as result of settlement or withdrawal with a subsequent dismissal under Rules 25 and 25A. Practitioners (and Employment Tribunals) are well aware of the need to obtain dismissal under those rules and these are therefore likely to account for most of the cases "struck out not at a hearing". That means that the proportion of disposals struck out probably *significantly* overestimates the strike-outs/dismissals related to weak or unmeritorious cases. It might be better to take the

estimate of the number of such cases as being closer to the number of cases "Dismissed at a preliminary hearing", i.e. on average 2% (in contrast to the 11% given overall).

1.8 There is reference to the existing power to award costs. Our view is that this slightly misstates the scope of the power in two ways, which itself illustrates one of the current difficulties in using the existing rules, namely their excessive complexity. The summary of the costs rules under the heading Rationale, suffers from the same defect.

1.9 First, it is stated that costs orders can only be made "against a party who is legally represented". In fact a costs order can be made in favour of a party who is legally represented. However, the rules only allow for a costs order where a party has been legally represented at a hearing, or where there is no hearing the party was represented at the time that the proceedings were disposed of (Rule 38(2)). In that respect we believe the interaction of Rule 38 with Rule 42 (for preparation orders) is needlessly complicated and may be a contributing factor in limiting the effectiveness of the current rules.

1.10 By way of example: A company or an individual Claimant has legal representation during the early stages of their claim. At the hearing of their claim, they decide to dispense with legal representation to save costs. In the event that they are able to claim 'costs' from the other party, under the existing rules, they cannot apply for costs under Rule 38 (the costs rule) as at the hearing they did not have legal representation. Instead in order to apply for reimbursement of the legal costs they incurred at an earlier stage in the process, they have to apply for a preparation time order (under Rule 42), which may include the reimbursement of previously incurred legal costs.

1.11 This type of complexity does not, in our view, assist any party or Employment Tribunals to use the existing the costs rules effectively.

1.12 Secondly, it is suggested that the Employment Tribunal cannot make a costs order in excess of £10,000. That is not a correct summary of the position. An Employment Tribunal *can* make an award of costs in excess of £10,000 (see Rule 41), but any such order must be subject to detailed assessment by a County Court (i.e. the Employment Tribunal can make a general award, but the calculation of the precise

amount to be paid is done under the CPR rules and practice on costs assessment). Alternatively, an Employment Tribunal can order a sum in excess of £10,000 with the agreement of the parties.

2 RATIONALE

2.1 At the beginning of this section, it is stated that there is a perception that "the current provisions available to Employment Tribunals and its judiciary to deal with such cases do not sufficiently deter Claimants from bringing weak, unmeritorious or vexatious claims; or empower Employment Tribunals to manage them robustly to an early disposal."

2.2 No evidence is given as to who has this perception and on what basis, although a clue as to its origin is evident in the fact that it refers to weak claims by Claimants. There is no mention of the robust case management of hopeless defences put forward by errant employers.

2.3 In any event, our view is that this perception is largely mistaken. The powers do exist. The problem is that they are not currently used. The reason for that is essentially twofold:

(a) As explained there is a natural judicial reluctance to strike out claims at an early stage before hearing evidence, except in the clearest of cases. Similarly, there is in our view, still a significant judicial inertia to the use of the costs powers in a meaningful way. Furthermore, there are large variations between Employment Tribunals and judges in relation to whether and, if so, how these powers are used.

(b) There is a reluctance by parties to make applications for strike outs or deposit orders, when (in the case of strike outs particularly) the bar is so high. Deposit orders are even more pointless. There are some Employment Tribunals that overtly express disinterest in making them. Even in the absence of such open judicial resistance it is very difficult to persuade a client of the efficacy of incurring the costs of an additional hearing (which cost is unlikely to be reimbursed) in order to have a by no means guaranteed chance of not determining any issue definitely, but instead merely obtaining an order for a small sum to be paid by the other party in order to continue with that claim or

part of it. The £500 amount is also a maximum, and if Employment Tribunals do make an order, they can and do order less. Many clients faced with the suggestion of making an application for a deposit order will seriously question the point of such an exercise. Table 2.2 is clear evidence of the lack of effective use of deposit orders.

2.4 This section also states that "There is a perception that the current system of deposits and costs powers is not credible or widely enforced." This is something we endorse although as explained above, the problem is not so much with the powers themselves, but rather with the manner in which they are (or are not) deployed by parties and Employment Tribunals.

2.5 Notwithstanding the actual or perceived shortcomings with the current powers, we agree that there is risk that more robust use of a strike out power might act as a barrier to accessing justice. Indeed any attempt to do so might be challenged as a being incompatible with Article 6 ECHR and the Human Rights Act.

2.6 We agree that it may be more effective (and less open to challenge) to make changes to the costs powers, rather than the strike out power, with the possible exception of addressing the suggested failure to refuse to permit claims by way of amendment that do not have a reasonable prospect of success.

3 AFFECTED STAKEHOLDER GROUPS, ORGANISATIONS AND SECTORS

We agree with the analysis under this heading.

4 OPTION A - DO NOTHING

We have no comment on this section.

5 OPTION B - AMEND EMPLOYMENT TRIBUNAL RULES OF PROCEDURE

5.1 Description of possible measures:

(a) As stated above, we believe in principle it would be a good idea for strike out powers to be available at Case Management Discussions. One issue is that these are currently private hearings, and there is a body of case law which indicates that the determination of someone's rights must take place at a

public hearing (i.e. a PHR) in order to be compliant with the ECHR and Human Rights Act.

(b) There may be limited benefit to be gained from making a strike out power available on the basis suggested given that it is unlikely to be taken up in practice by judges.

(c) We believe that it would be a good idea to make deposit orders available at Case Management Discussions. It is possible, although not very likely, that they might become more widely used.

(d) Our view is that there is little point to the existing deposit scheme. There is little to be gained by extending it.

(e) It is possible (but probably not very likely) that changing the test for the making of a deposit to make it a lower test might increase the use of such orders.

(f) An increase in the maximum level of deposit order might result in an increased deterrent effect, but it is unlikely on its own to tackle the root problem with deposit orders, namely that they are not used.

(g) An increase in the "cap" on costs is unlikely on its own to deter unduly weak cases. As explained above, the £10,000 limit is not in fact a cap on the maximum amount of costs that can be awarded. The real problems are: (1) the reluctance to use the current rules; (2) the needless complexity of those rules, and (3) the absence of proper cost shifting rules as exist under the CPR.

6 COST OF OPTION B

ELA agrees with the analysis of the transitional and ongoing costs.

7 BENEFITS OF OPTION B

7.1 In our view, the analysis of the ongoing benefits is open to question in a number of respects.

7.2 It assumes that there are a significant number of "spurious" cases clogging up the Employment Tribunal. There is no evidence for that assumption. We believe the reason why the Employment Tribunal system is struggling with a large load of cases is not that the cases (or even a significant number of them) are "spurious" it is simply that successive Governments have spent the last 30 years heaping ever more rights

and protections on workers. It should not come as a surprise if they decide to make use of them.

7.3 It assumes that the proposed changes would remove these “spurious” cases. Our view is that many of the proposed changes will have little, if any, effect and therefore the benefits may in large part be illusory.

