EMPLOYMENT LAWYERS ASSOCIATION

RESPONSE TO CONSULTATION ON MODERN WORKPLACES

INTRODUCTION

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

i) FLEXIBLE PARENTAL LEAVE

Questions 1 to 3: These questions relate to business and/or policy, which is outside ELA's remit and therefore we have not answered them.

Question 4: Should 18 weeks of maternity leave, accompanied by either statutory pay or maternity allowance, be reserved exclusively for mothers? If not, what proportion should be reserved? Please explain your responses?

As the consultation document points out, the duration of maternity leave must comply with the European Pregnant Workers Directive, which currently requires that at least 14 weeks maternity leave be provided (and it is proposed this period is extended to 18 weeks). This leave applies only to mothers. The Pregnant Workers Directive was introduced in 1992 in order to protect the health and safety of women in the workplace when pregnant or after they have recently given birth and women who are breastfeeding. While the European Commission proposed amendments to the Directive to achieve more gender equality in the labour market, those proposed amendments were not accepted.

While the current Consultation sets out as its objectives to encourage shared parenting from the earliest stages of pregnancy and to give parents choice and flexibility to enable them to share childcare, 14 weeks' maternity leave provision for mothers is required to comply with the current Pregnant Workers Directive (18 weeks under the proposed amendments to this Directive). It would also allow new mothers time to recover from labour and an opportunity to breastfeed their child(ren). Furthermore, it would protect women from being pressured back to work. However, whilst the Pregnant Worker Directive provides mothers with 14 weeks' maternity leave, it does not specify that this must be taken immediately before/following the birth. Article 8 of the Directive states that the 14 weeks can be allocated before and/or after confinement in accordance with national legislation and/or practice. Further, the Directive defines 'worker who has recently given birth' as a 'worker who has recently given birth within the meaning of national legislation and/or national practice'. Therefore, the Government could provide at least 14 weeks' maternity leave (including 2 weeks' compulsory maternity leave) to mothers at any time before or after the birth.

In March 2010 the revised Parental Leave Directive was adopted, which extended workers' rights to parental leave from three to four months. This right applies to both men and women and to encourage fathers to take up this right, at least one of the four months cannot be transferred to the other parent. It is left to each Member State to implement this Directive within 2 years.

Parental leave in Great Britain is covered by the Maternity and Parental Leave etc Regulations 1999 which allow both parents to take up to 13 weeks' unpaid parental leave for each child. This leave cannot be transferred to the other parent. We note in passing that the 1999 Regulations will not meet the requirement for 17.3 weeks' parental leave under the Parental Leave Directive from March 2012 when the Directive becomes effective. The proposed flexible parental leave however will provide sufficient parental leave under the Parental Leave Directive, but this is not due to come into force until 2015, which means the UK will be non-compliant in the meantime.

The Pregnant Workers Directive and Parental Leave Directive provide stand alone rights and therefore the Government must provide at least 14 weeks' maternity leave (or 18 weeks' under current proposals) to mothers and parental leave for both mothers and fathers.

Under the Pregnant Workers Directive, the 14 weeks' minimum maternity leave period must include 2 weeks' compulsory maternity leave. Mothers are able to forgo their right to 14 weeks' maternity leave but must take a minimum of 2 weeks' compulsory maternity leave.

Although mothers must be provided with at least 14 weeks' maternity leave, there would appear to be no EU law impediment to fathers taking time off at the same time as mothers (i.e. in the first 14 weeks). The Government should give serious consideration to not only ensuring that mothers are provided with their rights under the Pregnant Workers Directive, but also that this leave is not "exclusive" in the sense that the father should also be able to exercise the right to time off during the first 14 weeks (we have explained above that the 14 weeks' maternity leave under the Pregnant Workers Directive need not necessarily be given immediately before/after the birth of the baby). This is likely to be when mothers require the most support from fathers and would achieve the Government's objective of shared parental leave.

Indeed, there are a number of potential problems with maintaining exclusivity:

- If the mother is the main earner in the family and the family requires her salary she would not have the flexibility to return to work and transfer the remainder of the 18 weeks' leave to the father;
- If the mother is self-employed she would only be entitled to maternity allowance and would not be earning during her maternity leave. If the father is employed he would not have the flexibility to take parental leave shortly after the baby is born so that the mother could return to her self-employed work; and
- Fathers would not have the flexibility of taking time off to care for the newborn child during the first 18 weeks where there is a pressing need such as the death or severe illness of the mother or the mother abandons the child.
- Additionally, consideration might also need to be given to people other than the mother and father if they are the main carers of a newborn.

Finally, maintaining the exclusivity does not provide the flexibility and choice that is one of the objectives of the proposed amendments to current leave arrangements.

Consideration should be given therefore to legislation which does not maintain this exclusivity and gives the woman the opportunity to elect to return earlier (provided the compulsory period of maternity leave is observed) and enables the man to take time off before the 18 weeks have

elapsed either in all circumstances, or if the legislation does maintain this exclusivity, where there is a pressing need to enable the father to take time off more quickly.

Question 5: Should parental leave and pay be available to mothers and fathers on an equal basis? What benefits do you foresee? What difficulties are likely to arise?

Making parental leave and pay available to both parents provides flexibility and choice for both parents to take time off for leave and still receive some pay to cover any loss of earnings.

Below are some of the potential benefits arising from this proposed regime:

- It is designed to encourage sharing of caring responsibilities;
- It is designed to ease the burden on mothers of taking care of children;
- It may encourage fathers to take more time off work to care for their children during their first year, which may have an impact on the gender pay gap (as the time women take off for childcare responsibilities is a significant contributing factor to the overall difference in pay between men and women);
- It would assist to address the gender based assumption that only mothers care for young children.

Below are some of the potential difficulties with this proposed regime:

- As the rate of pay for leave is low and the last 13 weeks of leave will remain unpaid, men may be unlikely to take parental leave (particularly during the last 13 weeks of leave which is unpaid). Statistics produced by the National Equality Panel in February 2010 show that 81% of men earn more than their (female) partners. Therefore, in the majority of cases, it is less economically viable for fathers to take parental leave on low or zero pay (please also see response to question 11 below);
- Fathers as well as mothers taking leave may lead to more unpredictability for employers in managing their workplace;
- If parental leave was available to fathers this might dilute the existing protection of mothers in that mothers may be pressured to return to work;
- Similarly, it may take time for employers and fathers to adjust so that fathers are comfortable taking up these new rights.

Question 6: Do you agree with our proposals to facilitate greater flexibility in the taking of parental leave? Please explain your response.

As an apolitical organisation, ELA does not take a position on policy matters, instead focusing on the legal workability of proposed legislative changes. In practice, in order to facilitate the aim of greater flexibility in parental leave, consideration will need to be given to determining the right balance between the interest of the employer and the caring parents.

In considering the scope of the flexible parental leave it would be prudent to give some consideration to the following issues:

- The proposals envisage employers and employees agreeing how the leave will be taken, including the ability for the employer to request that the employee should return to work during busy periods. If agreement cannot be reached the leave must be taken in a single block and employers cannot refuse the leave. We agree that there needs to be a default position and in the interests of certainty for both the employer and employee it makes sense that the default should be that the leave is taken in one single block, because it could be disruptive for employers to have employees taking blocks of time off. This will replicate the current position for maternity leave and paternity leave, with which employers are familiar.

Clear statutory guidance needs to be provided however for employers to assist them in the factors to take into account in considering applications for parental leave and the circumstances in which it will be appropriate to postpone a request for a block of leave to be taken. Currently, employers can merely postpone requests for parental leave by up to 6 months on the basis that the operation of the business would be severely disrupted. Therefore, will this ability to postpone be widened, remain the same or be restricted? To what extent (if at all) can employers ask questions about the mother/father and their ability to take parental leave in reaching a decision? To what extent can employers check with each other as to what leave the other is granting? To what extent can an employer who has agreed in advance to the leave being taken in blocks subsequently impose a variation where business needs change? (Please see also our response to question 12 on this issue).

- Is the proposed system capable of extending to cases where both parents are employed by the same employer? If so, how should an application for concurrent parental leave be dealt with: is the fact that both parents are intending to be off at the same time a factor to be taken into account by the employer in considering whether to grant the request?

We would like to see legislation or statutory guidance which gives clarity on these issues so employers feel comfortable/have certainty that they are making fair decisions and are not exposing themselves to litigation risk. It would also be helpful if guidance could illustrate various scenarios where a flexible approach could be adopted for the benefit of parents and the employer.

Question 7: If parents are not living together, should the default position be for the parent with the main responsibility for the child to be able to take all the unreserved period of leave and pay? Please explain your response.

This question raises the wider issue of what happens when parents are not in agreement as to how to divide the shared allocation of parental leave between them. That parents are living together perhaps misses the point or over simplifies it. Clearly in the event of a dispute this will be a difficult issue for employers to regulate and they cannot make assumptions based on the living arrangements of the parents. It is important that any regulations avoid stereotypical assumptions that if parents are not living together they are not still jointly responsible for childcare or that the mother will have the main responsibility for the child.

In general, our view is that Regulations should be implemented with the objective of simplifying the procedure as much as possible for employees and employers alike while minimising the potential for fraud on the scheme.

For this reason, we agree that the default position should be that the unreserved period of leave and pay should be taken by the parent with the main responsibility for caring for the child to ensure that the child and the parent benefit from the flexible approach. We consider that employers will need clear guidance as to how they can clarify whether their employee has the main responsibility for caring for the child and the issue of whether parents are living together may be a relevant factor in this analysis.

The proposal suggests a light touch approach, so a declaration from one or both parents may be appropriate, similar to the declarations required for Additional Paternity Leave, although employers have concerns regarding the potential for fraud in relation to employees being able to self certify entitlement. For current parental leave (which is unpaid), employees are not currently obliged to make a declaration that they have responsibility for a child or are taking the leave to care for the child but the fact that the leave is unpaid is relevant to the degree of

regulation required. Employers should be able to contact the other parent or the other parent's employer to confirm information provided (as with Additional Paternity Leave). However, there is potential scope for fraud with these arrangements because employers must rely on declarations from employees. In the case of Additional Paternity Leave, the only recourse employers have is to contact the mother's employer to confirm she has returned to work. However, this does not confirm the father's eligibility. Employers should not be solely responsible for assessing employees' entitlements, family arrangements and honesty. We suggest that a formal notification procedure should be implemented to include an obligation to produce evidence of the fact that an absent parent participates in childcare. Also, if leave is paid, HMRC should play a role in matching applications to children to ensure only eligible employees are applying for paid leave.

Question 8: On what principles should the notification process for parental leave be based? Do you have any comments on our proposal that the process be based on that for additional paternity leave?

The principles for the notification process should be flexible but allowing as much advance notice as is feasible for employers.

If the process was to be based on that currently in use for Additional Paternity Leave then the main advantage would be the continuation of a system with which employers are already becoming familiar with fewer administration costs for adjusting to a new system.

One way in which it might be possible for the process to be simplified would be for the onus to provide the additional information which employers are currently entitled to request to be placed onto the employee requesting the leave. This should all be presented by the employee at the time of requesting the leave, whether the leave request is for one continuous block or in more than one block (it will be administratively burdensome for the employer and employee to process separate leave requests for more than one block of leave).

Currently, within 28 days of receiving the employee's leave notice, the employer must confirm the relevant dates to the employee in writing and may request a copy of the child's birth certificate and the name and address of the mother's employer (or, if the mother is self-employed, her business address). The employee must comply within 28 days of such a request being made by the employer. If that information was provided to the employer when the leave is first requested, the time limits would become less complicated.

Please see also our response to question 12 on this point.

To protect the employee, consideration could be given to whether an employer has a duty to inform the employee of any information it is missing.

The provisions should also spell out the consequences, if any, for an employee who does not notify the employer appropriately. What can the employer do in these circumstances? For example, can the employer postpone or refuse the request? Please also see our response to question 6 above in relation to the employer's ability to postpone leave.

Question 9: Should parents be expected to provide an indication of their full plans for taking the paid elements of parental leave prior to the child's expected date of birth (with the ability to change these plans subject to notice); or should separate notification be allowed for each period of parental leave?

It is not clear from the proposal whether it is envisaged that there would be an obligation on employees to outline their proposals but then have to give notice, as per the Additional Paternity Leave Regulations (the interplay between these two obligations would need to be carefully

managed if this were the case) or whether employees will give this indication as part of the notice, but could then amend the notice. This position needs to be clarified.

In our view, early dialogue between employer and employee should be encouraged, so the former would be more appropriate. It makes sense from both the employer's and employee's perspective for the employee to give notice upfront to the employer of his/her plans to take leave including the unpaid element, which are then subject to change at notice. It is important for employers to be able to plan as far as possible to cover their employees' absences, and early discussions would facilitate this. Consideration should be given as to when and how employers should give their final decision on the parental leave requested, so employees can make plans.

Further, some consideration needs to be given as to how to deal with a situation where one parent's employer agrees to their employee's request, and the other employer does not.

The proposals envisage employers and employees agreeing how the leave will be taken, including the ability for the employer to request the employee returns to work during busy periods, and if agreement cannot be reached the leave must be taken in a single block and employers cannot refuse the leave. In this case, as mentioned above, clear statutory guidance needs to be provided to employers to assist them in what factors to take into account in considering applications for parental leave. Currently maternity and paternity leave cannot be postponed, whilst parental leave can be (see our response to questions 6 and 8 above). Will employers have the ability to postpone flexible parental leave and if so, for how long and on what basis? Given this may disrupt the family's planned childcare, how will employees be able to seek to amend the arrangements with their employer to reflect the decisions of the other parent's employer?

