1 Executive Summary

BACKGROUND

1.1 **The Department for Employment and Learning, which has lead responsibility for employment law and employment relations in Northern Ireland, gave a commitment in the Economic Strategy[1] to conduct a fundamental review of employment law under three key themes:**

- *early resolution of workplace disputes;*
- *efficient and effective employment tribunals; and*
- *better regulation measures.*

1.2 The review, guided by better regulation principles, sought to identify opportunities to reduce the regulatory and administrative burden on businesses whilst protecting the rights of individual employees.

1.3 In May 2012, the Minister for Employment and Learning, Dr Stephen Farry MLA, published an employment law discussion paper[2] which highlighted employment relations developments and sought the views of local stakeholders on a range of broad policy proposals. The Minister subsequently made a statement to the Northern Ireland Assembly[3] on 5 November 2012, in which he highlighted the importance of encouraging and embedding good employment relations practice in the workplace, and set out the immediate actions that he intended to take forward, as well as the policy proposals that he wanted to explore further through public consultation. These intentions were reflected in the Department's response to the discussion paper, issued also in November 2012.[4]

1.4 Having secured Executive approval to take forward public consultation, the Department issued a document[5], in July 2013, that sought stakeholders' views on the following issues:

- ***early conciliation*** *–the routing of all potential tribunal claims to the Labour Relations Agency (LRA) in the first instance, with the objective of encouraging potential claimants to consider the merits of resolving their disputes without the need to go through a formal legal process;*

[1] *Economic strategy: priorities for sustainable growth and prosperity* (Northern Ireland Executive, March 2012); http://www.northernireland.gov.uk/ni-economic-strategy-revised-130312.pdf.
[2] *Employment law discussion paper* (Department for Employment and Learning (DEL), May 2012); http://www.delni.gov.uk/employment-law-discussion-paper.pdf.
[3] http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/05-November-2012/#4.
[4] *Employment law discussion paper: Departmental response* (DEL, November 2012); http://www.delni.gov.uk/employment-law-discussion-paper-departmental-response.pdf
[5] *Public consultation on employment law review* (DEL, July 2013); http://www.delni.gov.uk/employment-law-review.pdf.

- ***neutral assessment*** *– a proposed LRA service that would give parties an informed understanding of the potential outcome of a tribunal claim;*

- ***efforts to assist SMEs*** *– whereby the Department sought the views on options for assisting small and medium enterprises, and micro employers particularly, in dealing effectively with employment rights and relations issues;*

- ***qualification period for unfair dismissal*** *– consideration of the merits of extending the current qualification period for unfair dismissal (in Great Britain, the qualification period was extended on 6 April 2012 from one to two years, on the basis that it would increase business confidence, encourage companies to recruit more staff, and potentially reduce the number of tribunal claims);*

- ***the maximum amount that a tribunal may award in respect of an unfair dismissal****, and the means for calculating an award;*

- ***collective redundancy consultation periods*** *– consideration of the merits of amending consultation periods in collective redundancy situations;*

- ***compromise agreements*** *– a review of the existing policy for compromise agreements, including the potential for introducing a process of protected conversations that might allow for an employer to have a conversation with an employee about sensitive issues such as performance, where no employment dispute exists, on the basis that these conversations would not be admissible in an unfair dismissal tribunal hearing; and*

- ***Public Interest Disclosure*** *– a review of the legislation governing Public Interest Disclosure.*

1.5 The proposals took account of the UK Government's and the Republic of Ireland's reform programmes as well as international systems, while maintaining the review's key objective to shape Northern Ireland's employment law system and its implementation to suit its own particular circumstances and needs.

ISSUES CONSULTED UPON AND THE WAY FORWARD

Early Conciliation

1.6 The consultation sought views on the introduction of a new 'Early Conciliation' service requiring most potential employment tribunal claims to be routed, in the first instance, to the Labour Relations Agency (LRA). The process would be designed to ensure that potential tribunal claimants would receive an offer of conciliation prior to initiating legal proceedings, with the objective of maximising opportunities for the early resolution of employment disputes. Parties would be under no obligation to accept the LRA offer and would then

be free to proceed to tribunal if that is their wish. However, in going to tribunal, parties would need to provide evidence of having received such an offer. During the offer period, the normal time limit for lodging a tribunal claim would pause, ensuring that access to justice is not compromised and giving the parties 'breathing space' to attempt to resolve the dispute.

1.7 Protracted disputes are stressful, damaging and costly. The economy stands to benefit where matters can be resolved without the need for an adversarial and complex legal process. Stakeholder engagement consistently shows that the LRA is well respected by employer and employee interests alike and there is widespread recognition of its strong track record for independence and impartiality. The proposed system of Early Conciliation has been well received by the great majority of stakeholders.

1.8 The Department is therefore taking appropriate primary legislative powers to enable Early Conciliation to be established. This will make it mandatory for potential tribunal claims to be routed, in the first instance, to the LRA. There will be a need, in so doing, to extend confidentiality provisions to protect the integrity of the new process.

Neutral Assessment

1.9 A second consultation proposal envisaged the LRA offering a new service known as 'Neutral Assessment', an entirely voluntary process allowing parties, by agreement, to have an independent expert assessment of the respective merits of their case.

1.10 There was no clear consensus on this proposal with a number of stakeholders arguing that 'Neutral Assessment' is more appropriate to a legal setting. The planned consultation on a revised set of tribunal rules, referred to at paragraphs 13-16, will include proposals for early neutral evaluation to be conducted by the tribunal judiciary.