7.4 The reference to the 26 week KPI in the footnote is telling. In our experience many Employment Tribunals are sometimes excessively diligent in keeping to the 26 week KPI. Despite the imposition of this KPI and the zeal of many Employment Tribunals in applying it, the Employment Tribunals have not used their existing case management powers to reduce the number of “spurious” cases as a means of assisting themselves to meet the KPI. This is striking in ELA’s view.

7.5 The suggestion that there will be increased amounts of money on deposit on which the Tribunals Service will earn interest, does not seem in the view of ELA to be a particularly noteworthy benefit. It is unlikely that the sums involved would be that large. For example, suppose the number of deposit orders was doubled from 418 pa to about 800 pa. Assume that each deposit was of £1,000 (highly unlikely in fact). That would give a sum of £800,000 on deposit, which at current deposit rates would yield about £8,000 pa. In the context of the budget of the Tribunals Service (and indeed of the cost of the impact assessment) this is an insignificant amount.

7.6 We agree that there would be benefits as stated to both Claimants and Respondents if there were fewer “spurious” claims. However, we are not convinced that these benefits would be as significant as the impact assessment appears to assume.

7.7 The suggested link between “spurious” claims and reputational damage to employers is a tenuous one if there is a link at all. Lurid claims which have the potential to be reported in the media and thereby cause reputational damage are not restricted to “spurious” claims. They occur in cases of all degrees of merit. There is no evidence that such reputational damage is worse in “spurious” cases as compared to meritorious cases. The supposed benefit is therefore in our view not demonstrated.

7.8 Ms Wimmer lost her case, but it does not follow from that it was “spurious” or that her former employer suffered any real reputational damage.

7.9 We agree that there might be a benefit as stated as result of increasing the costs "cap".

8 **KEY ASSUMPTIONS/SENSITIVITIES/RISKS**

8.1 Unfortunately, the assumptions stated about the behaviour of Employment Tribunals do not accord with our experience as set out above. The assumptions are therefore open to question.

8.2 We agree with the statement of possible risks. We refer also to the comment as to risk in the first paragraph of the response to Proposal 2.

Response to Impact Assessment of Policy Option 3: Provision of information, require Claimants to set out details of claim in writing

1 **RATIONALE**

The rationale of this proposal is stated to be to improve efficiency. We would also suggest that it would be equitable for the Government to intervene in this manner given that, in our experience, the reasons for which a Claimant is bringing a claim are frequently unclear and sometimes not even provided in an ET1. This prohibits a Respondent from reaching an informed view as to the basis and therefore strength of a Claimant's claim at an early stage in proceedings.

2 **OPTION A – DO NOTHING**

We do not support this option and agree with the perception that steps need to be taken to deter weak and unmeritorious cases from proceeding within the Employment Tribunal system.

3 **OPTION B – AMEND THE ET RULES SO AS TO MANDATE THE PROVISION OF ADDITIONAL "REQUIRED INFORMATION" FROM CLAIMANTS**

3.1 Costs

(a) It is noted that "guidance" for tribunal users will need to be produced to implement the suggested changes. The extent of such guidance will of course depend on the level of detail that is required to be provided by Claimants however we suggest such guidance will need to be thorough and detailed. In addition Tribunal staff will need to be trained on such guidance. The Impact

Assessment has not quantified the transitional costs and ongoing costs of these two points but we suggest they will be significant.

(b) The costs that will arise from increased demand on ACAS, for advice from unrepresented parties, have again not been quantified but we suggest that these are likely to be significant.

(c) There is a significant risk that the use of "unless orders" to obtain information, not provided in claim forms, is a procedure that could be exploited and could lead to an increase in the number of applications before Employment Tribunal Judges. Employment Tribunal's will most definitely incur significant costs in dealing with such applications. These have not been quantified and in our view this risk has been under-estimated in the Impact Assessment.

(d) There is a significant risk that the use of "unless orders" will require Judges to make more directions/orders at an earlier stage. Consideration does not appear to have been given to the length of time it may take Employment Tribunals to deal with such applications. We are concerned about the increased burden on the Tribunal system, the impact of further delays and suggest consideration needs to be given to the requirement for additional Employment Tribunal resources.

3.2 Benefits

(a) We agree that there is a benefit in requesting Claimants to provide more detailed information about their claim(s) to ensure that their minds are focussed as to what they wish to achieve by issuing proceedings and to raise awareness of the seriousness of embarking on litigation. We disagree that the use of "unless orders" by Respondents, to obtain detailed information from Claimants, will reduce the number of vexatious or weak cases being brought in the Tribunal system. If Claimant's provide the detailed information required, their claims will be permitted to proceed and Respondents will have to provide a response to them, irrespective of the veracity or strength of the information provided.

Response to Impact Assessment of Policy Option 4: Incentivising the making and acceptance of formal settlement offers

1 **POLICY OPTION 4B - ESTABLISH, THROUGH EMPLOYMENT TRIBUNAL RULES, A PROCESS WHERE FORMAL SETTLEMENT OFFERS CAN BE MADE, ANALOGOUS TO THE SCOTTISH SYSTEM OF JUDICIAL TENDERS AND THE E&W CIVIL COURT MODEL UNDER CPR PART 36 WITH PENALTIES AND REWARDS BEARING PRIMARILY ON THE SIZE OF THE AWARDS MADE BY EMPLOYMENT TRIBUNALS.**

1.1 Will formal offers from either party be time limited in order to be effective?

1.2 It is fairly typical to have offers made by Respondents at an early stage. This is often described as a commercial settlement based on the costs of preparation time, costs of legal representation and on the number of days listed for the full merits hearing. Parties wishing to make a formal settlement offer are likely to wait until the case is listed for hearing to determine how much to offer on a commercial basis.

1.3 Considerable costs can mount up for both parties before the hearing is listed. If costs are a major factor when considering early formal offers, then Employment Tribunals need to indicate at the time the claim is lodged the number of days the case is to be listed. This can be difficult without the benefit of the ET3 or CMD directions.

1.4 If parties are expected to make formal offers into Employment Tribunals as early as possible based on the merits of the case, unless it is a clear cut claim (e.g. a procedural unfairness claim under S98 (4) ERA 1996), it will be difficult to assess the liability of the parties or for one party to concede that a claim has merit enough to offer a formal settlement.

1.5 Employment Tribunals do not request documentary evidence at the time of lodging claims. Therefore, the only documents available to Employment Tribunals and the parties are the ET1 and ET3. Unlike Civil Claims documents are normally only filed in Employment Tribunals on the first day of the hearing. This makes it difficult for parties to assess the merits of a claim. This will have a profound impact on what the parties consider to be a fair and reasonable offer to put forward.

1.6 If formal offers are to be made by either party, consideration should be given to whether documentary evidence in support of a Claimant's claim or a Respondent's response should be admitted at the time the parties lodge their claims or responses.