Most importantly the regulations should strike the right balance for employer and employee, but with particular regard to SMEs.

Question 10: **Do you agree that it would be inappropriate to exempt small and medium-sized employers from the flexibility provisions? Are there any other special arrangements that would be helpful for such businesses?**

At paragraph 47 of the Consultation on Modern Workplaces (Section (i) Flexible Parental Leave), the Government has suggested the possibility of exempting micro-employers and start-ups from the flexibility provisions. The Government has stated that it would be perverse to deny these employers the flexibility to negotiate with their employees on when leave is taken. There is no alternative proposal made for these employers but it is assumed that the alternative position would be to preserve the current position. Our view is that it would be in line with the Government's view to simplify the proposals by having one procedure for all employers irrespective of their size.

The flexibility arrangements appear to be targeted at parents whose employers offer fewer contractual entitlements to take time off work for childcare. In reality these employers are likely to be smaller employers. Therefore, it is appropriate that the flexibility provisions are applied in the same way for all employers, including smaller employers, in order to target employees who may require extra assistance in managing childcare responsibilities. We agree with the Government's view that there would be difficulties if there were two systems of parental leave and in particular knowing which would prevail in the situation where the mother worked for a smaller employer and the father for a larger employer (or vice versa).

As to whether the new proposals would be appropriate for small to medium sized employers, our view is that the overall system will require more administration than is currently required

and it asserts that a smaller employer may not be well equipped to deal with this. The existing maternity provisions are well established and to amend these will cause upheaval and potential confusion for smaller employers, who may not have a dedicated HR team in place to deal with the changes.

The Government's suggestion that it may assist a small employer for a mother to return to work sooner may be the case but, in our view, the proposed model for shared parental leave may also cause difficulties for a smaller employer (indeed any employer) to make arrangements for cover where employees are not taking leave in large portions.

- For example, where a mother takes an initial portion of leave, returns to work and then takes another short period of leave, an employer may find it more difficult to hire staff to cover these separate periods than they would to cover one long period of time off. This may affect smaller employers more adversely because they may not have the HR or financial resources to conduct numerous recruitment exercises to cover short periods of leave.
- In order to cover short periods of time when a parent is on leave, an employer may be required to use agency workers, a practice which is more expensive than recruiting directly and this may be prohibitively expensive for the smaller employer.
- For a smaller employer this may lead to work being spread amongst existing staff or, where there is an owner employer, work being taken on by the owner as set out in Annex 4 of the Impact Assessment. This may create added stress to the employer and the existing workforce.

It is envisaged that a lot of planning will be required by both parents and the employer as to when and how much leave will be taken by either parent. This may be more difficult to plan for than the existing system where the mother takes a large period of leave. This is especially the case where there will be shared parental leave as each parent will have to give a lot of thought as to how and when the leave should be taken and then they will still have to try and agree this with their respective employers. For smaller employers, this will add to the administrative burden.

The introduction of additional paternity leave has been a major change to the way that leave is managed and has already caused concern for employers (in particular small employers) in terms of administration. There may be useful lessons to learn from additional paternity leave once these provisions have been operating for a while.

Additionally it may be worth waiting to see the rate of take-up of additional paternity leave with fathers as this may give some indication as to whether the concept of reserved leave would be popular. As the additional paternity leave provisions are in their infancy, it may be some time before the numbers of employees taking up this leave can be gauged.

With regard to special arrangements that would be helpful for smaller businesses, we would propose:

- Ensuring that user-friendly forms are produced for smaller employers to use to reduce the administrative burden;
- Guidance on how smaller employers can manage shorter periods of absence by employees;
- Legislation or guidance which gives clarity to smaller businesses as to how they should handle requests and when fairly they can turn them down, so they feel comfortable/have certainty that they are making fair decisions and are not exposing themselves to litigation risk.

Question 11: **Should a portion of flexible parental pay be reserved for each parent? If so, is four weeks the right period to be reserved for each parent? Please explain your response.**

In our view the concept of reserved leave may be beneficial for parents to make a decision on how to share leave in the future. It is noted in paragraph 28 of the Impact Assessment that there has been no survey undertaken as to the rate of take-up for the new entitlement to four weeks of reserved leave, and so until data relating to this becomes available we cannot comment on the viability of introducing this new right.

Having an additional four weeks of reserved statutory parental pay available may make it more attractive for the father to take leave as it is envisaged that the father would still be reluctant to share the parenting responsibility if the leave was unpaid. If there is adequate wage replacement this may encourage take-up of the reserved leave and this may be the case where the father is a low earner as a statutory payment may be an adequate wage replacement in this event. This appears to be substantiated by the figures provided in Table 7 of the Impact Assessment. But it is noted that in the case of Portugal, where fathers can take 20 days as leave paid at 100% of their earnings, the take up was only 30%. Portugal has offered reserved leave for the father but this does not seem to have encouraged take-up.

However, as noted in our response to question 5 above, it is envisaged that fathers who work in certain highly paid sectors would be unlikely to consider a statutory payment to be an adequate wage replacement and so this may not encourage take up for fathers who work in certain sectors, e.g. financial services.

The ability for both employees to be able to take time off concurrently to spend time with their child will be advantageous for many couples and the fact that they will both be paid for four weeks may assist couples in their decision to make use of the reserved leave. The Government's proposals are likely to benefit couples where the mother is the higher-paid individual in the couple.

However, due to the foreseeable difficulties in planning the leave, and obtaining agreement from both sets of employers to taking leave (see our responses to questions 7, 8 and 9 above), it is not clear that having a reserved period of leave and pay for each parent would be attractive enough to outweigh the difficulty in making future plans as to when to take parental leave under the new scheme.

As to whether four weeks is the right period to be reserved for each parent, we are unable to respond as to whether this would be the case as this is a policy decision.

Question 12: What do you see as the core challenges to administration? Do you support the initiatives described above as a means of addressing them? What other opportunities for improvement to administration can you identify?

Some of the issues raised by this question are outside the scope of ELA's expertise given that they relate to the operation of payroll systems, the PAYE system and HMRC. However, there are a number of administrative challenges that ELA has identified around the operation of parental leave as follows:

- The potential for both parents to make claims for leave and/or pay during the same period when they are not entitled to do so. This may be deliberate or erroneous and we have discussed the risk of fraud in our response to question 7.
- Difficulties surrounding the keeping of accurate and up to date records regarding trigger points, dates and payments due to employees. This will be exacerbated by the fact that various dates may change, e.g. the date a parent wants to commence parental leave.

- Difficulties of dealing with over and underpayments to employees and how these will be rectified.
- Difficulties surrounding communications between employers.

In our view the main area which requires consideration by the Government is the extent to which employers will or should be required to communicate with each other and how this will be facilitated. Some communication will be necessary for the purposes of employers confirming, checking or verifying their own employee's entitlement to leave and/or pay. As this will be dependent on what the mother or father in any given circumstance has already taken and been paid, it is crucial that employers understand how they are to verify their own employees' entitlements.

The current scheme for additional paternity leave places the onus on employees to provide information to employers. However, in a more complex system the scope for employees misunderstanding their entitlements, giving inaccurate information or deliberately providing misleading information is heightened and consideration of how employers should deal with this is needed. How will communication between employers be facilitated? As we noted in our response to question 7 above, is there a role for HMRC? Should the onus remain with employees?

One area that needs to be given further consideration is what requirements employers need to meet to satisfy themselves that the information on which they are basing their judgment of an employee's entitlements is correct. In the event of over or underpayment this will be necessary to provide a "defence" to an employer, for example if this leads to investigation by HMRC or an employee asserting a breach of their entitlements.

The current system for additional paternity leave enables employers to request certain information, e.g. a copy of the birth certificate and details of the mother's employer, after they receive a leave notice. As mentioned above, consideration should be given to compulsory provision of information by male and female employees who anticipate they may want to take maternity, paternity or parental leave at the time when notification of the expected week of childbirth is currently triggered, i.e. no later than the end of the 15th week before the expected week of childbirth. Similarly it should be considered whether the provision of information regarding the identity of the mother or father's employer should be provided at the same time in order to enable employers to communicate with each other if necessary.

It should be considered whether it is necessary for both mother and father to provide a copy of the child's birth certificate when the child is born.

By requiring employees to provide information early on this should facilitate the smoother running of the administration of parental leave and pay.

We envisage that this will be a difficult area for employers to deal with and consider that guidance on the practical aspects of administration may be useful for employers. In addition the provision of training materials for employers may relieve the burden of the changes.

Unfortunately due to the recent changes regarding additional paternity leave/pay it is difficult to make an assessment about the effectiveness of administration in relation to this area. We note that the Government intends to evaluate the administration of additional paternity leave/pay and attempt to learn from this experience regarding how parental leave and pay will operate in practice. In particular, it is important that the views of employers are sought. As mentioned above, our view is that it is essential that this evaluation takes place in order to develop the proposed new system and identify where the likely practical difficulties will arise. We note that

the Government also intends to explore the extent to which HMRC's current proposals to reform the PAYE system through real time payroll information can support any new system. We support this initiative.

Question 13: Should the year's qualifying period for existing parental leave under the European Parental Leave Directive be retained, or should the two types of leave be consolidated to avoid confusion? Please explain your response.

This question involves an assessment of policy considerations which go beyond the scope of our remit as an apolitical organisation. We can therefore only provide general comments.

The underlying objective of the reforms appears to be to introduce flexible and family friendly policies. It is our view that this objective is likely to be furthered by the abolition of the one year qualifying period. This would have the effect of allowing either parent to take an additional period of unpaid parental leave during the first year of the child's life. In practice this is likely to enable the greater involvement of fathers in the early stages of a child's life. If the proposal is that maternity leave after 18 weeks (which is reserved exclusively for the mother) is reclassified as flexible parental leave, which either parent can take, and which will replace additional paternity leave, there should be no qualifying period of service for this entitlement because they is currently no qualifying service for maternity leave. Any qualifying period for fathers must be maximum of 18 weeks, which is when they can first take the leave, although it is likely to lead to sex discrimination claims to have a qualifying period for fathers and not mothers to take flexible parental leave. However, if the proposal is to have flexible parental leave as described *in addition* to parental leave under the Parental Leave Directive, there is no legal reason why the existing one year's qualifying period could not remain, although, as mentioned below, the terminology here may lead to confusion and should be clarified.

In response to the question whether the two types of leave should be consolidated to avoid confusion, it is unclear whether removing the qualifying period necessarily means that the two types of leave should be consolidated. The terminology may become confusing if the rights of parents during the first year of a child's life are not distinguished by terminology from the rights to unpaid leave through the early years of a child's life (or indeed subject to the outcome of consultation, potentially up to age 18). In our view the Government should consider whether a change in terminology would provide for greater clarity.

Question 14: Is the child's first birthday the right cut-off point for parents to receive parental pay?

As an apolitical organisation, ELA does not take a position on policy matters, instead focussing on legal workability of proposed legislative changes. As such, we do not feel that it is appropriate to comment on whether the child's first birthday is the right cut-off point for parents to receive parental pay. However, it is our view that the Government's proposal regarding this lacks clarity. The consultation document states that the proposal is that pay will not be available beyond the child's first birthday, but it is not clear what this will mean for a parent's entitlement to parental leave (as opposed to pay). As other parts of the consultation document refer to "paid leave" (for example, at paragraph 50, "we propose that part of the paid period of flexible parental leave…"), it could be that the Government proposes that, as well as the entitlement to pay ceasing once the child reaches one, a corresponding amount of parental leave (i.e. 21 weeks of shared parental leave which will be paid, 4 weeks reserved to each parent, which will be paid and 18 weeks reserved for the mother, which will be paid totalling 47 weeks) will be extinguished. Alternatively, it may be that the Government proposes that the amount of

parental leave that employees will be entitled to will be unaffected by the child reaching his/her first birthday and that simply the right to receive parental pay will be extinguished.

Question 15: Up to what age of the child should unpaid parental leave be available? Five (as it is currently), eight, 12, 16 or 18?

For the reasons stated above, we do not feel that it is appropriate to comment on to what age of child unpaid parental leave should be available. However we would note that in Imelda Walsh's review of how to extend the right to request flexible working to parents of older children (2008), Ms Walsh considered at what age a child was able to look after him or herself (which would seem to be pertinent to the subject of what age of a child the parental leave provisions should be available). Her view was that the legal position seems to suggest that 16 is the age at which a child is responsible enough to look after him or herself. She also received the advice of the NSPCC to the effect that most children under 13 should not be left alone for more than a very short period of time.

Question 16: Do you agree with the proposed approach on employment protections? How can the protections given to employees on parental leave be more effective?

It is not clear whether this question relates to current parental leave, maternity leave or paternity leave or the proposed flexible parental leave. However, we agree with the proposition that the same protections should be afforded to men and women taking equivalent periods of leave. The same protections currently apply to employees on maternity leave and employees on paternity leave, so the same principles should continue to apply for the proposed parental leave.

Under the current system, employees on maternity and paternity leave have greater rights than employees on parental leave, for example, offer of suitable alternative employment on redundancy and KIT days. Therefore, if the proposal is that maternity leave after 18 weeks (which is reserved for the mother) is reclassified as flexible parental leave, which either parent can take, and will replace additional maternity leave, the same protections as are currently available for maternity and paternity leave should be applied to the flexible parental leave rather than the (limited) protections available for parental leave as it currently stands.