1.11 However, some stakeholders did suggest that litigation could be avoided if parties to an employment dispute had a clearer understanding of the merits of their case at a much earlier stage. The Department considers that there is therefore merit in asking the LRA to further explore how such a service could be delivered as an integral part of the Agency's existing suite of services.

1.12 The Department is using an Employment Bill to be introduced in the Assembly in June 2015 to provide appropriate enabling provisions that would allow for a Neutral Assessment service to be established in the circumstances that it was regarded as providing added value by key stakeholders.

Efficient and effective employment tribunals

1.13 While early resolution can lead to positive dispute outcomes in many instances, there will always be employment disputes that require a legal determination. It is therefore important that the tribunal system continues to operate efficiently and in a way that is reasonably accessible to its users.

1.14 Historically, employment tribunals were blighted by a very significant backlog of cases with the disposal of individual discrimination claims often taking up to two years. Under the Department's direction that situation has been improved substantially through the introduction of more effective case management procedures. Not only has this delivered a more responsive service for the end users but it has also resulted in a significant reduction in the overall cost of the service. When the original tribunal reform business case was approved by the Executive in 2009 the cost of running employment tribunals was £4.4m. On an annual basis the Department has reduced the administration costs. The outturn for 2013/14 was just under £3.6m, representing a 20% saving on the original baseline.

1.15 Mindful of the need to respond to recent criticisms about the complexity of employment tribunals, the Department commissioned a review of the rules and procedures governing industrial tribunals and the Fair Employment Tribunal. That review is now complete and a consultation will take place later this year on a revised set of tribunal rules designed to bring even greater transparency and coherence to the tribunal experience for both employees and employers.

1.16 A key outcome from the consultation will be the creation of a single set of Regulations and Rules of Procedure governing industrial tribunals and the Fair Employment Tribunal as well as enhanced case management procedures. It is also intended to set in place improved guidance to ensure that parties better understand what they can expect when they go to tribunal.

Unfair dismissal: qualifying period

1.17 The consultation asked whether the current qualifying period for unfair dismissal should change from one to two years, in line with what has been in place in Great Britain (GB) since April 2012.

1.18 Opinion on the issue was evenly divided. To summarise the arguments, advocates of change considered an increased qualifying period to be a pro-growth measure, believing that it would give employers confidence to recruit staff, reduce tribunal claims, and sustain Northern Ireland as an attractive location for investment in the face of competition from other UK regions. Supporters of retaining a one year qualifying period, on the other hand, took the view that there is little evidence to support a change which, arguably, could introduce volatility to the labour market. There was also no meaningful support for introducing a change to the qualifying period for certain groups, such as micro employers.

1.19 None of the consultation respondents was able to present sufficient evidence to establish a causal link between the unfair dismissal qualifying period and employment growth, inward investment and the volume of tribunal claims. There has been no conclusive evidence from GB that the two year qualifying period has generated any positive outcomes.

1.20 Having considered the arguments around what is clearly a contentious issue, the Department has concluded that the evidential case for change has not yet been made. The key social partners are divided about the need to amend the qualifying period. It is accepted however, that there is the possibility that new evidence may yet be forthcoming which could warrant a re-evaluation of the current position, and the Department is open to considering this. In doing so, the Department will want to ensure that any change to the qualifying period will be politically sustainable and as such secures the prior support of the Assembly.

1.21 Currently, changes to the qualifying period can be made by regulations, which must be confirmed (confirmatory procedure) by the Assembly within six months. The reality is that subordinate legislation to increase/decrease the qualifying period could be introduced and the Assembly would not have the opportunity to ratify/rescind the legislation for up to six months. The Department considers that this is not a sustainable position. The confirmatory procedure is an appropriate mechanism for legislating on matters where there is an absolute deadline for implementation and the policy is not controversial. In particular, there is a danger that a Minister may take one view on the issue which may not be destined to find favour with the Assembly. This would create an anomalous situation in which the rules would change for a matter of months and then revert back to the status quo ante.

1.22 Given the very sensitive and contentious nature of this policy area the Department wants to ensure that any change to the qualifying period should only be made after, and not before, it has been agreed by the Assembly. This will avoid creating uncertainty for employers and employees where a change is potentially on the statute book for only a few months. There would also be modest additional costs for employers, in modifying their administrative systems,that could become nugatory if the regulations are subsequently not approved by the Assembly.

1.23 The Department will therefore make an amendment to the relevant enabling power so that any future changes to the qualifying period will be subject, not to the confirmatory but, to the draft affirmative procedure. There is no intention to exercise that power unless convincing evidence is forthcoming that it is appropriate to do so.

Unfair dismissal: limits on compensatory award

1.24 The upper limit on the compensatory award a tribunal can order for unfair dismissal is presently £76,600. The upper limit is uprated annually using a formula based on the Retail Prices Index (RPI), and rounded upwards to the next whole one hundred pounds, with the result that there have been above inflation increases in most years. The UK Government has already taken measures to curb above inflation increases in the comparable system that operates in Great Britain, by means of provisions within the Enterprise and Regulatory Reform Act 2013 ensuring that increases are rounded to the nearest whole pound.

1.25 The introduction of such a change in Northern Ireland was considered as part of the Department's 2012 employment law discussion paper and proved uncontroversial. The Department will therefore take forward a corresponding change by way of the proposed Employment Bill.

Collective redundancies: consultation requirements

1.26 In Northern Ireland, a minimum period of 90 days consultation is required where 100 or more employees are to be made collectively redundant. Where between 20 and 100 employees are affected, the period is 30 days. No special provision is made where fewer than 20 employees are affected by redundancy.