1.7 Assessing the reasonableness of the parties' offer or conduct in proceedings has a significant bearing on awards and costs in a claim. Employment Tribunals will need to judge the conduct before imposing a penalty or award based on the offer made and the action and conduct in rejecting that offer. If an offeree refuses an offer without having sight of all the documentary evidence for or against the claim if will be difficult for a Tribunal to measure the reasonableness of refusing the offer or to determine whether or on the formal offer was a sensible one in the first place.

1.8 Formal offers are easier to make in straightforward unfair dismissal claims, as losses are simpler to identify for actual and future losses. The losses in complex and difficult multi-jurisdictional claims are not so easily identifiable. Claimants may need to provide a detailed schedule of loss simultaneously to lodging an ET1.

1.9 It is notoriously difficult to assess what an Employment Tribunal is likely to award for injury to feelings in discrimination claims, even with the assistance of the *Vento* Guidelines. Parties will not be able to second guess the Employment Tribunals on awards for injury to feelings as often, the only way to measure the injury or psychological damage is after hearing evidence for the witnesses including expert evidence.

1.10 The costs to both parties will not necessarily be reduced by avoiding the hearing as legal advice will increase in obtaining opinions on the value of claims and on merits of claims before a sensible offer can be made.

1.11 The average number of cases over the last three years that proceeded to full hearing (see Table 4.1 - page 93 of the Impact Assessment) is 22,400 excluding cases dismissed at PHR or by default judgment. When compared to the average number of cases lodged over the same period (192,100) it is clear that many claims are already settled before hearing. We doubt these figures will be reduced significantly with the introduction of a formal offer process in the Employment Tribunals, but it will allow the parties a further stage at which to attempt settlement where settlement has failed under a compromise agreement or through ACAS or mediation.

1.12 The impact assessment makes reference to the potential reduction of fee income of some representatives and asserts without evidence (see page 94 and footnote) that some representatives may work against attempting a early settlement in order to continue charging fees. The fees and costs of a case will be reduced on early settlement, but ELA members are governed by Code of Conduct to act in the best interest of clients and part of that process is to seek a settlement of the claims as the statistics in paragraph 12 above shows.

1.13 We anticipate the administration of formal offers will place considerable burdens on the Employment Tribunals in order to keep the offer confidential from the judge and panel. Further, the panel will only have the information after the final decision has been made. This will delay the hearing and may involve further listed days, the end result being more delays in listing fresh claims.

2 POLICY OPTION 4C: ESTABLISH, THROUGH EMPLOYMENT TRIBUNAL RULES, A PROCESS WHERE FORMAL SETTLEMENT OFFERS CAN BE MADE, ANALOGOUS TO THE SCOTTISH SYSTEM OF JUDICIAL TENDERS AND THE E&W CIVIL COURT MODEL UNDER CPR PART 36 WITH PENALTIES AND REWARDS BEARING PRIMARILY ON THE COSTS/EXPENSES INCURRED BY THE PARTIES AFTER THE FORMAL OFFER HAS BEEN MADE.

2.1 This option could be used aggressively by Respondents at a very early stage i.e. as soon as an ET1 is lodged and before an ET3 is completed, with an assessment of the claim based solely on the ET1.

2.2 There will be a higher risk of costs against a Claimant under this option if the Tribunal marginally awards less but costs of preparation form the ET3 up to the hearing is taken into account. A Respondent's costs are typically two to three times that of a Claimant. The earlier a Respondent makes a formal offer based on actual loss and future loss in unfair dismissal claims the more likely it will recover some costs against the Claimant who rejects the formal offer.

2.3 Under this option the costs/expenses incurred by the parties would be the prime focus of the sanctions and rewards. The balance will be weighed against the Claimant as failure to accept a formal offer will leave the Claimant open to the real possibility of an order that the Respondent can apply for costs on an indemnity basis from the date the offer was made, plus interest on those costs. The provision that the Employment Tribunals may consider whether it is unjust to award costs and interest

will be rare as the Employment Tribunal will have to enforce and allow a costs application reasonably incurred without much regard to the ability of the Claimant's to pay such costs.

2.4 The Claimant is also entitled to make similar costs/expense applications if the formal offer is rejected by the Respondent and the Tribunal awards the Claimant an award at least as advantageous. Although the remedy appears reciprocal, it is more likely to result in a much lower award on costs especially in circumstances where the Claimant is unrepresented.

2.5 The costs as assessed under the transitional costs are deemed to be potentially greater than option 4B. It is clearly more complicated to operate for the Employment Tribunals and whilst costs awards are rare (only 412 in 2009/10 from 25,700 cases (see page 103)) it will create further delay and more hearings with the added costs to both parties and the Employment Tribunals as both parties can ask for assessment of costs. Employment Tribunals will have to adopt similar procedures and appoint costs judges in many cases.

2.6 As there is no legal aid in Employment Tribunals scales of costs will be difficult to assess as rates vary nationally. Legal costs may require standardisation.

2.7 The impact assessment recognises that there are likely to be inconsistencies between the parties and advisers in respect of the advice on merits of accepting a settlement. The party who is faced with a costs order make seek to claim professional negligence against the legal representative.

2.8 More claims are likely to be settled taking account of the risk involved to a party and the representative on a costs order. The likelihood of which is that those with considerable funds to defend and make early offers will use the Costs Order application as a bargaining tool in making a formal offer under this option.

Response to Impact Assessment of Policy Option 5: Witness statements to be taken as read

1 **POLICY OPTION 5(B): INTRODUCE A PROCEDURAL RULE WHICH REQUIRES A WITNESS'S WITNESS STATEMENT TO BE TAKEN AS READ.**

1.1 Non-monetised Costs

(a) The Impact Assessment identifies transitional costs to the Tribunals Service in updating procedural rules and in any necessary training. The ELA broadly agrees with the Impact Assessments view of likely transitional costs.

(b) The Impact Assessment identifies the following potential ongoing costs:-

(i) Potential costs to Employment Tribunals from being less able to assess the weight of witnesses' evidence.

In the ELA's view such costs would be minimal if Employment Tribunals make proper use of their ability to question witnesses and explore their evidence to seek clarification or further information when required.

(ii) Costs to Claimants and Respondents from potentially worse legal outcomes.

The Impact Assessment suggests that this Policy Option is likely to have an adverse impact on Claimants who are represented proportionately less frequently than Respondents and may not have access to the support required when drafting (or asking witnesses for) witness statements.

We believe such disadvantages arise out of the lack of representation and would not be materially exacerbated by a provision requiring witness statements to be taken as read. It is noted that in fact the number of unrepresented Claimants (59%) is only marginally in excess of the number of unrepresented Respondents (55%). In our view the quality of a poorly drafted or directed witness statement does not improve by reading it aloud.

(iii) Employment Judges may face time costs from having to read witness statements before the case is heard (if this is not currently done).

In our view advance reading of witness statements by Employment Judges would be vital if any such proposal is to work effectively.

(iv) Other parties may face costs from preparing authoritative witness statements.

In our experience most represented parties already understand the importance of well drafted and directed witness statements and incur costs accordingly.

1.2 Non monetized benefits

(a) We broadly agree with the Impact Assessment's Analysis of likely non monetised benefits.

1.3 Key Assumptions/Sensitivity/Risks

(a) The Impact Assessment refers to the following:

(i) As it is assumed witness statements are prepared in the bulk of cases this would not introduce any new burden on parties and witnesses.