Problems with the current system exist in relation to bonus and pension entitlements when employees are on maternity leave. This will also be a problem for employees on paternity leave, although the full effects of additional paternity leave are yet to be seen. These problems will be exacerbated under the proposed system because parents can divide leave as they wish and take it in a number of blocks. This will make the administration of pensions and bonus entitlements for employees on proposed parental leave even more difficult. For example, if a father takes 8 weeks' parental leave paid and later takes 4 weeks' parental leave unpaid, how will his employer determine his bonus entitlement and should his employer continue pension contributions during the parental leave and does this depend on whether the leave is paid or unpaid? Current law suggests that pension contributions should not be continued during unpaid leave (Regulation 9(4) of the Maternity and Parental Leave Regulations), but this potentially conflicts with European law (*Boyle* and *Sass)* and will be difficult for employers to administer if an employee is absent for only a short duration.

Under the proposals, flexible parental leave can be taken in a number of blocks, with the default position if parties cannot agree being one single block. If leave is taken in a number of short blocks or on a part-time basis, there may be less need for the protection of the right to return to the same job or suitable alternative employment on redundancy because that job is not left unfilled for a year (which can be the current position under maternity leave).

As we have noted above, the introduction of additional paternity leave has been a major change to the way that leave is divided between parents and there may be useful lessons to learn once these provisions have been operating for a while.

The Government may also want to consider what protection(s) should be given to employees who raise the issue of flexible working during the recruitment process and for employees and employers if employees' requests cannot be granted, for example, if an employee requests to take the proposed parental leave on a part time basis and the employer cannot accommodate a part time role.

Question 17: This question relates to business and/or policy, which is outside ELA's remit and therefore we have not answered it.

Question 18: Should fathers be entitled to time off to attend some antenatal appointments?

Mothers are entitled to time off at their normal rate of pay but fathers have no similar statutory entitlement and that does appear to be anomalous, as again, it reinforces gender based assumptions. The DTI, now BIS, produced a best practice guidance, "Fathers to be and Antenatal Appointments", in which it encourages employers to be flexible and agree to allow fathers to be paid time off to attend antenatal appointments. ELA does not have access to statistical information which indicates how many employers have followed or are even aware of this guidance but many of the clients we represent do allow fathers flexibility in this regard.

Allowing fathers time off to be present for antenatal appointment would be consistent with the government's stated aim, in the consultation document, of providing freedom, fairness and responsibility for both employers and employees, as well as delivering on its commitments in the Coalition Agreement. Moreover, according to the consultation document, there is strong evidence to suggest that fathers become more engaged with their children when they are involved at an early stage (para 16).

Scans normally take place during the first, second and third trimester of pregnancy and appointments generally take 2-3 hours. The Government has not provided sufficient reasons for proposing to allow fathers to attend only 2 out of 3 scans. Not providing fathers with equal rights as mothers to attend all scans is contradictory to the Government's aim to encourage fathers to become more involved in childcare from the earliest moments. Although the Government raises legitimate and good faith concerns over women raising issues of domestic violence during a scan without the father present, no evidence has been provided to demonstrate this is commonplace. Women have a number of options available to them to raise concerns regarding domestic violence, for example, at a medical appointment that is not a scan, specialist advice centres, police, charities, family members etc and we are not convinced that permitting fathers to attend scans will result in less women reporting domestic violence.

For difficult pregnancies i.e. where there is a medical concern for the mother and/or baby, additional scans may be recommended. In this case, fathers should be permitted additional time off to attend these scans, especially as mothers may require particular support during a difficult pregnancy.

Question 19: Do you have a preference between:
giving a father a new right to attend antenatal appointments
allowing fathers to use existing parental leave to attend antenatal appointments

Please explain your response.

We consider that giving fathers the right to attend antenatal appointments should be a new discrete right to time off rather than using up existing parental leave. The reasoning behind this

is that the entitlement will be limited to antenatal appointments and is likely to be more administratively workable as a separate right. Conversely, administering small blocks of time off and setting them off against the proposed parental leave is likely to cause administrative burdens for employers and increased regulation. Also, it will allow it to develop and change in its own right over time.

Question 20: Are there any special circumstances in which parents will need additional support?

We consider that where the mother is having a very difficult pregnancy, for example she has been diagnosed with pre-eclampsia and hospitalised prior to the baby's birth, the mother is likely to require significant additional support, both practically and emotionally, from the father. The need for practical support will be particularly strong where the couple already have another child/children, especially if the mother is their primary carer.

We suggest that by way of additional support for parents affected in this way, consideration should be given to the feasibility of allowing fathers to take paternity leave from the same time as the mother may take maternity leave i.e. from the period commencing eleven weeks' before the expected week of childbirth. This could be limited to cases where there are serious medical complications.

We consider that parents also need additional support in circumstances where there are significant complications for the mother and/or baby immediately following the birth, for example, where the baby is taken straight into the hospital's intensive care unit due to being unable to breathe unaided. Parents also require particular support in the event that a child is stillborn. However in such cases fathers should be able to take paternity leave and parental leave as those rights should be triggered following the birth of the baby.

Do you have any further comments or suggestions relating to our proposals or impact assessment on flexible parental leave?

Comments on proposals

We consider that as the proposals regarding parental leave are, in practice, quite complex, it will be important to ensure that not only is any implementing legislation clear but also that guidance provides practical examples of how the various entitlements work. In particular, it would be helpful if different terminology was used to describe the different types of leave that would be available, as the blanket term 'parental leave' is confusing. For example, under the proposals, parental leave can either be reserved, paid, unpaid, concurrent, taken only at specific times or taken at any time up to a child's fifth birthday (the latter being subject to further consultation).

Comments on impact assessment

We do not have any specific comments in relation to the impact assessment save to note that there is clearly a significant financial cost to these proposals and this will of course need to be reassessed once the new system has been implemented and a better idea of actual take up rates can be ascertained.

We also consider that the continuing ability for smaller employers to recoup a greater proportion of the costs from the Government than large employers is appropriate.

ii) FLEXIBLE WORKING

Question 22: Should the Government legislate to extend the right to request flexible working to all employees? Please explain your response.

At paragraphs 4.14. to 4.19 the Government sets out its proposal that the statutory right to request flexible working should be extended to all employees. The policy objective of this is stated to be delivering the significant benefits that more widespread flexible working has the potential to bring. The Impact Assessment annexed to the consultation document states that the Government is seeking to promote a culture where flexible working is available to everyone and has a wide take-up.

The Government has considered whether a non-statutory Code of Practice should be introduced to cover employees other than parents or carers (who are already protected by existing statutory rights). Such a non-statutory Code would, it is understood, sit alongside the statutory right to request procedure. The Government recognises that the combination of statutory and non-statutory requests would create significant additional complexity. It also believes that a difference in status would maintain the stigma which some claim is attached to requests from those who are parents or carers as well as the misconceptions attached to requests from those who are not. The conclusion reached by the Governments is that its objectives will best be achieved by legislation to extend the statutory right to request flexible working to all employees.

ELA's view is that, if the Government wishes to extend the right to request to all employees, in order to achieve a regime which is readily understood by all, a uniform approach should apply to all requests. As the Government does not intend to repeal the current legislation that covers parents and carers the best way forward would be to legislate to extend the right to request to all employees. The greater the complexity in the legislation, the more likely it is to be perceived as a source of risk and the less likely to be embraced positively by employers.

Legislation to cover all employees will be simpler than having a dual approach. As has been stated by the Government, a dual approach would mean that employers would need to identify under which procedure the employee was making a request. They would then need to differentiate between their obligations, depending on whether they were dealing with a statutory or a non-statutory request. There would be more scope for mistakes to be made (which could be costly for employers) and frustration on the part of both employers and employees. Rather than encouraging employers to see the benefits of more flexible working, an unintended consequence could be an overall reduction in successful requests. This appears to be borne out by the Impact Assessment annexed to the consultation.

Further, a dual approach may signal to employers that certain employees, namely parents and carers are entitled to a greater level of legal protection, and employers may take the view that they do not need to give serious consideration to requests from employees making non-statutory requests. A further unintended consequence could then be that those who are not parents or carers would be reluctant to come forward to make a request.

It is therefore suggested that the Government's stated objective of promoting a culture where flexible working is available to all and has a wide take-up is more likely to be assisted by all employees having equal statutory rights. An approach that highlights a distinction in rights between certain categories of employees is unlikely to engender a change in culture.

Given the policy objective, the Government may also wish to consider the introduction of incentives to encourage flexible working. These might include tax advantages for those

employers who employ more than a certain percentage of their employees on a flexible basis. Alternatively some kind of accreditation or kitemark scheme might be devised. A change of culture is likely to take some time and employers need to be persuaded that there will be significant benefits to them if they allow widespread flexible working practices. This is likely to involve more than just the introduction of legislation and will entail convincing employers that their objectives of attracting and retaining employees and motivating them will be better served by allowing flexible working.

Question 23: Do you support the proposal to replace the statutory process for the consideration of requests with a Code of Practice? Please explain your response.

ELA believes there are good arguments for a Code of Practice to replace the statutory process, provided a simple and straightforward "safe harbour" approach is followed in order to create more legal certainty and reduce the prospects of litigation.

It is our members' experience that employers have not in general commented that the consideration of requests in itself is administratively burdensome (although the effect is more acute on smaller businesses) - it is more that the procedure does not lend itself to flexibility. In ELA's view the lack of flexibility in the statutory process stems from certain elements of the procedures, such as the rigid and inflexible timeframes and in particular the lack of certainty over granting a trial period. In ELA's view, it is these elements of the procedure that many employers find burdensome.

In ELA's experience, some employers complain that the nature of the current legislation is unduly rigid and prescriptive. However, others accept that the certainty derived from a prescriptive legislative process is beneficial in reducing the risk of complaints to Employment Tribunals if the process is complied with to the letter.

The advantage of the current statutory process is that it provides certainty for employers with the obvious correlation of few claims being brought. The disadvantage is that its inflexibility does not address the varying and subjective needs of different types of employers - large companies, SMEs or family run businesses. A Code of Practice could provide considerable flexibility as the statutory duty on the employer would be reduced to considering requests "reasonably". Employers would have the advantage of being able to adopt a procedure which suited their particular business type and size. The downside, however, is that a Code of Practice could result in increased legal uncertainty which in turn would lead to an increase in Employment Tribunal claims and greater employer apprehension. Please see our comments below.

Other than claims in relation to discrimination which are not referred to here as they do not arise directly from the flexible working procedures but are often the most important factor in determining an employer's response to a flexible working request, under the current statutory regime an employee can only make a complaint to an Employment Tribunal on limited grounds:

- failure by the employer to deal with the request in accordance with the procedure (Regulation 6);
- refusal by the employer of a request for a reason other than one of the prescribed reasons (section 80H ERA 1996);
- the employer's decision to reject the application was based on incorrect facts (section 80H ERA 1996).

If the statutory process were to be replaced with a Code of Practice, and as such a code would not be legally enforceable, the Government would need to consider what recourse an employee would have if the Code of Practice or a reasonable process was not followed by the employer.

Question 24: Should the Code of Practice detail the existing statutory procedure or is there a less burdensome procedure? Please explain your response

Please refer to our comments above under question 23 in respect of the elements of the statutory procedure that, in our view, employers find burdensome. In addition, employees have found the requirements to specifically state that they are making a request pursuant to the Regulations, and providing details of the effect of their application on other employees, overly prescriptive. However, it is important to recognise that for employers to consider fully requests they need appropriate information and proposals from employees in relation to the impact of their requests on the business and colleagues.

ELA does not believe that all the requirements of the current statutory procedure should be detailed in the Code of Practice. Instead, it is ELA's view that the Code of Practice should include certain minimum requirements in order to provide employers with certainty. Those requirements should be the key stages of the existing statutory procedure, being: (1) the application must be made by the employee in writing; (2) the employer must hold a meeting to discuss the request; (3) the employer must write to the employee with the outcome of the request; (4) the employee has the right of appeal. Employers and employees will be familiar with such steps as they mirror other relevant procedures and best practice within the employment relationship, such as grievance and disciplinary procedures under the ACAS Code.

A statutory Code of Practice that demonstrates a "reasonable" process but which does not include a minimum requirement to be followed runs the risk of increasing litigation as employers grapple with what amounts to a "reasonable" process. Therefore, the value of a flexible Code of Practice will need to be weighed against the likelihood of litigation.

The benefit of a flexible Code of Practice that has only minimum steps is that it would give employers and employees a structured framework within which to deal with requests, but enough flexibility for it to be adaptable for different types of requests e.g. requests for permanent changes to an employee's working hours; requests for temporary changes to deal with emergencies; trial periods etc.

ELA recommends that any Code of Practice is supported by detailed and practical guidance notes and that the guidance notes should go further than the minimum steps in the Code of Practice. ELA suggests that it should address issues about how the employer and the employee can act reasonably in making and considering requests e.g. that an employee should provide sufficient detail about the request and its effect on the business in order for the employer to properly consider a request; the suggested timeframes for dealing with different requests and encouraging speedy resolution to requests; and suggesting trial periods if appropriate.

Question 25: Should a Code of Practice be principle-based (i.e. requiring requests to be considered in a reasonable manner and time) or provide a 'safe harbour' (i.e. where employers following the process precisely get protection)? Please explain your response.

In ELA's view there are potential legal issues with either approach. Please see our comments in responses to question 23 above for the ELA's general comments on these approaches.