1.27 In Great Britain (GB) the position was the same as that in Northern Ireland until April 2013 when the UK Government reduced the 90 day consultation period for 100+ redundancies to 45 days with the 30 day period remaining unchanged. In the Republic of Ireland (ROI) the consultation period for all collective redundancies is 30 days.

1.28 The consultation asked whether the minimum period of 90 days consultation remains appropriate; whether that period should be reduced to 45 days; or whether a period of 30, 45 or 60 days should cover all situations where more than 20 employees are made redundant. The consultation also sought views on whether fixed term employees (subject to certain exceptions) should be excluded from the count in determining what level of consultation is appropriate, as it has been argued that their present inclusion represents 'gold plating' of the Directive. Finally, the Department also asked about scope for improving guidance and the possible introduction of a Code of Practice.

1.29 Support for each of the consultation period options was fairly evenly divided. Advocates for the retention of the current consultation periods argued that this provided much needed time for employers and employee representatives to explore all available non redundancy options and also to facilitate effective collective and individual consultation. Supporters of a change to the current consultation periods argued that in 'real life' redundancy situations consultation took place over a more concentrated time than the statutory minimum requirements. There was, however, consensus on the need to improve the quality and effectiveness of the consultation process.

1.30 Having reviewed the arguments in favour of each option, the Department intends taking power in the Employment Bill to reduce the consultation period for 100+ redundancies from 90 to 45 days. Large scale redundancies represent around 10% of all redundancy situations in Northern Ireland, affecting around 37% of all individual employees made redundant. It is likely that a significant number of the affected companies will operate on a UK-wide and/or ROI basis.

1.31 Currently, the statutory arrangements that govern collective redundancies in Northern Ireland differ to the regimes that apply in GB and the ROI. Unlike the unfair dismissal qualifying period, which deals with an individual right, it could be argued that the anti-competitiveness position presented by some

stakeholders has validity in relation to collective redundancies. In a redundancy situation, employers operating on a UK wide and ROI basis currently face differing requirements based on the location of staff; and need to familiarise themselves with two and potentially three different systems. The ROI system is much more restrictive and therefore the option of mirroring the GB model would seem to be the most appropriate way forward.

1.32 A majority of consultees favoured the option of removing fixed term employees (with exceptions) from the count for the purposes of collective redundancies, seen by many stakeholders as unnecessary 'gold plating'. This would again reduce the complexity for companies operating in the rest of the UK and the ROI where fixed term employees are not included in the count for consultation purposes. The Department is therefore using the Employment Bill to remove fixed term employees from the count for determining consultation periods for collective redundancies.

1.33 The Department will also make an amendment to the relevant enabling power so that any future changes to the provisions relating to collective redundancies will be subject not to the confirmatory or negative resolution procedure but to the affirmative procedure.

1.34 In addition, it is intended to commission a Better Regulation project to develop guidance that will facilitate meaningful consultation.

Compromise agreements/protected conversations

1.35 Compromise agreements provide a means of ending an employment relationship by mutual agreement between an employer and an employee. At present, negotiations towards a compromise agreement can only be carried out on a 'without prejudice' basis where there is an existing employment dispute. The employment law consultation sought views on whether a new system of 'protected conversations' should be introduced, whereby an employer and employee could negotiate a compromise agreement even in the absence of an employment dispute, with the knowledge that these negotiations would be inadmissible at an industrial tribunal. The consultation also asked for views generally on the operation of compromise agreements in Northern Ireland, including on whether, as in Great Britain, they should be given the new name of 'settlement agreements'.

1.36 It is clear from responses to the consultation that the current system of compromise agreements generally works well in Northern Ireland. It is also evident that the proposed system of protected conversations is viewed by many as being controversial and likely to create unintended adverse consequences. Employers, broadly speaking, were in favour of a system whereby it would be possible to ensure that certain difficult conversations regarding performance, attendance and conduct could not be held to be admissible in future legal action. However, trade unions and employee advisory services were opposed to such a system on the grounds that it would leave employees open to potentially unfair treatment.

1.37 The Northern Ireland Roundtable Forum on Employment Relations, which is representative of the social partners, is not persuaded that the proposed system of protected conversations is appropriate for Northern Ireland. The Employment and Learning Committee has also raised similar concerns that such a system could have equality implications and generate unnecessary satellite litigation. Given this level of uncertainly, the Department is not proposing any legislative changes, but intends to commission the development of guidance for employers on the handling of what are commonly referred to as 'difficult conversations'.

Public interest disclosure

1.38 The current whistleblowing legislation protects those raising concerns about issues such as health and safety at work by providing that particular types of disclosure should not be the basis for an employer to subject an individual to detriment.

1.39 The employment law consultation asked for views on the following issues; introduction of a **public interest test** at industrial tribunal which would require an individual to show a reasonable belief that the disclosure was made in the public interest (closing a legal loophole, identified in Parkins –v- Sodexho[6], enabling the individual to use the protections where the matter relates to a personal work contract); an amendment to the **good faith test** so that it will be for a tribunal to adjust an award if a disclosure has not been made in good faith; amendment to the **definition of "worker"** to include some health workers inadvertently removed from the protections; and the introduction of **vicarious liability** into whistleblowing protections, allowing an individual who has suffered a detriment from the actions of co-workers, as a result of blowing the whistle, to bring a claim against the co-workers and/or their employer in respect of that detriment.