We would agree broadly with this Assessment save for the observation that more time and cost may be involved in the preparation of witness statements by those parties who hitherto relied more heavily upon an ability to expand upon the content of a statement through evidence in chief.

(ii) Based on the experience in the Bristol Region, shorter hearing times would be expected. However, this is by no means certain – see our discussion in relation to this issue in response to Question 45 in the main consultation document.

(iii) The proposal could disadvantage unrepresented Claimants disproportionately if their written advocacy is not as strong as the employer's and accordingly judicial discretion will be important to ensure procedural fairness is safeguarded.

Whilst we would agree with the importance of judicial discretion we do not necessarily accept that the proposal would disadvantage unrepresented Claimants anymore than unrepresented Respondents who might equally lack the resources and ability to prepare a detailed and properly focused witness statement. In this connection it is noted that the Survey of Employment Tribunal Applications ("SETA") Survey identified that 44% of cases were from workplaces with fewer than 25 employees, which according to the LFS accounts for 34% of workplaces (page 170).

1.4 Enforcement, Implementation and Wider Impact

(a) The ELA has no observations in relation to this section of the Impact Assessment.

1.5 Specific Impact Tests: checklist

1.5.1 We have no observations in response to this part of the Assessment.

Response to Impact Assessment of Policy Option 6: Withdraw payment of expenses Proposal 6B: Cease payments of expenses to all parties and their witnesses involved in the Employment Tribunal proceedings.

1 SUMMARY

1.1 In our view if the payment of expenses to all parties is ceased there will:

(a) not be a significant administrative cost to either Respondents or Claimants,

(b) vexatious and weak claims are unlikely to decrease,

(c) there may well be an impact on access to justice (see our reply to Question 49).

2 COMMENTARY

2.1 Costs to 'main affected' groups

(a) The Impact Assessment envisages that there will be additional costs to the main affected groups of £0.3m.

(b) It appears that this approximate cost has been taken from the calculated saving to the Employment Tribunal Service of £280,000 from not paying expenses to witnesses; and administrative savings of £10,000. If the figures are correct the estimated saving is £290,000.

(c) In our view Respondents calling witnesses that they employ will not increase their administrative costs because any administrative requirements will be dealt with in the usual course of the Respondents business.

(d) In our view in the event that Claimants pay the expenses of their witnesses this will be done informally and therefore no additional administrative costs will be incurred.

2.2 Key monetised benefits of 'main affected groups'

(a) The Impact Assessment envisages a saving to the Tribunals Service of £280,000 from not paying expenses to witnesses or parties; and administrative savings of £10,000 annually and therefore total annual savings to the Tribunals Service of £0.3 million.

(b) In our view if the figures are correct the saving to the Tribunals Service will be £290,000.

3 OTHER KEY NON-MONETISED BENEFITS BY 'MAIN AFFECTED GROUPS'

3.1 In our view the removal of expenses paid to all parties will not have an impact on the number of weak or vexatious claims being issued, but may have a minor impact on the number of claims being resolved earlier.

4 **KEY ASSUMPTIONS/SENSITIVITIES/RISKS**

4.1 In our view the removal of expenses for all parties will have a minor impact on access to justice. The large majority of Claimants and Respondents who have high regard for the importance of the issues behind a claim will attend the Employment Tribunal hearing regardless of whether or not they can reclaim their expenses.

Proposal 6C: Cease payments of expenses to all parties and their witnesses but with appropriate exemptions in place

1 In our view there will be the additional cost to the Employment Tribunals Service in producing or amending existing guidance, leaflets and forms to implement this proposal.

2 There will be the additional cost to the Tribunals Service in training staff to administer the new system for claiming expenses.

3 The administrative costs saved by removing the provision of expenses entirely for all parties will not be fully achieved if exemptions are in place.

Response to Impact Assessment of Proposal 7: Extend jurisdictions where judge can sit alone

1 **RATIONALE**

1.1 Reduction of inefficiencies within the tribunals service: cases could be dealt with faster without compromising fairness and access to justice.

1.2 It would be more consistent with civil court practice.

1.3 It would be easier to list cases for hearing.

1.4 It is easier to take one employment judge through the issues resulting in shorter hearing times.

2 **OPTION A: DO NOTHING**

2.1 What is the basis for the assertion that 300 additional lay members will need to be recruited in 2010/2011?

3 **OPTION B: REQUIRE JUDGES TO SIT WITHOUT WING MEMBERS IN (A) PROCEEDINGS IN EMPLOYMENT TRIBUNALS CONCERNING UNFAIR DISMISSAL; AND (B) ALL PROCEEDINGS IN THE EMPLOYMENT APPEAL TRIBUNAL**

3.1 It is unclear why unfair dismissal has been singled out. The impact assessment states that single jurisdiction unfair dismissal claims often involve questions of basic legal criteria which judges should be comfortable deciding upon themselves. However, in our experience unfair dismissal claims can be factually complex. In particular, wing member contribution has been valuable when considering whether a dismissal was within the range of reasonable responses.

3.2 Although variable competence of wing members means that the system can be open to criticism, they do play an important role and offer insight into the workplace from the perspectives of both employee representative bodies and business.

3.3 This proposal only relates to single jurisdictional unfair dismissal and yet no figures have been provided which demonstrate the proportion of claims which concern the single jurisdiction. Therefore it is not possible to assess whether the benefits will out-weigh the costs.

4 COSTS

Transitional costs

4.1 Would training for panel members be required? Surely they would simply be informed that they are no longer required to sit on unfair dismissal cases.

Ongoing costs

4.2 The impact assessment states that more parties may be inclined to appeal to the Employment Appeal Tribunal or to the Court of Appeal/Court of Session. However, this fails to take account of the fact that most Claimants are not individuals with deep pockets and most employers are small and medium sized employers. With this in mind, is it really envisaged that further appeals will be brought simply because of the absence of wing members? Has BIS gathered any evidence on this point?

4.3 The assumption made in relation to appeals seems to erode the premise of the proposal: The impact assessment states that single jurisdiction unfair dismissal claims often involve questions of basic legal criteria which judges should be comfortable deciding upon themselves. Except in exceptional cases, only points of law can be appealed. This cost consideration seems to imply that the absence of (non-legally qualified) wing members will increase the occurrence of challenges to legal reasoning.

5 BENEFITS

Ongoing benefits

5.1 The impact assessment applies a 21% mark-up to the daily fee payable to lay members in order to calculate non wage labour costs. How is this 21% made up?

5.2 The impact assessment states that it is not possible to quantify savings as there is no way to estimate volumes of single-jurisdictional claims. Would it be helpful to look at the volumes of single jurisdictional claims in previous years?

6 OPTION C: EXTEND THE CATEGORY OF CASES WHERE JUDGES CAN SIT WITHOUT THOSE WING MEMBERS TO (A) PROCEEDINGS IN EMPLOYMENT TRIBUNALS CONCERNING UNFAIR DISMISSAL; AND (B) ALL PROCEEDINGS IN THE EMPLOYMENT APPEAL TRIBUNAL, BUT PERMIT DISCRETION FOR JUDGES TO DIRECT OTHERWISE IN APPROPRIATE CASES

Similar questions and comments arise in connection with Option C as Option B.