Given that the Government's preferred approach is to extend the scope of the legislation in order to encourage more flexible working requests, a less prescriptive principle-based approach may

help to counterbalance the increased administrative burden on employers in dealing with an increased number of requests in the workplace.

However, the Government must also bear in mind that a principle-based approach is likely to give rise to increased risks of litigation. Disgruntled employees whose requests are refused may seek legal redress in Employment Tribunals for perceived failures by employers to consider their requests "reasonably", and it will then fall to Employment Tribunals to adjudicate on these complaints. The Government will need to consider the extent to which a reduction in legal certainty inherent in a principle-based approach is conducive to the policy aim of promoting growth in flexible working.

The Government is suggesting setting out details of recommended best practice in guidance contained within the Code of Practice, and that this may be based on the current process. ELA notes that the Government will consult on the details of the Code of Practice in due course, but offers the comment here that whilst prescriptive details in the Code of Practice may offset the perceived uncertainties inherent in a principle-based approach, a significant level of detail would detract from the perceived benefits of moving away from a purely statutory approach. Further, employers may focus their attention on the procedural steps rather than the request itself.

The "safe harbour" approach, on the other hand, is likely to create more legal certainty if appropriately drafted. ELA does not believe that a "safe harbour" approach would give complete protection to employers from claims brought by disgruntled employees, as there is always scope for argument on the facts (i.e. did the employer, in fact, follow the "safe harbour" approach or not?). It is not possible to guard against claims altogether, without removing the statutory provisions or the Employment Tribunal's jurisdiction to consider a claim for breach.

ELA believes that for a "safe-harbour" approach to achieve legal certainty and reduce claims, it is important for it to be as simple and clear as possible. ELA notes the approach set out in the (now-repealed) statutory disciplinary and grievance procedures which were plagued from the outset by claims arising from the difficulty of applying the principles in practice. More recently, ELA notes that claims have arisen in relation to the "safe-harbour" approach adopted in Schedule 6 to the Employment Equality (Age) Regulations 2006 as a result of the details contained in those Regulations. (See for example *Holmes v Active Sensors Ltd* (Case No. 3100214/07 and *Bailey v R&R Plant (Peterborough) Ltd* (Appeal No. UKEAT/0370/10)).

Whilst a "safe harbour" approach may bring more legal certainty, it may also give rise to criticism that it encourages employers to concentrate on fulfilling the requirements set out in the Code of Practice rather than considering the request itself. This may detract from the Government's policy aim of promoting growth in flexible working, although ELA's view is that this could be offset to some extent by efforts made by the Government to promote the benefits of flexible working to employers as noted above in our answer to question 22.

Whilst the number of Employment Tribunal claims arising from the current flexible working legislation is relatively low, in ELA's view this relates not to the prescriptive nature of the current legislation but the limited penalties available to employees for breach of the legislation. As noted above, Employment Tribunals are unable to subject employers' reasons for rejecting requests to much scrutiny. The Government is not consulting on making changes to the ways in which Employment Tribunals assess claims for breach of the legislation or to the penalties for breach. As a result, claims for breach of the flexible working procedures may not increase with either approach put forward by the Government.

In addition, ELA considers that with either approach alternative claims and remedies available to employees at common law and under statute will continue to have an impact on the way in

which employers consider flexible working requests, for example, claims of direct or indirect discrimination and constructive dismissal. Claims of this nature allow employees and Employment Tribunals to question the way in which requests were handled and greater scope to consider the reasons why requests were refused.

In ELA's experience, it is rare for a claim to be brought under the right to request legislation without the addition of claims that would potentially give rise to greater penalties being imposed on employers. If the Government does not intend to change the penalties for breach of the right to request legislation, or the scope for Employment Tribunals to scrutinise the decisions made by employers, then in the ELA's view the impact of flexible working legislation will remain unchanged whether the Government adopts the principle-based or "safe harbour" approach. For the reasons outlined above, however, the greater certainty that is obtained from a "safe harbour approach" is on balance more likely to achieve the government's policy aim, which would be enhanced if that were accompanied by incentives to agree requests for flexible working.

Question 26: If you do not agree that we should introduce a Code of Practice to govern flexible working requests, what alternative could be introduced to reduce the administrative burdens of considering requests, without diminishing employee rights? Please explain your response.

The introduction of a Code of Practice is essentially a policy decision. ELA has, however, considered the approaches adopted by the Netherlands and Germany in relation to requests from employees to change their working hours, and offers the following summary in order that the Government is able to consider an alternative legislative approach. ELA offers no view as to the relative merits of such an approach.

The principles adopted in Germany and the Netherlands are broadly similar, and can be summarised as follows:

- The worker must request a change in working hours, indicating the proposed number and schedule of hours, at least three months (Germany) or four months (Netherlands) before the proposed start date.
- The employer must discuss the request with the worker, with the aim of coming to an agreement.
- The employer must make his decision about the requested change to working hours known to the worker at the latest one month before the requested start date.
- The employer must agree to the request unless various business interests exist (similar to the UK position).
- If employer and worker do not reach an agreement about the reduction and the employer has not rejected the worker's request in writing at least one month before the desired start date, the worker's hours and schedule must be changed in line with the request.
- The employer can change the amount of hours or schedule when business interests considerably outweigh the interests of the worker and he informs the worker at least one month in advance.
- Courts in the Netherlands and Germany have the power to order employers to accept flexible working requests in the event of claims brought by employees for breach of procedure.

ELA considers that should a similar approach be adopted in the UK, it may have the effect of reducing the administrative burden of considering requests on the basis that the procedural requirements are simple and flexible.

Furthermore, ELA does not consider that employee rights would be diminished by adopting such an approach. To the contrary - employee rights may be enhanced by such an approach, on the basis that the penalty for an employer failing properly to deal with requests is potentially for the employee's requested changes to be imposed on the employer by law, thus encouraging the employer not only to adopt a fair procedure (albeit on a more flexible basis than the current position) but also to look constructively on the request itself.

In contrast, the approach under the existing flexible working legislation in the UK in relation to procedural failures by the employer is to give employees the right only to claim compensation. This allows employers the scope to ignore requests and be faced only with the prospect of an award of limited compensation.

A legislative approach such as that adopted in Germany and the Netherlands could also be supplemented with a Code of Practice outlining the Government's view on best practice in relation to flexible working requests. We note the approach taken by the Singapore Ministry of Manpower to the promotion of the benefits of flexible working as an example of a government actively promoting flexible working (see www.mom.gov.sg).

Question 27: Do you agree with our proposals on prioritisation of multiple flexible working requested that cannot all be accommodated? Please explain your response.

The proposal is that there is no requirement on employers to prioritise competing requests according to a particular hierarchy of concerns, but to take account of any other factors they consider relevant in the event that they have to choose between requests. This is proposed to apply to the prioritisation of competing interests. Employers would still have to show that they could not all be accommodated for purely business reasons. This proposal is to avoid both the risk of creating a 'tiered' right reinforcing the idea that flexible working is primarily for parents and carers, and, employers feeling they face additional legal risks, or have to make a value judgment on the merits of one employee's case for flexible working over another.

In summary, it is likely that employers do make value judgments, and that an unofficial, perhaps even subconscious 'tier' does develop.

In practical terms, it is not likely that an employer will be inundated with requests for flexible working at any one time. Nevertheless, there is a need for at least an ostensible consistency of practice in decision-making, and to this extent the proposal assists in so much as it does not seek to remove the employer's right to decline requests on purely business grounds. The current grounds are sufficiently broad to give employers scope to decline requests that cannot be accommodated.

It is inevitable that the extension of the right to all employees (subject to the eligibility criteria), will increase the legal risks whether or not the claims are in fact well-founded; that is a risk inherent in extending rights to broader classes of employees. For example, the first beneficiaries of the right can pursue separate claims for indirect sex discrimination (even if there was no real course of action in relation to the refusal of the flexible working request itself). The possible legal risks beyond the right itself, is in respect of those with protected characteristics and those that have the right to claim detriment, and or automatic unfair dismissal. Employers may find

that in circumstances where there are comparable business reasons for rejecting a request, they do prioritise on the basis of the likely cost of a claim from a disgruntled applicant.

The practical operation of the right to request flexible working for all (subject to eligibility criteria) inherently anticipates, or calls for the reasonable exercise of judgment (including value judgment), by the employer, as well as commercial considerations particularly where reliance on the prescribed business reasons does not produce a clear 'winner'. The reasoned judgment of the employer who knows the business and employees should be left untrammelled, given the safeguard provided by the need for employers to give business reasons for any rejection. Recourse to value judgments is not wholly irreconcilable with the public policy consideration behind the proposal for extension, and any potential unhelpful manifestation of a value judgment is likely to be tempered by the requirement for business reasons for the decisions.

The proposed publicity of the extension of the right to request flexible working should be clear as to the breadth of the beneficiaries to assist the necessary move away from its association with the original beneficiaries, and the accompanying expectation that their rights take priority.

The European Parental Leave Directive (referred to in paragraph 44 of the document) by conferring the right to request flexible working on parents returning from parental leave may lead to employers believing that requests from this class of employee should take priority as the directive may be seen as a gold-plating on the right conferred on employees generally.

Question 28: Do you agree that the current 26-week qualifying period should be retained? Please explain your response.

On balance, as explained below, we do agree that a qualifying period of service as an employee should be retained.

In view of our support for the retention of a qualifying period, we add that we see no reason this should be varied from the current 26-week period. In favour of the current length of period is the fact that it is likely to tie in with probationary periods commonly operated by employers. We feel that, in practice, employers will want the reassurance of having passed an employee through his or her probationary period before being required to consider a flexible working request.

In reaching our view, we have considered the impact of retaining the current 26-week period on the position of applicants for employment. We note that a driver towards extending flexible working opportunities is the belief that this has the potential to increase overall levels of participation in the labour market and to make a contribution to increasing employment and decreasing benefit dependency. We understand that the aspiration is that members of a number of groups who are currently not in work, will through the extension of flexible employment, be able to enter the employment market by taking up flexible opportunities.

If, as is proposed, the current 26-week qualifying period is retained, there will be no "right" to apply for a job that is advertised as full time and include with the application a request that the employer consider recruitment on a flexible basis. This may have the effect of discouraging applicants from applying for jobs that they could potentially do. Where applicants nevertheless do apply and make it known to a potential employer that they would want to work flexibly, employers will not be obliged to consider such requests (at least not under the flexible working

regulations, though they will have to consider the risk of discrimination claims in refusing any request).

Although the above situation may be felt to not be ideal, we consider that removing the service qualification would create a level of obligation on employers that would be too onerous, particularly in the current economic climate. It is difficult to envisage an appropriate compulsory procedure for requiring employers to consider flexible working requests from applicants. This is an entirely different situation to consideration of the position of an existing employee where it will be possible to arrange meetings over a reasonable period of time. In a recruitment scenario, an employer may be faced with a number of requests from a number of different applicants at once.

In reaching our conclusion we have taken account of the fact that existing anti-discrimination law does extend rights to applicants for employment. This means that existing legislation provides a route to recourse to certain individuals, having relevant protected characteristics, who may be refused employment unless they can work full time.

We feel that this will protect the groups who are most likely to need to seek flexible working opportunities in order to participate in the labour market. The current anti-discrimination legislation provides protection for individuals with caring responsibilities for children and disabled and elderly dependants or who are older and/or disabled themselves which could be used.

Finally, we have also taken account of the fact that many employers currently voluntarily invite applicants to indicate if they wish to work flexibly. We note that the Government is in a position to encourage this type of voluntary practice which we anticipate may well grow organically in view of the extension to the current flexible working regime, if as anticipated, flexible working practices become better understood and accepted as beneficial. This could be a feature of the kitemark or accreditation programme suggested in our answer to question 22 above.

Question 29: Do you agree that the restriction on the number of requests allowed in any 12-month period should be changed? Please explain your response

At paragraphs 24 to 39 of Section 4 of the Consultation Paper, the Government describes its proposal to promote greater flexibility by permitting employees to make a further flexible working request in any 12 month period, where their original request is expected to last for less than one year. The Government feels that such a change may be necessary to make the flexible working regime better suited to individuals who are unclear for how long they will require a flexible working arrangement.

The proposed increase in the categories of employees eligible to make flexible working requests is of course likely to lead to a corresponding increase in the number of requests made. Although ELA considers this, on the whole, to be a positive outcome, this increase will inevitably increase the burden upon employers to deal properly with flexible working requests from their employees.

The Consultation Paper makes clear the Government's desire to promote increased flexibility in the workplace. In ELA's view one of the key limitations of the current scheme is that it is couched in terms of a request to change terms and conditions of employment (in effect, on a permanent basis) rather than a request to work flexibly. It might fairly be said that the scheme itself currently lacks the flexibility that it seeks to promote. We believe that flexibility can be

introduced by changing the current scheme as described elsewhere in this consultation response and by adopting the approach to temporary changes set out below in response to question 30. In our members' experience, flexibility is best achieved via an informal approach rather than through the statutory scheme. In many cases employers and employees will first agree an arrangement before going through the statutory process to give it legitimacy.

Overall, our view is that the aim of any legislation, Code of Practice or procedural guidance regarding flexible working should be to promote precisely that flexibility. We feel that increasing the number of formal requests which may be made by an employee in any one year would make the process more rigid rather than more flexible and would be likely to force employers to retreat to the statutory reasons for refusal in a greater number of cases. A better approach would be for a formal process which could be invoked no more frequently that once per year, coupled with firm guidance which promotes general flexibility by employers where informal requests are made by employees and are consistent with the requirements of their business. Our members have also noted that other European countries with flexible working arrangements, notably Germany and the Netherlands, only permit one request every two years.