1.40 The consultation process has illustrated that there was widespread agreement with the view that Parkins –v- Sodexho created a loophole in the law whereby private, contractual disclosures could be protected under public interest disclosure law. The majority of the consultees agreed that this loophole should be closed. The Department will amend the law to clarify that disclosures must be in the public interest, thereby closing the loophole. There was clear support for the proposals to include some health workers within the scope of the legislation and to introduce vicarious liability into whistleblowing protections. It is therefore intended to use the Employment Bill to address these issues through primary legislation.

1.41 The Small Business, Enterprise and Employment Act has recently introduced further public interest disclosure reforms in GB, including: a duty on regulators to report annually on whistleblowing issues; improved guidance for individuals and businesses; and the expansion of whistleblowing protection to include student nurses and student midwives. The Department is currently consulting on these proposals

[6] Parkins V Sodexho

and will revert to the Executive when these additional matters have been considered.

PURPOSE OF THIS PAPER

1.42 This paper summarises the views expressed in response to the 2013 consultation. Each thematic chapter sets out the questions asked by the consultation, summarises the views of stakeholders, and sets out the actions the Department has taken or intends to take by way of response. Not every respondent has been cited in each case; however, representative views and pertinent quotations have been provided to give an indication of the tenor of the responses received.

2 Early resolution of workplace disputes

2.1 **This section deals with the questions asked in the consultation document about the early resolution of workplace disputes. The purpose of these questions was to explore options designed to make it easier for employees and employers to resolve individual employment disputes without it becoming necessary for them to escalate the matter to a potentially costly, stressful and time-consuming legal process at an industrial tribunal or the Fair Employment Tribunal.**

ROUTING OF CLAIMS THROUGH THE LRA

2.2 Under the proposed LRA early conciliation (EC) service, people would no longer be able to have a claim accepted by a tribunal (unless an exemption applied), without providing evidence that the LRA had offered conciliation as a means of resolving the dispute. There would be no obligation to accept conciliation, when offered, but the objective of the proposed system was to place conciliation front and centre in the minds of potential tribunal claimants and, indeed, respondents.

Q1. If early conciliation (EC) is implemented, should it include a provision to 'stop the clock', suspending the limitation period for lodging a tribunal claim? Please give reasons for your answer.

2.3 A key question asked as part of the consultation was whether a provision to 'stop the clock' (creating a pause in the normal tribunal time limits) was required to complement this proposed process.

2.4 Of the 40 responses received, 28 contained substantive comment on this issue. Twenty-one respondents supported the 'stop the clock' provision, although a number of them indicated that their support was subject to certain provisos. One respondent did not indicate either support or opposition for EC but did provide a suggestion as to what would be required if EC is to be implemented. Six respondents were opposed to the proposal as outlined.

2.5 Many of those who supported the 'stop the clock' provision considered that this would give EC a realistic prospect of success and focus the parties on meaningful conciliation rather than on distractions associated with the prospect of impending litigation. Many also anticipated that providing sufficient time for effective conciliation would help to avoid unnecessary, costly and protracted legal cases.

A 'stop the clock' provision would provide an opportunity for both parties to reach a conciliated settlement or reassess their positions. It could lead to non-legalistic, quicker, cheaper, informal resolution rather than a costly tribunal process.

University of Ulster

This would ensure the possibility of a resolution without added stress of a ticking clock for the limitation period.

Individual response

Otherwise many claims that might have been resolved will be lodged with the tribunal simply to ensure compliance with time limits.

Jones Cassidy Jones Solicitors

Many claims presented close to the end of the time limit are not able to engage in conciliation, or alternatively, the conciliation process is cut short due to running out of time. Stopping the clock would allow these claims to benefit from early conciliation without pressure to do so within the current tribunal deadlines.

Citizens Advice

2.6 The Northern Ireland Committee of the Irish Congress of Trade Unions (NICICTU) and the Labour Party of Northern Ireland both suggested that a 'stop the clock' provision was necessary to avoid detriment to the claimant: where conciliation is not pursued or is unsuccessful, it would be important to ensure that the claimant's rights to access the legal system were not in any way prejudiced.

2.7 Donnelly and Kinder Solicitors and the Northern Ireland Strategic Migration Partnership, while supportive of the 'stop the clock' principle, suggested that an alternative means of achieving the same objective would be to extend the time limit for lodging tribunal claims generally.

2.8 Some respondents' support for the provision was qualified.

Would agree with a 'stop the clock' approach however this needs to be for a specific time-bound period to avoid disputes being elongated.

Northern Ireland Civil Service Corporate Human Resources

There is little or no point in having all cases filtered through an early conciliation process in circumstances where either the employee or employer has no interest in seeking an amicable resolution. In these circumstances it is futile to extend out the limitation period...[Where the parties do choose to engage in EC] the limitation period should be stopped until such time as the conciliation process has concluded...The complaint details should be set in stone from that time of lodging and unalterable at a later date.

Peninsula Business Services

2.9 The latter view was broadly shared by Northern Ireland Conservatives Economy Group and CBI Northern Ireland.

2.10 Among those respondents who were opposed to the 'stop the clock' provision, some common themes emerged; particular concerns were repeated about the prospect of satellite litigation on time point issues.

The disadvantage in such a mechanism is the growth in satellite litigation on time points given the overly complicated way in which it is proposed the clock

with be stopped and restarted, which in part is dependent on the method used in communication.

EEF NI

Another way to simplify things would be to increase the limitation period to 4 or 6 months...from the time of the incident complained about but it is not wise to allow another way to challenge tribunal processes through artificial clocks.