7 COSTS

Transitional costs

7.1 Would higher training and guidance costs arise from this option because of the need to train judges as to the use and parameters of their discretion?

Ongoing costs

7.2 The impact assessment states that more parties may be inclined to appeal to the EAT or to the Court of Appeal/Court of Session. However, this fails to take account of the fact that most Claimants are not individuals with deep pockets and most employers are small and medium sized employers. With this in mind, is it really envisaged that appeals claims will be brought simply because of the absence of wing members? Has BIS gathered any evidence on this point?

7.3 The impact assessment has not considered whether it will be possible to challenge the exercise of judicial discretion and the cost of such challenges.

8 BENEFITS

Ongoing benefits

8.1 See the questions raised in relation to Option B.

Response to Impact Assessment of Policy Option 8: Introduce the use of legal officers

1 ALL PROPOSALS

1.1 There is a discussion at p. 132 under the heading ‘rationale’ of the extent to which the current position permits inefficiencies in case management by the case management powers not being exercised adequately or swiftly enough throughout a case. However this misses a significant question, which is the extent to which those

powers are to be interventionist (through some form of 'docket' system) or – as present – largely voluntary, in that on the whole a party has to *apply* for one of the powers to be exercised. Clearly the former is more likely to reduce inefficiencies, but overall the impact assessment appears to assume the latter.

The summary at p.133 of likely affected groups appears reasonable.

2 **OPTION B: DELEGATE A LIMITED NUMBER OF POWERS TO EXPERIENCED MEMBERS OF THE ADMINISTRATION – PROPOSAL 8(B)**

2.1 For ease of reference we will refer to this type of proposed legal officer as an 'administrative officer':

(a) On the whole we believe that (anecdotally at least) there already exist in most Employment Tribunals experienced administrative staff capable of exercising the limited powers proposed to be delegated under proposal 8(b). Indeed, we would question whether this does not in practice to some extent already occur in a *de facto* manner by way of the helpful comments and reminders no doubt made by Tribunal staff to busy Employment Judges when they put post and applications before the Judges.

(b) With regards to the reference to increased numbers of appeals (p 27) this raises the whole question of how decisions of the administrative officers could be reviewed or appealed. There must, we assume, be such a review or appeal procedure specific to these newly delegated powers – to avoid "worse legal outcomes" occurring as envisaged by the impact assessment. Plainly the Rules could be altered at the time of introduction of the policy to permit many different variations as regards review or appeal (or both). However, the likelihood most in line with the proposal would be the possibility of a review of the decision by the same or another administrative officer, or an appeal to another administrative officer, rather than to an Employment Judge - these are, after all, very limited areas where discretion is being given to administrative officers. If so, so that an Employment Judge is unlikely to be involved in these reviews/ appeals, the anticipated disruptive effects of appeals might be overstated in the impact assessment.

(c) Likewise, much emphasis is put (p.27, p.134) on the possibility of judicial review applications being made. This ignores the true nature of judicial review, which is not primarily intended as a review of interlocutory or case management decisions such as this, and which is anyway inherently slow, expensive and complex. Practitioners would be extremely unlikely to recommend that their clients attempt to judicially review the decision of an

administrative officer, particularly because the High Court would not necessarily find that such decisions were even justiciable – indeed, as stated above, the Rule amendments should expressly provide for an appeal or a review procedure which would make the whole notion of a separate judicial review entirely moot.

(d) We would query to what extent there would be a real saving of expenditure on legal representation under proposal 8(b)(p.27). Surely written contentions will still need to be made to administrative officers. Indeed arguably the legal costs will increase because of the need (particularly when the changes are first introduced) to ensure that all relevant legal references and contentions are set out and referenced – one would not ordinarily assume from an administrative officer the same level of knowledge of case law and procedural law as one would expect from an Employment Judge or such a legal officer as is proposed under 8(c). This applies whether or not the decisions proposed to be delegated to an administrative offer remain the limited ones currently set out, or (as a result of arguments that this is merely 'tinkering at the margins') they are marginally increased within the consultation or by later amendment.

3 OPTION C: DELEGATE AN EXTENDED RANGE OF POWERS TO A SUITABLY QUALIFIED LEGAL OFFICER (PREFERRED OPTION) – PROPOSAL 8(C)

3.1 For ease of reference we will refer to this type of proposed legal officer (the preferred option being put forward under the impact assessment) as a 'legal officer'

(a) Without wishing to suggest too radical amendments to the proposals for legal officers, at least some significant savings could be made if some or all of the legal officers were existing employment law practitioners of a robust nature working on a part-time basis. They might agree to devote up to 3 one (or one and a half) hour sessions per week at a nominal rate of remuneration (they would take the office as a quasi-judicial role with the aim of gaining experience and increase the likelihood of a future judicial appointment); their firms would agree that they would assist with ensuring their availability and the tenure might be from 6 months to one year. Such a pool of practitioners could be selected relatively cheaply and swiftly, significantly reducing all the costs outlined at pages 29 and 136. Please see our replies to Questions 55 and 56 for further comment in relation to legal officers.

(b) The same points apply, as to the need under amended Tribunal Rules for a new defined review/ appeal model for such legal officers, as stated above with regard to proposal 8(b), not least the necessity of having such a

formalised review/ appeal procedure to avoid the possibility of "worse legal outcomes" occurring. Hence 'risks of appeals' should be less of a concern as the revised Rules should *automatically* provide for a review/appeal procedure when the amendments are introduced, without (we would suggest, to be consistent with the proposal) the need for the involvement of an Employment Judge in the vast majority of decisions of legal officers. Plainly if there was the possibility of review/ appeal to an Employment Judge then there would be too great an incentive to ask for a review/appeal however fair or correct the decision of the legal officer and his or her role would be rendered otiose as merely a stepping stone to a 'real' decision by an Employment Judge. Equally there would be little savings to the Tribunals Service or the time of Employment Judges if there was an easy route of review/ appeal to an Employment Judge – at the least some form of first 'sift' would be required by a legal officer before a select few matters (at most) could reach the level of an Employment Judge, if the desired savings, benefits to parties and efficiency gains are to be achieved.

(c) We believe that our comments above (regarding proposal 8(b)) as to the unlikelihood of judicial review being relevant, apply equally to the decisions of legal officers, particularly when the assumed amendments to the Tribunal Rules are made to allow for reviews/appeals of their decisions.

(d) Legal officers would in theory be able to significantly reduce the legal costs of the parties and achieve many of the other gains outlined in the impact assessment *if* they became known as knowledgeable, pragmatic and swift decision-makers – in such a case practitioners would feel less need to set out every detail of the contentions being argued and would feel more satisfied with each individual result even if it went 'against' their client, a desirable outcome that we believe would be more difficult to achieve by the alternative use of administrative officers within proposal 8(b).