Question 30: Do you have an alternative proposal for promoting temporary changes to working patterns?

The wording of Section 80F of the Employment Rights Act 1996, together with the restrictive approach taken in the Flexible Working (Procedural Requirements) Regulations 2002, has led many employers to believe that it is not currently possible to agree to a temporary contract variation under the statutory process. Many employers similarly believe that they are unable to put into place an initial trial period. It is ELA's view that this restrictive interpretation is incorrect, but we support the desire to be clearer with employees and employers on this point.

We do not think that the problems identified in paragraphs 34 to 39 of the Consultation Paper would be adequately remedied simply by allowing employees the right to make two flexible working applications in the same 12 month period for the reasons set out above. Our view is instead that amended legislation should make clear the right of employers and employees to agree a trial period for any particular period of flexible working. The new regime should also provide specifically for a temporary change to terms and conditions to be requested, rather than simply referring to the need to specify the duration of the change.

It is ELA's view that the preferred approach would be as suggested in paragraph 38: for a Code of Practice to reinforce a recommendation that employers should consider immediate temporary requests wherever they are made by their employees. This should not be a procedurally prescriptive, but should be used as guidance which will inform any tribunal considering the question of whether, in refusing such a request, the employer has acted consistently with its obligations of trust and confidence to the individual employee.

ELA also agrees that where a trial period is put in place, the employer and employee should be strongly encouraged to agree fixed review points to consider between them whether the flexible working pattern is viable. We believe it would be helpful for best practice guidance to recommend review periods (3 months, 6 months, etc) although again believe that these should not be prescriptive.

Question 31: Do you agree with the Government that micro-businesses and start-ups should be exempted from the extension to the right to request flexible working for the three year moratorium? Please explain your response.

At paragraphs 40 to 44 of the Consultation document the Government sets out its proposal that micro-businesses (i.e. those with fewer than 10 employees) and new start-ups will be exempt from new domestic regulations for three years. The policy aim is to promote the growth in the economy. It is stated that this moratorium may or may not apply to the extension to the right to request flexible working to all employees.

It is suggested in paragraph 41 that, due to the size of micro-businesses, it may be easier for these employees to hold informal discussions about ways of working with their employer and that this would make the statutory right to make a request less necessary. We regard this as a questionable assumption and indeed consider there is a good argument that the opposite is true. It is possible that because of the small size of such businesses employees may feel less inclined to hold an informal discussion without a legal framework to back up any informal request. Micro-businesses are more likely to be owner-managed, without HR support and employees may find it more intimidating to raise the issue of flexible working than in a larger and more sophisticated business where personalities are arguably less important.

Exempting micro-businesses from any legal obligation to consider requests from non-parents and carers is likely to reinforce the distinction of rights between parents and carers and the rest of the workforce. It will hinder the Government in its aim of seeking to promote a culture where flexible working is available to everyone and has a wide take-up. If the Government genuinely considers that more widespread flexible working has the potential to deliver significant benefits it does not make sense to exempt certain employers from the extension of the right to consider requests. An exemption may suggest that the extension of flexible working may be an obstacle in the way of promoting growth in the economy i.e. this is stated as the reason for the exemption from new domestic regulations for micro-businesses and new start-ups.

An exemption may fuel resentment from employees working for micro-businesses and may impact on recruitment, motivating and retaining staff. The Government has stated that flexible working can help to retain staff and widen the talent pool so employers are able to recruit people with more skills. If this is the case, there is no business case for an exemption. Those who are parents and carers will still be entitled to make requests and are probably the most likely to do so in practice. However, an exemption will highlight the distinction of rights between different categories of employee.

Micro-businesses and new start-ups may find it easier to establish one of the business grounds for refusal of a request and, as the business grounds are to be retained, they will have this comfort.

An exemption may lead to confusion amongst both employers and employees i.e. as to who is entitled to make a request. The number of employees of a micro-business may fluctuate and the rights of employees who are non-parents and non-carers could then change depending on the number of employees at any given time.

In view of the Government's stated objectives, it is the ELA's view that micro-businesses and start-ups should not be initially exempted from the extension to the right to flexible working. An extension to the right to request flexible working should apply to all employers.

Question 35: Do you have any further comments or suggestions relating to our proposals or impact assessment on flexible working?

A Trial Period

This is discussed above but to reiterate, whilst the Government is considering the possibility of a temporary change to working patterns (paragraph 34 – 39), it may also be appropriate to consider allowing trial periods before a flexible pattern is permanently agreed.

A trial period would allow both parties to establish the suitability of the proposed pattern, in the knowledge that if it does not work out, the employer can reject it for one of the eight business reasons, or in the alternative, the employee can withdraw and/or amend their request to a more suitable pattern. It may also encourage more employers to agree to a request. Further, should the employer ultimately decide to turn down the request, this can be done on the basis of actual experience rather than conjecture as to the consequences of the proposed working pattern.

As noted above, a trial period could be agreed of, for example, three months, with objectives set and reviewed periodically throughout that period to determine the success of the working pattern for both sides.

Improved application process

In opening up the right to request to all employees, it would be of great assistance if employees were encouraged to give more thought to the impact their application would have on the organisation. This could be done by creating a standard application form, similar to the one BIS has recently issued, but with more detail.

As an example, the application form proposed by the Singapore Ministry of Manpower (attached) specifically identifies the groups that may be affected by a flexible working request, encouraging the employee to consider that there may be some negative aspects to their request. This type of application form would go some way to establishing an easier dialogue between employer and employee.

iii) WORKING TIME REGULATIONS

Question 36: Do you agree with the proposal to allow employers to limit the carryover of leave in sickness cases to the four-week entitlement under Regulation 13? Please explain your response.

The issue of whether employers should be allowed to limit the carryover of leave in sickness cases to the four-week entitlement under Regulation 13 is a policy decision for the Government and falls outside the scope of ELA's response. However, we would highlight the following points for consideration.

The impact of this proposal will be that workers may lose 1.6 weeks of their existing entitlement to leave under the Working Time Regulations. The policy aim behind the Working Time Regulations is to ensure that workers take adequate rest. Therefore, limiting the carry-over of leave in this way may encourage workers to take more of their leave in the holiday year in which it accrues, rather than allow it to be carried over into the next holiday year. Employers would welcome both the reduced costs and operational disruption caused by limiting the carryover of leave due to sickness absence.

The Government may want to consider providing clarity as to when in the subsequent holiday year the accrued carry-over leave should be taken. Some employers already such a provision in contracts of employment requiring carried over leave to be taken by a specified date (e.g. within 3 months following the start of the new leave year). Introducing a deadline for taking carried over leave might encourage workers to take that leave soon after the leave year to which it relates, which is consistent with the underlying policy objective of the Working Time Directive. However, such a change could also reduce the leave available to workers who are, and potentially may be, absent over two leave years and who might therefore lose some statutory leave.

Employers could prefer to avoid the operational disruption of carried over leave being taken during the early part of the new holiday year. However, they might agree in relevant agreements (or by one-off exercises of discretion) to defer any deadline.

Question 37: Do you agree with the proposal to allow employers to limit the right to reschedule leave in the event of sickness to the four-week entitlement under Regulation 13? Please explain your response.

The issue of whether employers should be allowed to limit the right to reschedule leave in the event of sickness to the four-week entitlement under Regulation 13, is a policy decision for the Government and falls outside the scope of ELA's response. However, we would highlight the following points for consideration.

The proposal could provide administrative difficulties for employers in identifying which elements of holiday can and cannot be rescheduled within a leave year. This problem could be encountered several times during a leave year (rather than simply at the end of the year, as would arise from the issue of leave being carried over).

If employers were obliged to allow the carryover / rescheduling of Regulation 13A leave in addition to Regulation 13 leave, employers may be less likely to be required to consider the duty to make reasonable adjustments under the Equality Act 2010, by permitting additional leave to be rescheduled / carried over. Therefore, employers may face reduced risks of indirect

discrimination claims – although the carrying over and rescheduling of Regulation 13A leave would lead to increased costs and potentially operational impacts for employers.

Question 38: Do you agree with the proposal that the Working Time Regulations be amended to specify the order in which leave is deemed to be taken, subject to contrary provision in a relevant agreement or contract? Please explain your response.

We agree that the order in which leave is deemed to be taken should be specified in the Working Time Regulations, subject to contrary provision in a relevant agreement. Many contracts are silent on the point and we consider it would be helpful to both employer and worker to have clarity, particularly if Regulation 13 and Regulation 13A leave are to be treated differently in terms of carry-over and/or rescheduling rights. We agree that the parties should be able to agree to a different order, such as designating bank holidays as Regulation 13A leave. If the Government decides, for policy reasons, that workers should have fewer rights to carryover or reschedule Regulation 13A leave, we agree that this will only work if Regulation 13 leave is taken first as suggested.

We consider that it would be helpful if the Regulations also made clear the order in which carried over leave is taken. If Regulation 13 leave carried over from a previous year is to be treated in the same way as current year Regulation 13 leave (i.e. in terms of ability to reschedule), this should be made clear. We assume that both carried over Regulation 13 leave and current year Regulation 13 leave would be treated as the first slice of leave taken, ahead of current year Regulation 13A leave. Presumably this would be followed by Regulation 13A leave, then any additional contractual leave entitlement.

A difficulty or conflict between any statutory and contractual arrangements could arise if an employer permits the carryover of (Regulation 13A leave or additional contractual) leave over and above the statutory entitlement to carryover, where both the statutory scheme and the worker's contract specifies that the worker must take such Regulation 13A or contractual leave by a specified deadline in the following leave year. This is currently quite a common provision in employment contracts. It would be helpful if the Regulations specified what was to happen in this situation, in the event of the contract being silent.

If Regulation 13A or contractual leave could only be taken after Regulation 13 leave has been used, it might be difficult for the worker also to take the carried over leave in accordance with any contractual stipulation to do so within e.g. 3 months after the start of the holiday year. The Regulations could specify that, in this situation, unless the contrary is provided, carried over leave which is subject to a time stipulation is deemed to be taken first, before Regulation 13 leave.

Question 39: Do you agree that there is no merit in amending the Working Time Regulations to limit the accrual of annual leave during sickness absence to the four-week entitlement under Regulation 13? Please explain your response.

The issue of whether the accrual of annual leave during sickness absence should be limited to the four-week entitlement under Regulation 13 is a policy decision for te Government and falls outside the scope of ELA's response. However, we would highlight the following points for consideration.

It is suggested in the Consultation Paper at paragraph 20 that the "fairly small savings" (in limiting the accrual during sickness absence to Regulation 13 leave) would be more than offset by the additional complexities and the administrative costs. However, depending on the circumstances, including the number of workers that a given employer has on sick leave, it is

possible that the costs of the additional 1.6 weeks' pay would exceed associated administrative costs. This will particularly be the case for workers on PHI who, under current proposals (assuming they are able to take all their annual leave in the year in question), will be entitled to 5.6 weeks' leave per annum, potentially for a period of several years. This represents a considerable cost to the employer and limiting it to 4 weeks' leave, could represent a significant saving.

The administrative burden argument could not really be applied to those employers who offer their workers annual leave in excess of their entitlement under the Working Time Regulations. The HR departments of such employers are already likely to be accustomed to having to work out how much statutory annual leave versus contractual annual leave has accrued during any period of sickness absence (unless they have decided to allow the entire contractual entitlement to accrue).

It is argued in the Consultation Paper that as an employer will not know how much sickness absence a worker will have until the end of the leave year, it would be impossible to calculate before then precisely how much leave a worker was due and that, by this time, a worker may have taken all his leave. However, the employer would be able to adopt a similar system at the end of the holiday year as it currently does on termination – i.e. if a worker has taken more holiday than s/he has accrued, the employer can claw back the amount that has been paid in excess of the entitlement. This could be done by deducting an amount equivalent to the overpayment from the worker's first salary payment in the subsequent holiday year (assuming of course the employer has the appropriate wording in the contract to avoid any claim for unlawful deduction from wages).

We also question the extent to which employers would calculate the appropriate amount of leave due for short, isolated periods of absence. In practice, such periods of absence may not be taken into account when calculating the amount of holiday due in any given year. Taking this kind of pragmatic approach would avoid the administrative burden referred to in the Consultation Paper and might cost the employer less overall than having to pay an additional 1.6 weeks' holiday pay to those workers who have been absent for the entire year.

However, an advantage of not limiting the accrual of annual leave during sickness absence to Regulation 13 leave is that, once again, it would provide certainty, and would not lead to situations where employers are having to decide, in the case of any worker off sick, whether to permit accrual of Regulation 13A leave or not.

Question 40: Do you foresee any problems or difficulties with the approach proposed on the interaction of annual and family-related leave? Please explain your response.

Our understanding is that there are few practical difficulties with the present regime. For shorter periods of leave, such as parental and ordinary paternity leave, workers have ample opportunity to take their annual leave at another time. For longer periods, such as maternity and adoption leave (and now additional paternity leave), employers and workers often co-operate in agreeing a mutually satisfactory solution - such as leave being taken in one block at the start or end of leave, or being paid out (notwithstanding the legal restrictions on the latter). We therefore question whether there is a need for legislative action in this area, and prescriptive rules could prove counter-productive.