Legal Island

The current proposal (particularly the "stop the clock" provision) is unduly complicated and could amount to a bar on access to justice as some claimants (especially unrepresented claimants) may find themselves out of time and therefore unable to access the tribunal. Real problems could arise where, for example, a claimant's ET1 might set out claims that the respondent might argue were not referred to in the EC form. Thus disputes could arise as to whether parts of a claimant's case are time barred.

Law Centre (NI)

1) People are already familiar with the 3 month rule; 2) Not stopping the clock would enable the focus to stay on EC rather than let it become protracted: and 3) With no stop the clock there is no room for abuse or it being used as a delaying tactic.

Almac

The aim is to resolve disputes at an early stage and if there is a prospect of this being successful it should be possible to achieve this within the existing limitation periods.

Antrim Borough Council

2.11 In the event that the 'stop the clock' principle is progressed, the Engineering Employers Federation suggested that "a reciprocal stop the clock mechanism should be applied to the compensation period instead of this period being added on to the compensation period claimed in the case."

Q2. Your opinions are sought on:

- ***unintended consequences that could arise if prospective claimants are required to give a brief description of the nature of the dispute(s) on the EC form; and***
- ***the other proposed contents of the EC form.***

2.12 It was proposed that, unless exemptions applied, a person contemplating bringing a tribunal claim would first have to complete and submit a form to the LRA, either online or in hard copy. The consultation document also made suggestions for the proposed content for such a form.

2.13 24 substantive responses were received. Of these, a majority shared the view that the content of the EC form should have no bearing on any subsequent tribunal and that, as long as this was so, no unintended consequences should arise if prospective claimants were required to give a brief description of the

nature of the dispute(s) on the EC form. As Antrim Borough Council put it, "The Department's approach to this appears to be very appropriate as the provision of a brief description assists with conciliation and yet has no bearing on any subsequent tribunal."

2.14 A number of respondents suggested that there was a need for details of the dispute in order to allow any EC to be effective.

It is appropriate to provide a brief description of the issues; without this, employers cannot be confident that they have settled all of the issues.

Citizens Advice

The absence of a brief description of the subject matter of the dispute may be detrimental to the success of EC due to a lack of shared understanding of the matter or matters in dispute.

Alana Jones Workplace Solutions

The prospective claimant would have to indicate what the issue is for early conciliation to be effective. Should the claimant fail to identify any obvious potential claims these should be identified by the conciliation officer during the conciliation process.

Queen's University Belfast

ET1 forms should not be limited to what is in an EC form as we understand the EC form is simply to give the conciliation officer and other party a brief idea of the main incidents and issues. The EC form should be private and confidential and shouldn't be referred to in subsequent proceedings; therefore there shouldn't be any unintended consequences.

Donnelly and Kinder Solicitors

The brief description helps focus the mind on the core issues and will help a conciliation officer quickly highlight misunderstandings or differences.

Legal Island

Prospect is concerned about the proposal for the claimant to be required to state the nature of the dispute on the EC form. We believe it is essential that this is not prescribed information, as if it was it could lead to satellite litigation...We consider that it would be preferable not to require details of the dispute on the form...it is essential that the early conciliation process does not become over legalistic, but instead is used by the parties to genuinely seek resolution of the dispute in order to avoid litigation...having contact details rather than being required to name the respondent (as in the Great Britain proposed scheme) is helpful...We strongly believe that the form should include details of a representative if the individual has one, such as a union representative or advice worker. In this case the representative's details should be provided and contact should be made by LRA direct to the representative.

Prospect

[The claimant should] summarise, in a limited number of words, the legal nature of their dispute [to help the LRA determine if it has jurisdiction; the form

should therefore include] any perceived legal claim...key facts in support of such claims (subject to a limited written narrative)...remedy sought...detail of any alternative employment.

EEF NI

2.15 In total, six respondents advised that they were satisfied with the proposed content of the form as outlined in the consultation document. Other practical additions to the proposed content of the form were suggested.

The EC form should have space to indicate any necessary reasonable adjustments required by the claimant to participate fully in the process.

Disability Action

We would request that the form asks the claimant if they have already followed company grievance procedures before the agency accepts EC.

CBI NI

2.16 Additional suggestions included those listed below.

Details of age and representation.

Equality Commission

The form should also contain a unique claimant reference number for records.

Individual response

Claimants should be able to lodge an EC request over the phone with LRA staff recording the details of the potential claimant and respondent and any other required information. This is particularly essential for potential claimants who through certain circumstances are very close to the end of the OITFET time limit.

NICICTU

2.17 Those who did not agree with the proposed content tended to be those who took the view that EC could not fail to be connected, in some way, with a subsequent tribunal process.

If the EC form does not mirror the IT1 in content, challenges are likely to arise, e.g. the EC may cover one aspect but the IT1 may relate to a totally different matter. Almac strongly opposes an EC form that does not exactly mirror the content of an IT1.

Almac

An employee must provide sufficient detail on their application claim before they are permitted to have their complaint heard by the EC. In this respect we disagree with the approach outlined by BIS...in order for EC to be truly effective the LRA should require sufficient detail of the complaint before proceeding...The form should contain the names of both parties, the details of the dispute and whether or not the employee is open to resolving the matter through the EC process. If they indicate that they do not wish to utilise the EC process then the matter should be processed as a tribunal claim as normal.

Peninsula Business Services

Vulnerable and/or unrepresented claimants may not fully comprehend the nature of the dispute. They may 'miss out' on potential claims through ignorance. The BIS recommendation in this regard appears to be a common sense approach.