(e) Overall, the 'guesstimate' of a saving of 20% of the current time of Employment Judges by this proposal (p.136) does not seem unreasonable, depending on what percentage of reviews or appeals of the decisions of legal officers would be allowed to progress to Employment Judge level. Certainly we know anecdotally of a number of Employment Judges who do, or claim to, spend considerably more than 20% of their time on work of this nature; and as an average it might seem possibly marginally on the low side. Likewise, the use of legal officers clearly would save Employment Judges the time and trouble of dealing with more many mundane matters, allowing them to

concentrate on more complex and significant matters. Equally in theory this would indeed permit more cases to be listed each month, but some monitoring would be required to ensure that this aim was actually being achieved.

4 OPTION D: TO INTRODUCE THE ROLE OF A 'JUNIOR' JUDGE – PROPOSAL 8(D)

4.1 For ease of reference we will refer to this type of proposed legal officer as a 'junior Judge':

(a) The introduction of the role of a 'junior Judge' would presumably imply that his decisions would likewise be subject to review or appeal mechanisms, but presumably there is less danger of the parties perceiving his or her decision to be significantly less worthy than that of an Employment Judge, so perhaps less of a rigorous 'sift' might be required before reviews or appeals could progress to an Employment Judge. Nevertheless, there is still clearly a danger of the benefits in time and cost savings to Employment Judges being lost if an appeal route to an Employment Judge is too easily available. Overall, assuming a sensible 'sift' procedure of some sort, it is hence questionable whether there would be a large increase in appeals by way of appeals from junior Judges to Employment Judges (p.31).

(b) The question of pay leads into the question of whether a 'junior Judge' (or indeed the legal officer role with more rather than less powers) is actually therefore based on that of the Master in the High Court; or is similar with powers somewhat reduced in some respects and somewhat enhanced in others (Masters cannot, for example, give judgment on claims, even if they can in principle decide summary judgment applications – whereas monetary claims could be decided by junior Judges). If that is a fair comparison then that will affect both the qualities sought from the legal officers and their recruitment costs. A Master of the Supreme Court currently commands a salary of £102,921, being within band 7 - the same level as that of a District Judge or (significantly) an Employment Judge (p.138 notes that this is an Employment Judge's salary without noting the possible comparison with a Master's identical earnings). Clearly if the purpose of the 'Junior Judge' is (at least partly) to save the costs of appointing further Employment Judges, then the salary for that office would therefore actually have to be significantly less than that of a Master, even if the job roles are not entirely dissimilar. 80% of that level seems to be a fair reduction. Therefore there would still be very significant monetary costs, and hence some might question whether a

worthwhile saving is achieved compared to the alternative of simply appointing more full-time Employment Judges and ensuring that they each conduct a proportionate share of case management matters, and in a more robust manner.

(c) Logically, if a 'junior Judge' conducted both interlocutory work in the same manner as a legal officer, and in addition the judicial determination role envisaged, he must surely save the Employment Judges more than 20% of their workload (p.138) as that is the figure given for a saving by legal officers alone with their more limited proposed powers (p.136). We believe the time saving for Employment Judges would be higher, but so of course would be the monetary costs for the Tribunals Service.

(d) The derivation of the costs given of the recruitment campaign for 'junior Judges' is not clear, and the figure given of £540,000 for that and associated general HR transition costs (p.137) appears very large. Equally why the recruitment campaign would have to be lengthy (p.138) is not clear – in the first instance, 'near miss' recent candidates for the full or part time Employment Judge offices could be asked if they would be content to be considered for this new judicial post, and the first 20-30 appointees could surely therefore be made relatively swiftly.

Response to Impact Assessment of Policy Option 10: Introduce fee charging for Employment Tribunals

1. It is not clear what outcome the proposal is aiming to achieve. Is it to reduce the number of claims overall? Is it only to reduce unmeritorious claims? Is it to make the tribunal service self-funding? The Impact Assessment seems very confused about what the primary outcome should be.

2. It is striking that the proposal is directed at a 'perception' among the business community that many claims presented to the tribunals lack merit but there is no hard evidence to back this up. Fee charging would be a major change to the employment tribunals but there does not seem to have been any proper assessment of whether it is necessary.

3. Introducing fees will not only be a significant change to the nature of the employment tribunals, it will presumably carry upfront costs in setting up the fee charging system.

There is no assessment of how much this would cost vs. the resulting income stream.

4. There are undeniably arguments in favour of introducing fees but there is very little detail on how this might work. A flat fee would almost certainly result in inequity and unfairness in particular to low-paid workers where the value of the claim is unlikely to be high and the proportion of fee to compensation is likely to deter claims. Possibly there could be a sliding scale of fees depending on the nature of the claim and/or the value of the claim but there will inevitably be anomalies - otherwise the system would be so expensive to administer that there would be no cost reduction. Potential recovery of fees paid from the losing party could also help to balance out any initial inequity. A fee at an appropriate level for bringing a discrimination claim might also discourage unmeritorious claims aimed at increasing settlement values.

5. A full consultation is planned in the spring but we think there are a number of issues and questions which are not set out in the proposal in the impact assessment e.g.: should the question be asked whether some claims or circumstances should be excluded from the fee, should fees payable be the same for both employer and employee, will the fee be recoverable in certain circumstances, will arrangements be different where the employer is insolvent.

6. It would be helpful if the consultation set out some detailed financial information. It is proposed that the question should be asked whether the fee should be at a level to enable full cost pricing but there is no indication as to what level that would have to be.

7. It does not appear from the Impact Assessment that there has been any analysis of what practical impact introducing fees might have - it is assumed that claims will go down but by how much and what types of claims?

8. There does not seem to have been any detailed consideration of the types of claims which the tribunals are dealing with on a day to day basis and what impact charging fees might have on them.

9. We believe the time and resources would be better allocated to the tribunal having the ability to weed out and dismiss at an earlier stage, cases without merit.

Response to Impact Assessment of Policy Option 11: Increase qualifying periods for unfair dismissal

1 INTRODUCTION

1.1 The approach taken has been to review and appraise the relevant parts of the BIS document, Resolving workplace disputes: A Consultation - Impact Assessment, dated January 2011, and to provide observations in respect of the content. This has been carried out within the context of the overall policy objectives of encouraging earlier dispute resolution and ensuring a more efficient Employment Tribunal system.

1.2 In this respect, pages 147 to 155 (inclusive) and 164 to 174 (inclusive) of the Impact Assessment document have been considered in particular. The Overarching Impact Assessment at pages 40 to 51 (inclusive) has also been considered.

2 OBSERVATIONS AND GENERAL COMMENTARY

2.1 Problems Under Consideration

(a) It is unclear what is meant, precisely, by the statement "…Businesses have told us of their concerns that the existing legislation is too weighted against employers when it comes to the decision to employ people – making it feel a riskier step than some are prepared to take...". (Which businesses? Who within those businesses? What is the extent of and rationale behind the apparent "concerns"? Does it just "feel" like a riskier step to take or is it, in fact, a riskier step to take? Riskier to whom? Which legislation, precisely?). On the face of it the statement would appear to demonstrate an overall bias towards the employer's perspective.