Subject to the above, we do not foresee any significant problems or difficulties, but note as follows:

- the proposal to allow employers to take into account business interests when rescheduling annual leave untaken due to family-related leave could give rise to indirect sex discrimination claims. The risk arises because female workers are likely to be placed at a particular disadvantage by (in effect) being required to defer their annual leave and take it a particular time, as currently they are the main beneficiaries of the family-related leaves in question. This said, if the business interests are sufficiently compelling, employers ought to be able to establish an objective justification defence;
- with respect to the proposal not to limit the carry-over provision to Regulation 13 for these types of leave (whereas for sick leave the carry-over provision would be so limited), we question whether this creates a risk of a disability discrimination claim from long-term sick workers who are disabled. They could argue that they have been treated less favourably. However, the difference in the types and, in particular, the duration of the leaves in question (i.e. fixed-term family leaves on the one hand versus open-ended sick leave on the other) may provide a justification for applying different rules.

Question 41: Do you agree that existing statutory notification provisions will be sufficient to enable employers to manage issues arising from the proposed changes to the Working Time Regulations? If not, what additional statutory requirements might be helpful in relation to rescheduling or carrying over leave?

ELA believes that the existing statutory notification provisions are sufficient to enable employers to manage issues from the proposed changes.

The Working Time Regulations set out the minimum requirements and employers have the right to add to those provisions through their internal policies and terms and conditions.

There is therefore no merit in increasing the statutory notice period. ELA does not believe that "one size fits all".

It should be sufficient that minimum statutory notification provisions are in place and the Courts can decide subsequently if any additional requirements were reasonable or not.

Question 42: More generally, are there any additional issues that you would like to raise in relation to the proposed amendments around the interaction of annual leave with sick leave and family leave?

As stated in the answer above to question 40, ELA notes the proposals treat workers differently according to the reason for absence could be subject to challenge. In particular, it is proposed to treat those who are sick differently, and less favourably, in limiting the carrying over of annual leave to Regulation 13 leave. By contrast, those who do not take holiday for family reasons, will be entitled to carryover both Regulation 13 and Regulation 13A leave.

The difference of treatment may be unnecessarily complicated for employers to manage. However, employers may consider that the potential cost savings in limiting the carryover of leave (to Regulation 13 leave only) for those absent due to sickness may outweigh the disadvantage of any complications or administrative burdens.

Some members of our working group considered that paragraph 27 of the Consultation Paper reflects a potentially negative view being expressed i.e. that workers may falsely claim to have been sick during annual leave. However, others agree with the concern expressed in paragraph 27 and the need for employers to introduce procedures to manage that risk.

Similarly, some members of our working group felt it unnecessarily complicated to specify the order in which Regulation 13 and Regulation 13A leave would be taken, suggesting that both

categories of leave should be carried over in all circumstances. However, some members of the group tended to favour the views expressed in our response to Question 38 above.

The unnecessary complication relates to paragraphs 14 and 15 of the Consultation Paper, and the proposal to ensure that the Working Time Regulations would specify the order in which Regulation 13 and 13A leave is taken in the absence of local agreement.

The distinction appears unnecessary. ELA's recommendation would be to keep it simple and allow a carryover of Regulation 13 and 13A rights in all cases.

Question 43: Would you support amendment of the Working Time Regulations to allow: 'buy out' by agreement of the additional 1.6 weeks leave entitlement under Regulation 13A; and employers to require the carry-over of the additional 1.6 weeks leave entitlement under Regulation 13A in cases of overriding business need?

ELA supports the amendment to enable employers to 'buy out' the additional leave entitlement of 1.6 weeks Regulation 13A leave by agreement. This proposal gives the employer and worker a much needed degree of flexibility for a small proportion of the annual leave entitlement, while ring-fencing the bulk of it as "protected". Since the "buy out" applies only to 1.6 weeks Regulation 13A leave, ELA takes the view that red tape and complexity should be kept to a minimum so that the advantages of flexibility are not outweighed by any bureaucracy involved. To achieve this, ELA suggests that the way in which the "buy-out" is agreed should be a matter for the parties, rather than prescribed by the WTR, so that these arrangements can be brought into line with any contractual holiday policies, where "buy-out" and "carry-forward" are common features.

ELA suggests that workers are protected from a detriment for failing to agree to a "buy-out" proposal or request.

ELA also supports the carry-over of the 1.6 weeks Regulation 13A leave in cases of overriding business need for the flexibility reasons stated above for "buy-outs". To ensure that workers are not deprived of annual leave within the leave year without justification, we suggest that any Guidance sets out concrete examples of what would amount to an "overriding business need". In our experience, the specific business grounds for rejecting a flexible working request (set out in s80G ERA 1996) are helpful to employers, as they set the parameters around what is a legitimate business reason with which employers are already familiar. A similar approach might be taken for carry-over of the 1.6 weeks Regulation 13A leave, provided that the operation of the rules is not administratively burdensome.

Question 44: Do you have any other proposals for ways in which the operation of the annual leave provisions could be made more flexible, consistent with the requirements of the Working Time Directive?

Following the *Stringer* judgment, there has been uncertainty for employers and employees as to the position where an individual is receiving benefits under a permanent health insurance scheme (PHI) – under which employees generally receive a PHI payment representing a percentage of their normal pay. The usual position is that the PHI scheme requires the individual to remain employed in order to continue receiving PHI benefits. Consequently, they would continue to accrue holiday entitlements. The employee's right to benefits under the PHI policy may be adversely affected if an employer was to require them to take their holiday. Employees may receive benefits under such schemes for many years. Where the employment of such an employee does terminate, an employer could be subject to a large liability for accrued but untaken holiday pay. Subject to compliance with European law, it would be helpful if there was a statutory clarification of whether or not an employer could off-set an individual's PHI

benefits received against the employer's liability to pay for accrued but untaken holiday on termination.

Revised regulations could specify how "normal remuneration" is calculated for employees on PHI – i.e. by reference to the prevailing PHI benefit or the "notional" salary otherwise payable. However, if the latter approach were taken, questions arise as to whether that "notional" salary is frozen or increases each year. If it were to increase each year, would it do so by reference a standard measure (e.g. RPI) or by reference to a comparator within the workforce?

Consideration should be given to specifying the rate at which payments made in lieu of accrued statutory leave on termination of employment should be paid. In particular, where leave has been carried over, it should logically be paid at the rate applicable at the end of the leave year in which it arose (and during which it would normally be taken). Otherwise, an employee may gain an unfair benefit (or possibly disadvantage) by a change in salary or wages in the new leave year. Clearly, in order to operate such an arrangement, there would need to be a mechanism to identify which carried over leave is derived from the earlier leave year.

Regulations might also consider a definition (or at least guidance) in respect of the inability to take holiday due to sickness. For example, it might be the same level of sickness as would justify absence from work (in which case no separate definition may be necessary) or a higher standard. That higher standard might reflect the underlying objective of the Working Time Directive, by representing sickness which reasonably precludes the worker from benefitting from the benefit of rest from work and/or leisure time.

The other issue where statutory clarification might be welcomed by employers is in respect of liability under Regulation 14 of the Working Time Regulations for payment in lieu of accrued but untaken holiday, including where an employee is dismissed for gross misconduct. Regulation 14(3)(a) provides that a relevant agreement can stipulate "such sum" as may be payable on the termination of employment in respect of accrued but untaken statutory leave. However, in *Witley District Mens Clubs v Mackay* [2001] IRLR 595, the EAT concluded that Regulation 14(3)(a) requires the payment to a worker of a sum, but not no sum. Therefore, a provision of a relevant agreement providing for no payment to be made would be void. The decision suggests that a nominal amount may be lawfully paid where the contract provides for this, rather than the amount representing the value of accrued but unused leave calculated in accordance with the statutory formula set out in Regulation 14(b). Codification of this principle would be helpful.

The Government may be aware of the Opinion of the Advocate-General of the ECJ delivered on 7 July 2011 in *KHS AG v Schulte C-214/10*, a German case concerning the relationship between holiday rights under the Working Time Directive and long-term sick leave. The Advocate General apparently concluded that:

- EU law does not require that workers on long-term sick leave accumulate, without any time limitation, the right to paid annual leave or to payments in lieu of such entitlement. Allowing a worker to take accrued leave several years after the leave year to which it related would not achieve the Directive's purpose of enabling the worker to recuperate from the effort and stresses of that year.
- A national law under which annual leave entitlement extinguishes 18 months after the end of the relevant leave year (effectively giving workers up to two and a half years to use a year's leave entitlement) is not inconsistent with the Directive. An 18-month period is a guideline which member states should follow as far as possible for the purposes of implementing the Directive: a carry-over period of only six months is insufficient.

Clearly, any decision by the ECJ to uphold the Opinion of the Advocate General would have a significant impact upon the degree of flexibility available to the Government, should it wish to take advantage of such opportunity.

Question 45: Do you have any comments on the analysis contained within the Impact Assessment?

For ELA the key issue is to ensure that there are clear rules that can easily be understood and applied by employers and adhered to by employees. Maintaining flexibility for employers to take into account business needs is also important. The provisions regarding buy out and carryover are, therefore, welcomed. However, there should be consistency between all types of leave.

iv) EQUAL PAY

ELA have some overall comments about the Government's proposal to introduce a requirement for employment tribunals to make employers conduct pay audits (sometimes called equal pay audits or equal pay reviews) if they are found to have discriminated on pay. Below is therefore a summary of our general views, following which we have responded to each question.

Whilst agreeing with the need for greater transparency in the area of pay, our primary concern is that if the Government introduces its proposals regarding equal pay there is a risk that employers may see pay audits as a punishment for discriminating on pay as opposed to a forward-thinking way to promote transparency and address any gender pay gap within their organisations.

Historically, equal pay audits have been seen as a positive way for employers to identify and address equal pay issues within their workforce. In 2002 the Equal Opportunities Commission ("EOC") launched a five-step Equal Pay Kit for employers to use to assist them in carrying out pay audits.

According to the Women & Work Commission's February 2006 report '*Shaping a Fairer Future*': "Many stakeholders, public and private sector businesses and trade unions told us that equal pay reviews are the best way to address discrimination in pay systems." It would be unfortunate, therefore, if pay audits become seen as a punishment rather than as a positive step forward for employers. Such an approach would also be out of step with the Codes of Practice put forward by the Equality and Human Rights Commission ("EHRC").

This position is also supported by the Equal Pay Code ("EPC") which provides guidance on the equality of terms provisions at Chapter 3 of Part 5 (and Schedule 7) of the Act, including the new pay transparency and disclosure of information provisions at sections 77 and 78.

Alongside the legislative process the EHRC implemented and continues to carry out initiatives targeted at encouraging voluntary gender pay auditing and reporting (e.g. Proposals for Measuring and Publishing Information on the Gender Pay Gap 19 January 2010 and Financial Services Inquiry – sex discrimination and gender pay gap report September 2009), with the aspiration of achieving "high levels of participation on a purely voluntary basis, thereby ensuring that gender pay transparency will become normal business practice".

Given that gender pay auditing and reporting is not mandatory, part two of the EPC outlines aspirational "good equal pay practice" in this area and provides information and guidance for employers on steps which can be taken, going beyond mere compliance with legal obligations, to review/audit pay systems effectively. This guidance mirrors, with a little additional commentary, the guidance on equal pay audits contained in the former code of practice on equal pay issued by the EOC.

The EHRC consider that properly conducted equal pay audits may be the most effective method of ensuring that pay systems are free from unlawful bias. According to the Equal Pay Statutory Code of Practice, such audits should include:

- comparing the pay of men and women doing equal work;
- identifying and explaining any pay differences; and
- eliminating pay inequalities that cannot be explained.

In addition to the guidance of the EHRC other organisations promoting equal pay also promote the benefits of equal pay audits and favour a voluntary approach. The *Equal Pay: Where Next?* report, jointly published in 2010 by the Fawcett Society, UNISON, the Trades Union Congress and the Equality and Human Rights Commission, recommends reforming equal pay law, including robust pay auditing obligations for employers. The report recommends "Implementing, in full, existing legislation such as the Equality Act 2010 that encourages workplaces to undertake and publish gender pay audits, change attitudes, challenge stereotypes and cultures that sustain unequal pay practices."

ELA is concerned, against this background that having a two track approach, whereby pay audits are used as a penalty for a small number of employers, whilst encouraging a larger number to undertake audits on a voluntary basis, is unlikely to be an effective way of bringing in robust equal pay auditing obligations. In particular, ELA felt that using audits as a 'penalty' may discourage other employers (especially in the private sector) from carrying out audits (or seeing them in a positive light). Therefore, if this proposal proceeds (and we can equally see advantages to the proposals) detailed consideration needs to be given to the presentation of it and any conflict with broader messages about pay audits.

In addition, and as a 'knock on' effect (detailed further below) ELA feel it would be an unwelcome development if the Government's proposal resulted in employers deciding to settle equal pay claims merely as a means of avoiding pay audits (which we felt was a likely and unintended outcome). If employers choose to settle individual equal pay claims and do not in addition conduct pay audits, wider or systemic unfairness in pay will potentially remain unaddressed.

Question 46: Do you agree with the principle that greater transparency is required where an employer has been found to have breached the law? Please explain your response.

The starting point needs to be to consider what should happen once it is found that there has been a breach. In ELA's view, there are three primary considerations, and different ones may be higher priority depending upon the nature of the law that has been breached. First, there may be a penalty on an employer for the breach itself. Secondly, there may be a need to make good the breach, in terms of compensating the affected employees/workers. Finally, there may be a need to prevent similar breaches arising in the future, and this is where the introduction of greater transparency may prove most useful.