University of Ulster

Q3. Are there other jurisdictions in relation to which EC would be inappropriate; in particular categories of claim unlikely to settle in a four week period (e.g. discrimination claims)? Please give reasons for your views.

2.18 In the consultation, the Department suggested a list of jurisdictions which might not be suitable for EC. Of the 20 responses received, 15 agreed that the jurisdictions outlined in the Department's list were inappropriate for EC.

2.19 Specific comments included the following.

We are aware that there are numerous complaints that involve multi-jurisdictional claims and therefore any attempt to exclude any other categories of claim would undermine the EC process.

Thompson Solicitors

The comprehensive list of jurisdictions (Annex A of the consultation document) not appropriate for early conciliation (EC) is welcomed. The proposal for the Department to establish the list of proceedings in relation to which EC will be applicable will be useful to all parties.

University of Ulster

[if it] is going to be introduced it would seem sensible that the scheme would cover as many jurisdictions as possible.

Donnelly and Kinder Solicitors

2.20 Some of the respondents who agreed with the Department's proposals also offered additional examples of jurisdictions which would also be unsuitable.

Claims which involve an insolvent respondent should be excluded as insolvency practitioners do not generally have the ability to make settlement and there would be little to gain in EC.

Citizens Advice

Jurisdictions most likely to involve multiple claims should be excluded. This includes equal pay claims particularly, but also TUPE claims, failure to consult on the grounds of collective redundancies and TUPE, and indirect discrimination claims.

Prospect

2.21 The National Aids Trust considered that where there has been "harassment, or direct discrimination that approaches, or is, abusive", EC would be inappropriate given the need to guard against vulnerable individuals feeling pressurised into using the process "when it is unsuitable because of the nature of their claim (for example a discrimination case)".

2.22 Two respondents disagreed with the proposal that discrimination cases (because of complexity) might be excluded, advocating that while it may take longer than four weeks to settle some claims, rather than exclude these, the correct approach would be to ensure that there is scope for some flexibility around extending the conciliation period, where appropriate.

The scope of EC relates to all appropriate jurisdictions currently submitted to the tribunals. In the Agency's experience discrimination claims are appropriate for early conciliation."

Labour Relations Agency

We believe that discrimination claims should not be exempt from the EC requirement. Discrimination cases are often complex (and thereby costly) and many could benefit from a conciliatory intervention – especially where the employment relationship is on-going and a chance to preserve employment still exists. We agree that it may be difficult for some claims to settle in a four week period. However, rather than exclude such claims from early conciliation, we believe the correct approach would be ensure that there is scope for some flexibility around extending [the] conciliation period where appropriate as the potential gain is so great.

Law Centre (NI)

2.23 NIC ICTU reserved its opinion on this subject advising that it would welcome further discussion on this matter.

Q4. Please set out and explain your views on the proposed circumstances in which EC would not be appropriate.

2.24 The consultation document suggested that there were certain circumstances in which there would be little sense in requiring prospective claimants to submit the details of their claim to the LRA and outlined proposed exemptions to EC.

2.25 There was a more limited response to this question. Among the 10 responses, while there was majority support for exemptions, there was a range of opinion as to what these should be.

2.26 For example, one respondent considered that EC should apply even where conciliation has already been requested or is being provided.

Parties who have already come to conciliation should benefit from an extension of time limits to afford maximum opportunity for them to resolve the issue without having to go down the tribunal route.

Law Centre (NI)

2.27 There was some overlap with answers to the previous question.

An option in respect of exemption is to exclude other categories of claim which are unlikely to settle in a four week period e.g. discrimination claims.

Labour Relations Agency

Almac would not rule out any categories at all. In our experience, all potential cases, including ones of discrimination, can change and are the view of the applicant at that point in time.

Almac

Disability discrimination claims are multi-faceted and unrepresented claimants may not fully understand their position and whether they should engage in the conciliation process or not. The process would also delay the start – and therefore the conclusion – of claims. Finally it may be the case that conciliation is better pursued during the case, rather than before it. Often it is the progression of a case that encourages negotiation, so this initial process may just waste both claimant and respondent's time.

National Aids Trust

2.28 For another respondent, workplace procedures should be completed first.

EC intervention should only occur where the workplace level procedures have been exhausted. An employee ought not to be able to process matters through EC where they have not sought to resolve the matter locally.

Peninsula Business Services

2.29 In relation to multiple claimants, views included the following.

We are happy with the proposed circumstances with the exception of (b). Conciliator may attempt to settle the dispute on behalf of all the claimants in a multiple claimants dispute eg. equal pay. Respondent engages EC. No need for claimant to submit if respondent has already engaged LRA in EC. LRA limitations in conciliation, where the LRA has no legal jurisdiction then the scope for ER is nil or at least very limited. E.g. unfair dismissal, written particulars, government intelligence agencies.

University of Ulster

We do not agree that in multiples there should only be an exemption in respect of those claims where one claimant has completed the EC form. We believe this will be extremely confusing and impracticable for claimants, who would have no control over the process of the first case and in many cases would not know whether or not an EC form had been submitted.

Prospect

We believe that a more robust model would be for all potential claimants to contact the LRA. This would then allow the LRA to conciliate, successfully, in at least some of the cases, or potentially all. The situation where part of their case is covered by the multiple (e.g. unfair dismissal for redundancy) but other aspects are not (an allegation that they were selected due to being a trade union official) needs to be considered. It could lead to a situation where claimants mistakenly thought that they did not need a certificate for their entire claim, as they were part of a multiple action, only to later discover that the certificate issued to the "lead" claimant did not cover their entire claim.