(b) This overall approach is also evidenced within the overarching impact assessment pages:-

(i) At page 40: "…business groups continue to believe that the tribunal system is weighted more in favour of the Claimant"

(ii) At page 41: "Business representatives (particularly for SME's) have been active in calling for a rebalancing of the employment tribunal system."

(iii) Also, at page 41: "Business groups, including the British Chambers of Commerce, Institute of Directors, Confederation of British Industry and others, have said there should be more clarity and transparency in the system, and action to deter individuals from making unmeritorious

claims, as well as reducing the cost and time it takes for cases to be heard".

(c) There is no apparent evidence put forward within the document to further support or justify the rationale behind these assertions. At the start of an employment relationship employees, too, are entering into a contract of employment which they, presumably, will wish to succeed. On any objective analysis there are also risks to the employee in the relationship not working out. It is not clear to what extent, if any, this has been considered and/or what other alternatives have been explored?

(d) Looking at it purely from the employer's perspective, there is a suggestion that the greater risk perhaps lies with smaller businesses. The evidence is not conclusive. This is acknowledged throughout the document. In any event, does this necessarily justify a legislative change which affects all employers – and employees? (For more on this see paragraph 5 below).

(e) It is stated that: "There may also be a risk that the current one year period is too short for employers and employees to resolve differences….."

(f) The use of the word "may" is not conclusive and there is no information about the reliability or rationale behind this view. To what extent has it been considered whether there is any risk that the proposal to extend the qualifying period from 1 to 2 years may, whilst keeping that dispute out of the Employment Tribunal (at least for the time being), lengthen the continuance of the internal dispute between employer and employee? (e.g. a dispute arising at, say, 9 or 10 months into a working relationship may feasibly continue a year or more beyond that, without any prospect of resolution).

(g) Within the overarching impact assessment, there is an overriding assumption that a dispute arising between an employer and employee is suitable or capable of being resolved in the workplace, as opposed to in the Employment Tribunal (pages 41 and 44). This is not always the case. There does not appear to have been any analysis or acknowledgement of this.

(h) Finally, the statement: "…the one year qualifying period acts as an incentive to some employers to bring the relationship to an end earlier than is in everyone's interests…" It is not clear to what extent this has been analysed? Which employers (i.e. "some")? A dispute may still arise at, say, 1 year and 10 months service, or, by that time have been ongoing for, say, 18 months or longer. Are "some" employers still, in that scenario, likely to "…bring a

relationship to an end earlier than is in everyone's interests?" It is not clear to what extent these matters have been considered in the impact assessment.

2.2 Rationale for Intervention

Here, the terminology changes from "employees" to "workers." Workers and employees have different statutory rights and the phrases should be used carefully in this particular context. The proposed aim of yielding *"a more efficient outcome*" is not elucidated and without more information it is difficult objectively and/or critically to analyse the merits of the intention.

2.3 Policy Objective

No further information is provided here in relation to the perceived imbalance that it is suggested needs to be redressed.

2.4 Options Under Consideration

Although it is mentioned, it is not clear to what extent data has been considered and analysed in respect of the impact that occurred when the qualifying period for bringing unfair dismissal claims was previously changed (reduced from 2 years to 1 year). Has it been considered how useful an indicator this might be, on a practical level?

2.5 Assessing the Impact of Raising the Qualifying Period

(a) This part of the document demonstrates, by graphic illustration, that various statistics have been analysed (trends in unfair dismissal claims per quarter, years of continuous service distribution, monthly distribution of continuous employment in the 4th Quarter of 2009, the effect of lengthening the qualifying period on eligible population based on 2009 and 2007 4th quarter data).

(b) There are oblique references in the text to the recession, the downturn in the economy and, in particular, the level of redundancies having peaked in the second quarter of 2009. No further explanation or rationale is provided in relation to these references. It is not clear whether the analysis has intended to simply demonstrate that the number of unfair dismissal claims received by Employment Tribunals has been higher during the recessionary period, or whether the intention of the impact assessment is to acknowledge that the most recent figures are extracted from a recessionary period and should, perhaps, therefore, be treated with some caution, as in not being representative of a longer period of analysis. This raises the question as to

whether the intended proposal is put forward specifically as a reaction to the recession and, if so, this move would lend itself to a reflection and analysis of whether the proposal would still be being considered in a non-recessionary period?

(c) There is no explanation as to why data from the 4th Quarter of 2009 has been selected in the analysis but there is a comparison in respect of some of the statistical data between the 4th Quarter of 2009 and the 4th Quarter of 2007 which is described as a pre-recession comparator. Notwithstanding this, there is no separate consideration or break down in respect of those unfair dismissal claims which arise out of non redundancy related dismissals compared to those that do. This would appear to reduce the effectiveness of any such comparison. The extent to which the figures are representative and/or reliable is not, therefore, apparent.

(d) The statement is made that: "*Lengthening the qualifying period will reduce the pool of those who are eligible to bring certain claims and therefore potentially reduce the total number of disputes progressing to Tribunal* ". It ought to have been fairly easy to draw this conclusion, in any event, without any statistical analysis. This does not, however, lead to a natural conclusion that earlier dispute resolution between employers and employees will be achieved as a result.

2.6 Quantifying the Effect on Unfair Dismissal Claims

(a) The restrictions and limitations in respect of the reliability of the data from LFS and SETA are set out in the paragraph headed "data sources" at page 151 of the document. The paragraphs that follow then seek to rely heavily on that data. The number of caveats contained in the text, thereafter, makes it very difficult to comment upon the findings in any meaningful way. The paragraphs headed "comparison of data", "calculating the effect on Employment Tribunal claims", "monetary estimates" and "familiarisation costs" are extremely difficult to digest and, as lawyers, not statisticians, we do not feel suitably qualified to comment in any detail other than to say that there is no obvious conclusion that the proposal will result in either earlier dispute resolution and/or a more efficient Employment Tribunal system.

2.7 Unintended Consequences

One such unintended consequence is mentioned, without any statistical analysis or data, this being a potentially increased demand for ACAS services. This raises the question as to whether other unintended consequences have been sufficiently analysed or considered. Shifting a burden from one source to another may not be compatible with the achievement of the overall policy objectives.

2.8 Summary of Impact

Save as set out above, it is not possible to comment on the reliability or usefulness of these figures.

3 EQUALITY IMPACT ASSESSMENT

3.1 Conclusion – Removal of Barriers Which Hinder Equality

(a) The conclusion to this aspect of the impact assessment (as set out in pages 164 to 169 inclusive of the document) is summarised at page 169. This is that: "*The proposed changes reflect a broad policy and are designed to have an impact on all employees regardless of their gender, race or disability. Therefore, the proposed changes are unlikely to create any barriers to equality in terms of gender, race and disability*".

(b) Might this conclusion have reasonably been arrived at without the data having been analysed?

4 COMPETITION ASSESSMENT

There is inadequate information or data to be able to comment meaningfully on this aspect of the assessment.

5 SMALL FIRMS IMPACT TEST

5.1 An analysis is carried out at pages 170 to 173 of the Impact Assessment in respect of whether small businesses are disproportionately affected by the proposals. This is in the light of an apparent finding that: "*Employment Tribunal cases are disproportionately found in workplaces with under 25 employees*". The analysis again relies on data from SETA and LFS (in respect of which the apparent limitations are commented upon at paragraph 2.6 above).