ELA considers that there are certain breaches, such as those in the equal pay arena, where transparency should prevent or reduce future breaches. Inequalities in pay scales are often suspected, however, without greater transparency: the fact of the inequality; its precise location in the pay scale; and the extent of it may not be apparent (and therefore the ability to identify and resolve it is lost). Greater transparency, as a general principle, would therefore be of benefit not just to employees/workers, but also to employers, to enable them to identify and rectify pay inequalities at an early stage and without the need for litigation. In fact, given the ultimate goal stated in the consultation paper of reducing the continuing and wide gender pay gap, our concern was not that transparency was not required, but where a breach has been found, the priority is to have an effective remedy. Given that pay equality issues are often systemic, greater transparency would assist in eliminating such problems both within the employer's organisation and potentially more widely. However, the need for transparency should not be over stated. Legal proceedings are by their nature open and transparent and decided cases create precedents that are of general application.

Question 47: Do you agree that where employers have breached the law, requiring employers to conduct equal pay audits is an effective way to increase transparency? Please explain your response.

Subject to the proviso that audits are done in a meaningful way, ELA agrees that the requirement for employers to conduct pay audits in this situation will increase transparency, but only to a limited extent (and with some unintended consequences). As stated above, transparency in the form of properly conducted pay audits is an extremely important tool in identifying and correcting inequalities in pay, the stated aim of the proposals. However, as noted above ELA has reservations about the use of compulsory pay audits as a penalty measure as this may give rise to the perception that pay audits are a "penalty" to be used against an employer found to be in breach of equal pay law. This seems to work against other comments in the Consultation Paper and elsewhere seeking to encourage employers to conduct voluntary pay audits, and therefore seems to us to be somewhat counter-productive, particularly given that proper pay audits are an essential weapon in the fight to reduce the gender pay gap.

Some members of ELA would also question, as alluded to above, whether requiring an audit only once there has been a breach is a sufficient means of tackling the persistent and wide gender pay gap, or whether pay audits should be used in a more proactive (and positive) way, by making their application compulsory at an earlier stage. Early use of audits, and early identification and correction of inequalities in pay may well avoid or at least reduce the amount of equal pay litigation that ensues and prevent an employer from receiving an unattractive tribunal finding that they have breached equal pay law.

Question 48: Do you agree the obligation to conduct an audit should apply to all employers found to have breached an equality clause except in specified circumstances? If you do not agree, to which employers should it apply? Please explain your response.

As mentioned, the use of appropriate pay audits is an essential part reducing the gender pay gap. As a result, ELA considers that, if they are to be used as a penalty, any limitation on this should not be prescriptive. Introducing numerous categories of exceptions to and limitations upon employment tribunals' powers in this regard will cause the tribunals to have to jump additional hurdles which will lead to satellite litigation and remove the focus from the primary aim of the proposal. In addition, we consider that adopting a consistent approach across the board as far as possible delivers parity between employers. Instead, a general ability for the employment tribunal to require a pay audit would allow flexibility in circumstances where an audit was clearly not appropriate (such as where the issue did not arise from a matter which would have been identified by an audit or where one had recently been carried out). To ensure that the ability to order a pay audit is well used, it would also be of assistance to require any tribunal who did not make such an order to specify why it was not appropriate to make such an order.

Question 49: Do you agree that audits should not be ordered if one has been conducted in the last three years; there is another means in place of ensuring the pay structure is non-discriminatory; or the tribunal does not consider it would be productive. Please explain your response.

ELA recommends that the scope of a "pay audit" is made clearer.

ELA considers that an equal pay audit should not be ordered if a comparable audit has been conducted in the time period since there were material changes to the pay structure (which we

would imagine would be a period of 1 – 3 years depending on the employer's practices) or if there is another means in place being regularly used by the employer to ensure the pay structure is non-discriminatory.

ELA recognises that it takes time to collect and analyse the data for an equal pay audit. We recognise that there is a cost in terms of staff time and the cost of external providers in undertaking them.

That said, an audit can be an effective mechanism for employers to identify unjustified pay inequalities and thereby ensure compliance with equal pay legislation. ELA considers an audit can be a snapshot of the pay and related terms at a given time. Depending on the employers pay system, it may be quickly out of date (for example, if the employer applies a discretionary approach to pay increases) or can be relevant for a number of years (for example where the same pay rises are applied to all staff). On this basis, we consider that it would be impractical for the legislation to specify a set period within which a pay audit had been carried out, in order to avoid being required to carry out a new pay audit.

ELA also recognises also that where employers currently conduct equal pay audits their scope is typically related to pay only. The government's intention is that the equal pay audits a tribunal can order will include non-contractual and discretionary entitlements (e.g. bonus). Therefore, a tribunal considering making such an order would need to consider whether any recent pay audit had addressed the relevant issues (such as non-contractual and discretionary entitlements), and if it had not, whether it was appropriate to therefore order a further audit to address these issues.

ELA accepts there may be other means possible for an employer to ensure an equal pay structure but an audit is an effective means for an employer to conduct its review and ensure transparency and compliance with the law. The efficacy of any alternative method proposed would need to be compared to that of an equal pay audit. In general ELA considers that wide discretion to employment tribunals to make such orders as they consider appropriate in the circumstances of the cases before them is probably the best approach, rather than too many prescriptive rules about the circumstances in which pay audits can or cannot be ordered.

Question 50: Do you think that the size of an employer is a factor that the tribunal should bear in mind when deciding whether it would be productive to order an audit. Please explain your response.

No. The Government's aim is to achieve maximum transparency in pay and to address wider unfairness, for all employees. Accordingly, ELA considers there is no reason why employers of any size, should be treated differently from each other, although we accept that the unintended consequences of the risk of an order being imposed could be greater depending on the size of the employer (see further below).

ELA accepts there is a burden for any employer. However, an audit is already good practice and not an unduly onerous way of achieving equal pay. Further, the work required to undertake the audit will vary according to the size of its workforce covered by the audit. A smaller employer will therefore have a lesser task than a larger one. A tribunal could limit the scope of the audit to the department / division / branch in which the Claimant works/worked which would minimise the burden on employers.

ELA has considered that there exist areas of employment law where a tribunal would to take into account the number of employees (e.g. the Information and Consultation Regulations) and the resources of the employer (unfair dismissal). The small employer exception in respect of disability discrimination has been removed for several years and the employer's size is not a

consideration in sex discrimination or in equal pay law. ELA considers therefore that it should not be a factor in the ordering of equal pay audits.

Question 51: Do you think there should be an exemption from the requirement to conduct an audit for micro-employers (fewer than 10 employees) and/or small employers (fewer than 50 employees)? Please explain your response.

We repeat the comments in the reply to question 50 above.

Question 52: What factors do you think that the tribunal should bear in mind before deciding it would not be productive to order an employee to conduct an audit.

ELA considers that to set out a list of factors/criteria might fetter the practical exercise of the Tribunal's discretion to do justice in each particular case as set out in the response to question 49 above.

ELA considers that the tribunal will have regard for the burden of conducting an audit (taking into account number of employees, available staff time, and likely expense) and the likely benefits for the employees concerned (the degree to which the pay structure is not already transparent and the likelihood of inequalities being discovered and rectified). Where an employer has become insolvent or is in the course of insolvency proceedings then ELA considers an audit would be unproductive.

Overall, the public interest in creating and maintaining a culture of non-discrimination and accountability is of high importance, and ELA considers the expectation ought to be that an employer will be ordered to carry out an audit, unless this would not advance transparency or equal pay in that particular case.

Question 53: Do you agree with our proposal to impose pay audits following findings in claims relating to equality of terms and claims relating to non-contractual pay discrimination? If not, to which claims do you think the obligation should attach? Please explain your response?

Yes, we agree that, if pay audits are an available outcome, then this should cover all terms and non-contractual pay, especially as the latter can form a significant part of an individuals pay. For some terms, an pay audit would not be a productive way to increase transparency or appropriate, but we would anticipate that this could be addressed in the tribunal's discretion as to whether or not such an order should be made.

Question 54: Do you agree with our proposal that these pay audits should be published? Please explain your response.

ELA agrees that the pay audit should be published, but, from a practical perspective that this should be in a manner consistent with the relevant organisation (so, for example, this could be by providing a copy to all employees or publishing it on a notice board for a small employer or posting it on the organisation's intranet for larger organisations). If the pay audit was not published this would undermine the stated purpose of the ability to require employers to carry out an audit – transparency. Employers should also be required to provide a copy to any recognised trade union or employee consultation body.

Question 55: Should publication requirements include a period of grace, within which pay changes could be agreed, before publication takes place? Please explain your response.

The consultation document states that a 'period of grace' would be useful to allow time to put forward 'next steps' with a view to promoting negotiated settlements and avoiding litigation. We agree that the time period should be flexible to allow the employer to consider the outcome

of the pay audit and to consider and discuss next steps and that it is useful if the pay audit and 'next steps' can be published together. However, we do not agree that the pay audit should be held back until changes are agreed as the pay audit would, in itself, be critical to employees and their representatives making a decision as to whether to agree any changes.

Question 56: What do you think would be the most appropriate sanction for failure to comply with an audit requirement?

ELA believes, consistent with promoting transparency and other areas of employment law, that the appropriate sanction is the ability to consider the failure in a future claim and the ability for the relevant employee (or any trade union) to bring an action for a civil penalty.

Applying a criminal sanction would be a draconian move, in circumstances where (as set out above) this is a substantial departure from the approach to pay audits taken in the past. In addition, even if clear and detailed guidance is given on what must be undertaken to comply with an order to carry out a pay audit, it is unlikely that whether or not an employer has complied would be a clear cut question. In ELA's view it would be inappropriate for employers to be subjected to risk of a criminal fine, if the pay audit requirement could not be made entirely clear.

A further option, which in ELA's view would support the goals of transparency and reducing the equal pay gap, would be a requirement that any employer who does not comply with the order would be subject to a further order, requiring an external pay audit to be carried out, at the employer's cost (see further below). Some members of ELA also considered that a further option would be to apply a similar penalty as was available under s 132(4) of the Equality Act, whereby employers guilty of concealment could be required to backdate any damages to the date of the offending term (and not just 6 years). However, in all cases it must be clear what is required of an employer in carrying out a pay audit (see further below).

Question 57: Do you agree with the proposal that the detailed content of the proposed audit should be set out in secondary legislation following a further consultation? Please explain your response.

We do agree with the proposal to use secondary legislation to set out the detailed content of the audit.

Used effectively, we consider secondary legislation might best achieve the objectives listed at a) and e) below. These objectives are paramount to ensuring that:

- there is a universal understanding of what constitutes an effective pay audit by employment tribunals, employers, employee representatives and other stakeholders; and
- that this understanding is achieved through use of secondary legislation and guidance from the outset rather than developed by case law.

We consider that the principles outlined above are essential if the audit recommendation powers are to be effective and proportionate.

a) The increased consultation opportunity would ideally be tasked with achieving a universal understanding as to the minimum required of an employer undertaking an audit.

b) The development of a minimum standard that the vast majority of employers were capable of complying with would mean that the audit process would be used more widely benefitting employers and employees alike.

c) Effective use of associate documents/Codes of Practice, that are designed to provide working examples to establish models of good practice across sector/industry, or by other criteria (such as size of employer).

d) The opportunity to shape and guide employment tribunals (but not to prescribe) as to when recommending an audit might be appropriate.

e) An aide to employers in conducting such audits effectively, encouraging them to go beyond 'headline' figures.

However, it is important to note that there is currently a significant lack of clarity as to what is required from employers to conduct a pay audit and some difference of views among practitioners as to job evaluation criteria and approaches. These differences might cause difficulty in setting minimum requirements and/or providing effective guidance (which ELA considers essential to the proposal). The Government will need as a priority to consider whether it is envisaged that employers will in almost all cases require specialist help to conduct pay audits (and, if so, how that help is to be provided) or whether the legislation will be drafted with the intention of ensuring that employers can manage on their own.

At the same care must also be taken to ensure that any secondary legislation is not too prescriptive as to form and content of the audit, so that it remains suitable for all employers and to audits of different contractual and non-contractual terms. This could lead to reluctance on the part of employment tribunals to recommend that audits take place when dealing with smaller employers.

Question 58: Do you have any suggestions as to what should be included in the proposed audit?

Any pay audit should require the employer to set out and explain its terms of reference as to how it came to determine/identify the factors for audit, including which employee representatives were consulted, if any, and/or guidance followed. This should be directly linked to the employment tribunal's findings regarding any breaches committed by the employer as a starting point to help shape the terms of reference for commencing the audit.

The audit should ensure that employee groups are consistently and clearly identified (applying the same approach taken to identifying comparator groups under equal pay legislation) . The emphasis should not be on the collection of data, but rather the interpretation of that data to draw conclusions on the effect of the organisation's decision making upon its employees.

However, the focus should aim to be wider; the purpose of the audit must be to assess how groups are/have been affected across the organisation (or relevant business area/establishment within the organisation).

Any pay audit undertaken must involve evidence that the employer has incorporated the following three stages:

1. comparing the pay of women and men doing equivalent work within the organisation, business area or establishment;
2. investigating the causes of any pay gap, requiring the employer to respond/comment on any differences; and
3. identifying steps to close any gap in pay which cannot be explained by factors other than the employees' gender.

ELA believes that, if the tribunals are given the power to order that pay audits be undertaken, that, to achieve the goals of transparency and advancing equal pay, the emphasis within the pay

audit needs to make clear that employers must not be concerned only with complying with the basic statistical collection requirements of the audit itself (addressing the requirements of 1 above), but our concern is that employers might focus their main attention here, rather than seeking to consider how they might address any adverse findings (elements 2 and 3 above).