EEF NI

2.30 Citizens Advice agreed and reiterated that EC would not be appropriate where the employer was insolvent.

2.31 A more general concern was voiced by NICICTU, which warned that individuals may not necessarily know whether a potential claim is exempt. Thus, an individual submitting a claim at the end of the tribunal time limit may suffer from a potential delay of two working days occasioned by the need for the conciliation officer to contact the claimant.

Q5. Should hard copy EC forms receive a written acknowledgement?

2.32 It was proposed that when EC forms were received by the LRA, no acknowledgement or information in hard copy would be issued as first contact from the conciliation officer would likely precede the receipt of any correspondence issued by post.

2.33 In response to this proposal the overwhelming majority of respondents were of the opinion that the hard copy EC forms should receive a written acknowledgement.

2.34 Many of those who expressed a preference for the written copy acknowledgement did so on the grounds that this provided certainty for the parties involved and in particular certainty regarding the application of the 'stop the clock' principle. While some suggested that this acknowledgement could issue by e-mail, others expressed concerns that not all claimants would have access to IT resources. Responses included the following.

In the absence of written acknowledgement, there is a risk that a potential claimant may believe that the "the clock has stopped" in circumstances when the EC form has not actually been received.

Alana Jones Workplace Solutions

A written acknowledgement should be provided together with information about the conciliation process as the costs involved would be relatively small and the process could be automated...Also, as online forms are acknowledged, it seems unfair to place parties who are not technologically competent or who prefer to use hard copies in a different position.

Citizens Advice

Yes, as the person making the claim may not have access to IT resources or is a vulnerable person.

Individual response

Yes, there is a lot of junk e-mail and other e-mail in circulation so it could be easily missed. If you are prepared to receive hard copy forms then you should be prepared to issue written acknowledgements.

Castlereagh Borough Council

Yes. Written acknowledgement would be as important for hard copy as for forms received and acknowledged electronically.

Disability Action

Yes, either by e-mail or by letter depending on whether or not the parties have access to e-mail. Written acknowledgement should help to avoid confusion at a later stage, particularly in respect of the issue of time limits.

Donnelly and Kinder Solicitors

Yes – so that there can be no doubt about the date on which the 'clock was stopped'.

Thompsons Solicitors

Yes – we believe that it will assist all parties in understanding the complicated time frames and consequential extension that will apply if an acknowledgment form is sent that record the date that the LRA received the EC referral form.

EEF NI

As dates are very important in this jurisdiction, the ELG strongly supports the issue of an acknowledgement of receipt to ensure that all parties are clear about the date on which the 'clock' was 'stopped'.

Employment Lawyers Group

Yes. It is very important that both parties receive a written acknowledgement. A dated letter from the LRA may be crucial if there is a subsequent dispute about whether the timeframes have been complied with.

Law Centre (NI)

Yes. If the responsibility for complying with OITFET time limits remains with the potential claimant then it is essential that they have proof of receipt of the lodging of an EC request.

NICICTU

We believe that it is helpful for the record, and does provide a potential further opportunity for consideration by the claimant, that an acknowledgement in writing is sent. This need not prevent the conciliation officer from contacting the claimant immediately.

Jones Cassidy Jones Solicitors

We consider it would be helpful to have a written acknowledgment of receipt by LRA of hard copy forms. This is to ensure that the claimant understands the procedures and has the comfort of 'proof' that their form was received.

Prospect

All EC forms should be acknowledged and this should be by hard copy or email (if an email address is provided).

Northern Ireland Civil Service Corporate HR

There is merit in issuing acknowledgement on the grounds that the opportunity to provide information on the EC process (at relatively low cost) might have the effect of persuading the claimant to agree to EC where his or her initial reaction had been to decline. Automated acknowledgements are a good idea but this may not be suited to every prospective claimant who may not be as confident in the usage of online services.

Peninsula Business Services

"Yes", provided the clock does not stop.

Almac

2.35 Only a small number of respondents considered that such a measure was unnecessary, with some suggesting that it would be a waste of LRA resources.

This is a waste of agency resources given that the conciliation officer is likely to make contact beforehand.

CBI NI

2.36 The Construction Employers Federation held a similar view. For the University of Ulster, the GB approach was appropriate, while for Legal Island, there was a need for proportionality.

Not unless someone asks. Most people have access to e-mail or text. Those should be the default method of acknowledgement unless the parties do not have e-mail or phone.

Legal Island

2.37 The Labour Party NI suggested that this was really a matter for the LRA to determine. The LRA confirmed its view that written acknowledgement would be appropriate given that not everyone has access to information technology. However, the Agency went on to provide a caveat.

Written responses to hard copy forms should not be required when the Agency has, prior to issuing an acknowledgment, already made contact with a party.

Labour Relations Agency

Q6. What should be considered 'reasonable attempts' to contact the parties in the first instance, and should the same approach be taken for both prospective claimants and prospective respondents?

2.38 Given the significant time constraints associated with the EC process, it was considered necessary to determine the extent of efforts that should be made by a conciliation officer in attempting to contact the relevant parties in the first instance. It was outlined that reasonable attempts should, of course, be made but that it would be unreasonable to expect these to continue indefinitely. As such, views were sought on what may amount to reasonable attempts at contact.