5.2 The analysis begins with the same broad brush approach to that employed in relation to assessing the potential impact upon equality issues (see paragraph 3.1. above). It is stated that: "*The proposals set out in the consultation document should benefit*

employers by streamlining and simplifying the employment tribunal system and so will apply to all enterprises".

5.3 Given that approach, it is not clear why there has been further statistical analysis carried out in this respect. There is no apparent explanation in relation to this analysis and, therefore, the relevance of breaking down the analysis into such sub groups as ACAS PCC users, private sector employers, public sector employers, non-profit/voluntary sector employers, employers with a single workplace, employers with multiple workplaces, employers who are aware of the number of employees in the workplace, "small", "medium-sized" and "large" workplaces, employers with and without a Human Resources or Personnel Department and employers with or without an internal or in-house legal department, cannot be established. It is not explained how this analysis assists in assessing the impact of the proposals against the overall policy objectives.

6 **POST IMPLEMENTATION REVIEW**

The objective of the review is clearly set out (i.e. "*to establish whether changes meet the twin objectives of encouraging earlier dispute resolution and a more efficient employment tribunal system*"). The objective is sensible but without further and clearer information as to how, precisely, this review will be carried out, it is not possible to comment any further – phrases such as "baseline information", "systematic data sources" and "all things equal" are difficult to interpret without more details.

Response to Impact Assessment of Policy Option 12: Introduce financial penalties for employers

1 **INTRODUCTION**

1.1 The approach taken has been to review and appraise the relevant parts of the BIS document, Resolving workplace disputes: A Consultation - Impact Assessment, dated January 2011, and to provide observations in respect of the content. This has been carried out within the context of the overall policy objectives of encouraging earlier dispute resolution and ensuring a more efficient Employment Tribunal system.

1.2 In this respect, pages 156 to 162 (inclusive) of the Impact Assessment document have been considered in particular, together with pages 40 to 51 (inclusive), the overarching impact assessment.

2 **OBSERVATIONS AND GENERAL COMMENTARY**

2.1 Introduction

(a) It is suggested that some behavioural change from employers is expected "*in the long run*" resulting in increased compliance with employment laws going forward, but those behavioural changes, and the timescale in which they are anticipated, are not further elucidated. This has been described as a "*dynamic change*" and it is expressly acknowledged that the purported costs savings to employers, brought about by apparently fewer disputes entering the Employment Tribunal system, have not been quantified. These have not, therefore, been considered in the calculation of estimates in relation to the remainder of this proposal.

(b) It is not explained why assumptions have been made (e.g. that 50% of employers will "*take advantage of*" an early payment "*incentive*").

(c) The reliability of the figures used in the remainder of this proposal must be considered against this background.

2.2 Objectives

It is stated that the overriding objective is to avoid workplace disputes and hence potential employment tribunal claims. This implies that the purpose of the proposal is to act as a disincentive to employers to have or engage in workplace disputes. It is not clear how it is proposed that employers will have any direct control over where and when a workplace dispute will arise.

2.3 Economic Rationale

(a) The stated policy aim is to "*deter non-compliance*", presumably by employers, with employment laws. It is somewhat emphatically stated that: "*This will be achieved via the proposed penalty*…" but then it is acknowledged that this "…*has been assumed*…" and that "…*finding evidence to support this assumption is difficult*...".

(b) A comparison is then made with the impact of the introduction of penalties in the area of health and safety legislation. It is not explained why this comparison is then made with the labour market. There is no explanation as to why this is considered to be a useful or reliable comparison.

(c) There is no apparent evidence put forward to suggest that the assumptions made are accurate or relevant or why there is any prospect of a similar trend emerging as was found in the evaluation carried out by Greenstreet Berman Limited or the review carried out by the London School of Economics and Political Science 2008.

(d) It is not clear, therefore, to what extent it is being suggested that these assumptions can reasonably be relied upon.

2.4 Proposed Penalty Scheme

2.5 The proposals refer to a minimum threshold of £100 and an upper ceiling of £5,000. There is no explanation or rationale as to how or why these figures have been put forward.

2.6 There is no explanation as to the rationale behind how the penalties are to be calculated.

2.7 It is stated to be "…*important that there should be an incentive for non-compliant employers to pay the penalty quickly*" but there is no explanation or rationale behind this statement or why the reduction incentive is proposed to be 50% if paid within 21 days.

2.8 Total Estimated Costs to Employers and Monetary Benefit to the Exchequer

(a) It is indicated that "*possible dynamic effects*" are excluded from the estimated potential revenue for the Exchequer but it is not explained why or whether and how the estimates would be different if the aforementioned dynamic effects were not excluded.

(b) An analysis of data is then carried out in relation to various jurisdictions over a 5 year period but no explanation or rationale is provided in respect of this methodology. Without that explanation, it is difficult (as a lawyer and not a statistician) to comment further on the methodology used but it is noted that various further assumptions and adjustments are made (without apparent explanation) and omissions from the data are acknowledged. A comparison is made with National Minimum Wage legislation, but again, this is made without any apparent explanation of the merits of doing so.

(c) It is not apparent why the figures presented in the analysis should be considered to be reliable or accurate.

2.9 Administrative Burden

It is expressly acknowledged that this has not yet been considered.

2.10 Risks

It is expressly acknowledged that the effect of the proposed penalty on non-compliance could have been over or under estimated in the analysis carried out. It is expressly acknowledged that this could produce "*damaging wider consequences*" or not act as a sufficiently strong deterrent. No suggestion is put forward as to how these difficulties will potentially be overcome.

APPENDIX 1

There follows a list of ELA members who have contributed to this Response as follows:

Chair, ELA Resolving Workplace Disputes Committee - Richard M Fox, Kingsley Napley

Group 1

Chair: Peter Frost, Herbert Smith

Yvette Bude, Cloisters

Heidi Watson, Clyde & Co

Elayne Hill, Coventry Law Centre

Esther Fagbemiro, Abbey Legal Protection

Matthew Ramsey, Berwin Leighton Paisner LLP

David Widdowson, Bevan Brittan

Susan Doris, Freshfields Bruckhaus Deringer LLP

Ranjit Dhindsa, Hill Hofstetter

Peter De Maria, Doyle Clayton

Nigel Forsyth, Barker Gillette

Rebecca Townsend, Rebian Solicitors

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Group 2

Chair: Stephen Levinson, RadcliffesLeBrasseur

Lucy Bone, Littleton Chambers

Anthony Korn, No5 Chambers

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Yvonne McCabe, Rentokil

Vanessa M Hogan, Hogan Lovells International LLP

Paul McFarlane, Weightmans LLP

Ronald Mackay, Burness LLP

Paul Brown, Biggart Baillie

Christine Jenner, Davies Arnold Cooper LLP

Adam Creme, Unison

Group 3

Chair: Robert Davies, Dundas & Wilson

Peter Wallington, 11KBW

Tony Greenstein, Brighton & Hove TUC Unemployed Workers Centre

Sam Gage, PLC Employment

Shona Newmark, Ayers Newmark Solicitors

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