We would expect to see provisions that advocate the early and continued involvement of employee representatives, to maximise the validity of the audit and success of subsequent action taken.

The terms of reference used to conduct the audit must clearly set out how the employer has:

- decided the scope of the review and identify the data required;
- determined where men and women are doing equal work in the relevant business area, organisation or establishment;
- collected pay data to identify differences in pay; and
- identified the reasons for the pay gap.

Pay audits must seek to evaluate the data collected effectively with clear conclusions and actions to:

- draw conclusions from any gaps in the data that might affect the conclusions drawn, or indicate that the terms of reference should be amended; and
- make recommendations and identify steps to change where there are discriminatory policies and practices.

We consider that the list below sets out standard types of data that should be collected and analysed when auditing pay on gender lines. These factors could form the basis of a minimum standard, but are not intended to be an exhaustive list.

- Distribution of men and women within the same roles or roles of equal value or grade (taking into account the impact of part time employees).
- Mean/median salaries by gender in each relevant role or roles of equal value.
- Mean/median salary of men and women on entry by same role or roles of equal value or grade.
- Mean/median salary of men and women on promotion, by same role or roles of equal value or grade.
- Mean/median amount of non-contractual pay awarded by gender and by same role or roles of equal value or grade.
- Mean/median amount of incremental increases by gender and by same role or roles of equal value or grade.
- Mean/median amount of overtime, allowances and other relevant benefits by gender and by same role or roles of equal value or grade.

Some members of the working group also felt that the pay audit should also look at distribution of men and women across the relevant organisation, and the equivalent pay gaps, should also be included. Other members felt that, since such information would not give rise to an equal pay claim, it should not be included in a pay audit and that this should only look at pay issues within the roles (or roles of equivalent value or grade), as have been the subject of the equal pay claim giving rise to the order.

It is important that any legislation or guidance also makes clear that a consistent approach should been adopted throughout the audit, for example using hourly rates or full-time equivalent annual salaries and specifying the type of analysis, e.g. median or mean averages, so that it can be objectively established that the comparisons are a fair basis on which to draw meaningful conclusions.

It would be expected that guidance would encourage employers to supplement the basic criteria with other data relevant to the particular organisation, especially if specific problems have been identified.

Question 59: Do you have any suggestions as to the best way of ensuring the requirement is appropriate to the circumstances of the employer?

Our view is that the more purposive the audit requirements, the greater the employer's scope to develop an audit process that can be tailored to suit specific requirements and circumstances. Our emphasis is that minimum requirements be prescribed at a level that every employer should be able to comply with. Any additional requirements, such as those we have suggested in answer 58, are sufficiently flexible in scope and approach to ensure that there is sufficient consultation, review and evaluation built into the audit process to enable due account to be taken of the employer's individual circumstances.

While it is accepted and understood that "one size" of audit will not fit all, we consider that the more considerations that an employment tribunal be required to contemplate the greater the fetter (or the implication of such) on their ability to make recommendations.

Question 60: Do you consider there to be a risk of unintended consequences? If so what do you think these could be and how do you think they could be mitigated?

As highlighted in the Consultation Document, we consider that there is a risk that some employers will choose to settle pay-related discrimination claims rather than run the risk of being ordered to complete an equal pay audit. This might particularly be the case for a large employer dealing with "discrete" pay discrimination claims and would not be in the interests of transparency and narrowing the equal pay gap.

For example, it is not uncommon for sex discrimination claims to be brought by senior and/or highly paid individuals in connection with bonuses. Requiring an employer who lost a claim of this type to conduct a pay audit across its entire organisation could provide an incentive to settle, given that the cost of doing so may well be less than the cost of conducting a pay audit across a sizeable organisation. We note in particular the recognition in the Impact Assessment that the estimated £8,800 cost of conducting an equal pay audit is likely to be much higher for large employers.

Pay inequality in one part of such an organisation, will not necessarily indicate pay inequality in other parts of the business. Consideration should be given in appropriate cases to limiting the pay audit requirement to the part of a business in which a successful pay complaint is made. This may reduce the risk of employers seeking to settle claims simply in order to avoid a pay audit requirement. It may also be an approach more in keeping with the policy behind these proposals than simply deciding not to order a pay audit in such circumstances on the basis that a breach is not "indicative of underlying structural pay inequality" (see the suggestion at paragraph 15 of chapter 6).

Other unintended consequences would be a tendency for employers to develop overly bureaucratic processes that may not address the inherent issues.

Also care needs to be taken to ensure that processes required do not create unnecessary costs

Question 61: Do you have any further comments or suggestions relating to our proposals or impact assessment on equal pay?

Please see our introductory comments in this section.

Consideration should be given to whether any form of independent validation of pay audits conducted by employers pursuant to a tribunal order should be required and if so, by whom that validation could be given. Pay audits will only improve transparency and minimise unfairness if they are properly carried out.

In particular, assessing whether two jobs are of equal value can be a complicated process. If the issue arises for determination by a tribunal, an independent expert is usually appointed to help the tribunal decide the issue. If an employer does not carry out that assessment properly, for whatever reason, the pay audit will not necessarily reveal whether there are pay disparities within the organisation. Requiring independent validation of the employer's approach to the equal pay audit would minimise this risk, although would add to the administrative and cost burdens incurred by the employer. It might however make pay audits more robust, particularly in small businesses without extensive HR expertise.

If a pay audit is carried out in accordance with EHRC guidance, pay discrepancies on the basis of protected characteristics other than sex would normally be addressed. The consultation suggests that an audit would only be required to address gender pay discrimination. Again, the advantages of additional transparency would have to be balanced against an increase on the burden on employers if a wide approach were to be taken.

We note the suggestion in the impact assessment that requiring complaints to be referred to ACAS for pre-claim conciliation might reduce the number of claims going to tribunal and therefore decrease the number of equal pay audits ultimately ordered. Equal pay claims tend to be complex and we think it unlikely that a requirement for a (short) period of pre-claim conciliation will substantially reduce the number of equal pay claims being lodged.

Co-ordinating Chair of Working Parties:

James Davies, Lewis Silkin

Members of the Working Parties:

Part i) – Flexible Parental Leave

Hester Briant, Lewis Silkin
Susan Dennehy, Newspaper Soc
Felicia Epstein, Pattinson & Brewer
Rebecca McAlees, Lewis Silkin
Deepa Nathan, Allen & Overy
Jennifer Platt, Kuits
Helen Rice, Birchall: Eversheds
Anne Sammon, Herbert Smith
Sarah Takun, Abbey Legal Protection
Ellen Temperton, Lewis Silkin (Chair)
David Tyme, Webster Dixon

Part ii) – Flexible working

Emma Burns, Geldards
Esther Fagbemiro, Abbey Legal
Heather Grant, Kuits
Vanessa Hogan, Hogan Lovells
Adrian Hoggarth, Norton Rose
Tom Kerr-Williams, Baker & McKenzie
Joanna Lada-Walicki, Barlow Robbins
David Widdowson, Bevan Brittan (Chair)

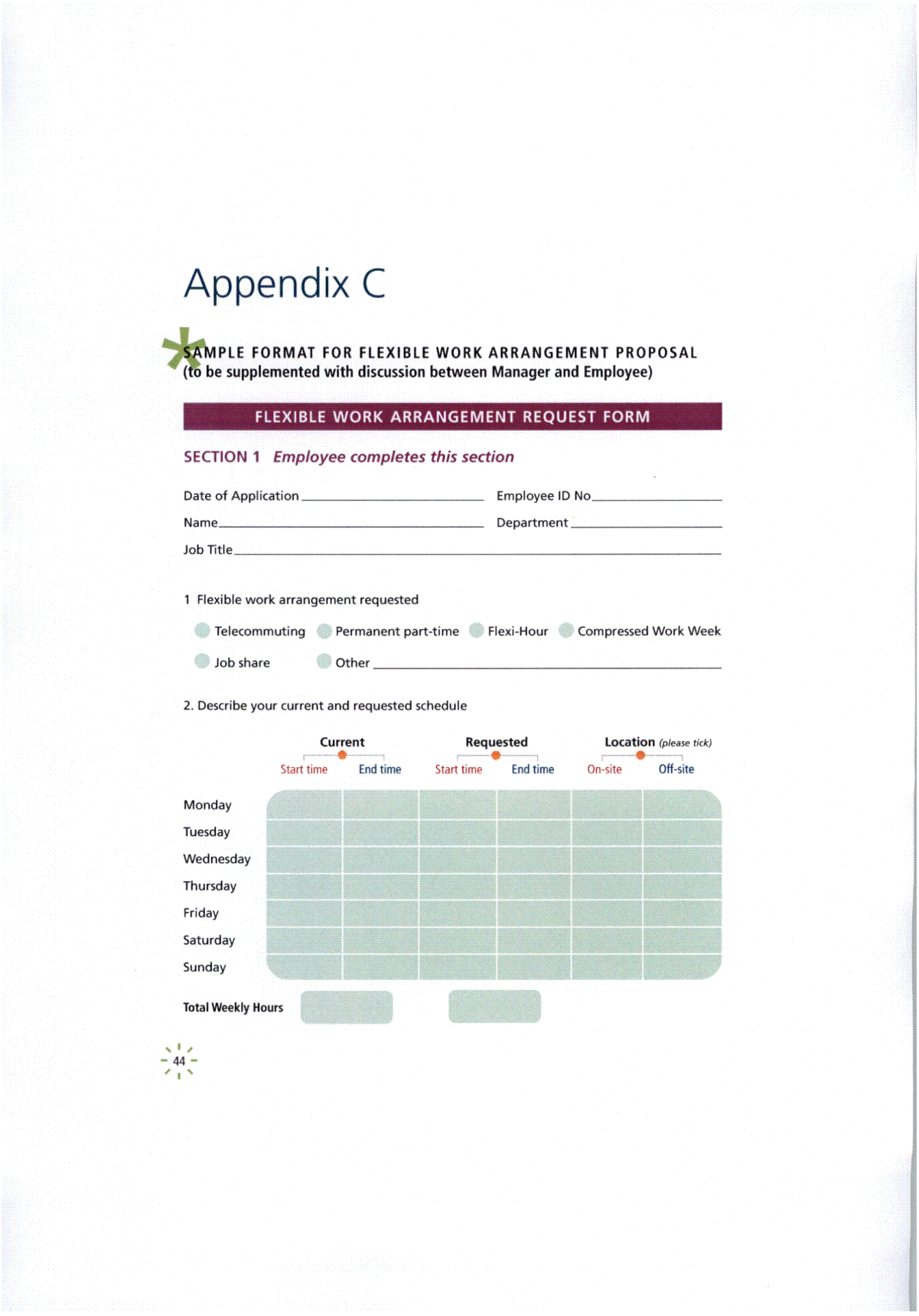
Part iii) – Working Time Regulations

Trevor Bettany, Speechly Bircham (Chair)
Ranjit Dhindsa, Hill Hofstetter
Sheila Fahy, Allen & Overy
Anna Henderson, Herbert Smith
Colin Leckey, Baker & McKenzie
Jennifer McGrandle, Mayer Brown International
Katy Meves, Shoosmiths
Sejal Raja, Radcliffes Le Brasseur
Simon Rice-Birchall, Eversheds

Part iv) – Equal Pay

Sue Ashtiany, Ashtiany Associates
Shubha Banerjee, Unite
Chris Benson, Leigh Day
Jo Broadbent, Hogan Lovells
Adame Creme, Unison
Fiona McLellan, Field Fisher Waterhouse
Brona Reeves, Barclays Wealth (Chair)
Melanie Stancliffe, Pritchard Englefield

Singapore Ministry of Manpower application form for flexible working



Appendix C

SAMPLE FORMAT FOR FLEXIBLE WORK ARRANGEMENT PROPOSAL
(to be supplemented with discussion between Manager and Employee)

FLEXIBLE WORK ARRANGEMENT REQUEST FORM

SECTION 1 ***Employee completes this section***

Date of Application _____ Employee ID No _____

Name _____ Department _____

Job Title _____

1 Flexible work arrangement requested

Telecommuting Permanent part-time Flexi-Hour Compressed Work Week

Job share Other _____

2. Describe your current and requested schedule

	Current		Requested		Location *(please tick)*	
	Start time	End time	Start time	End time	On-site	Off-site
Monday						
Tuesday						
Wednesday						
Thursday						
Friday						
Saturday						
Sunday						
Total Weekly Hours						

44

3. How will your proposed arrangement enhance your ability to get the job done?

4. What potential barriers could your changed work arrangement raise with

External Customers

Internal Customers

Co-Workers

Your Manager

5. How do you suggest overcoming any challenges with these groups?

6. Describe any additional equipment/expense that your company might require. Detail any short and long term cost savings that might result from your new schedule to offset these expenses.

7. What impact will there be for you if this flexible work arrangement is not possible?

_____

_____

8. What review process with your manager do you propose for constructive monitoring and improvement of your flexible work option? Are there measurable outcomes to use in the review process? List these outcomes here.

_____

_____

9. Proposed review date _____

SECTION II *Line manager completes this section*

Request for Flexible Work Option ○ approved ○ declined

If you decline this request, please provide the reasons.

_____

_____

_____

_____

_____ _____

Line Manager's Signature Employee's Signature

Date _____ Date _____

Effective date _____ to _____

If option is time limited or terminated

Copy of this form and any attachments should be given to HR