2.39 Of those who responded, one consultee was content with the proposals as outlined in the consultation document.

2.40 While either broadly supporting or not necessarily objecting to the proposals, other consultees offered additional or alternative suggestions. The detail of these suggestions varied, but there was a common theme that 'reasonable' is likely to involve at least two attempts at contact, possibly using two different communication methods; and that similar approaches should be adopted for contacting claimants and respondents. A number of respondents suggested

that this was a matter for the Labour Relations Agency to determine. Comments included the following.

Claimants should be asked to confirm their preferred means of contact to make this more efficient i.e. by phone, letter or e-mail. Reasonable attempts would include more than one occasion, there should be a written record that both parties have been informed of the next steps in the event that they are not contactable.

Antrim Borough Council

The time period or number of attempts to contact the prospective respondent should be longer in order to allow them to participate in the process, as they may not be expecting contact from the LRA, and the prospective claimant may not have identified the correct person to deal with the matter.

Citizens Advice

1 letter/e-mail with 1 follow-up phone call is reasonable for both.

Castlereagh Borough Council

An employer who is unaware of any approach to the LRA may mistakenly believe after three months they will not face any claim and may plan accordingly, potentially failing to retain evidence...a reasonable attempt to contact claimants should consist of a single approach on the same occasion using two alternative means of communication. By asking the claimant to specify their preferred method and time to contact them in the EC form, this will hopefully help expedite the process

CBI NI

A reasonable attempt to contact claimants should consist of a single approach on the same occasion using two alternative means of communication. By asking the claimant to specify their preferred method and time to contact them in the EC form, this will hopefully help expedite the process.

Construction Employers Federation

One attempt by phone and one attempt in writing, either by letter or e-mail. The same approach should be taken for both parties.

Donnelly and Kinder Solicitors

A single approach on the same occasion using two alternative means of communication.

EEF NI

It would seem reasonable if the LRA has made attempts to contact by phone/e-mail where a number/address can be identified, or has sent a letter to the registered office, allowing a period for reply; following which reasonable attempts would be regarded as complete. A reasonable period for reply might be 7 or 10 days. This is in the context that the employer can of course still seek assistance from the LRA at any point, so a failure to respond is not irretrievable.

Jones Cassidy Jones Solicitors

We think it would be reasonable for the conciliation officer to attempt to contact the parties using all the methods of communication that the party provided on the EC form e.g. telephone, postal address, e-mail, etc.

Law Centre (NI)

It is deemed reasonable that an invitation plus a single reminder is sufficient. For consistency, we would suggest that a similar approach should be taken for both the claimant and the respondent.

Northern Ireland Civil Service Corporate HR

It is submitted that where the employee has indicated an intention or willingness to avail of EC that both parties are contacted by telephone call in first instance in addition to the written acknowledgement...Both parties should be given two weeks to respond.

Peninsula Business Services

Making contact with the claimant will be much easier if the form provides for a representative to be named and to be contacted by LRA.

Prospect

Two attempts over a four week period. The same approach should be taken for both prospective claimants and prospective respondents.

Queen's University, Belfast

Congress is broadly content with the approach as outlined in the consultation document. However, in our experience many employees are forbidden from using their phones during working hours. To counter this problem the LRA would need to provide coverage at lunchtimes and outside of normal business hours to ensure that the attempts to contact parties are reasonable.

NICICTU

For both claimants and respondents there should be a maximum of 2 attempts by the conciliation officer to both parties. If after 2 weeks one or other party has not responded the conciliation officer should communicate to both and issue a certificate.

University of Ulster

2.41 It was highlighted that the service would need to be accessible.

Care should be exercised to ensure that people with disabilities have equitable opportunity to be contacted – particularly those with sensory impairment, learning disability, autism, and mental ill health. Reasonable adjustments should be applied to extend the time taken to contact and ensure that disabled people are being contacted by their preferred method of communication/alternative format.

Disability Action

Communications with migrant workers will be more prone to misunderstandings and misinterpretations due both to the different first languages of parties and the different levels of familiarity with employment rights and the justice system in Northern Ireland. In addition, the more

temporary accommodation arrangements of migrant workers may mean that first attempts to contact could be unsuccessful. These factors should be taken into account when deciding what constitutes a 'reasonable attempt' to contact this party.

NI Strategic Migration Partnership

Q7. What are your views on the proposed process for issuing EC certificates? Should different or additional information be included? Should a certificate be issued even where all matters have been conciliated?

Q8. How should evidence of having completed EC be provided to OITFET and what form should it take?

2.42 In the consultation document, a proposed process for issuing EC certificates was outlined. This included detail of what information the EC certificate would contain; how the certificate could be issued and the associated time limits; the implications for multiple claims; and what information might be provided to the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET). Views were sought on these proposals.

2.43 Responses put forward a variety of opinions and solutions. A number of responses stressed the need to minimise potential satellite litigation which might arise by restricting the information provided to OITFET and developing processes which provided certainty. Key suggestions as to the information that the EC form should contain included names and addresses of claimants and respondents, unique reference numbers and mechanisms to create concrete evidence of the process being followed.

The proposed approach is appropriate and the preference would be to provide information electronically so that there is a record.

Antrim Borough Council

The requirement to submit a certificate to the tribunal identifying matters referred to in the conciliation process is likely to produce a new battleground for litigation...The reference number should be added to the ET1 form by the claimant.

Alana Jones Workplace Solutions

Citizens Advice welcomes a proposal that the EC certificate will omit reference to the issues addressed during EC. This will avoid any prejudice should matters not settled through EC go to tribunal, and would allow additional jurisdictions to be added to a claim after it has been lodged at tribunal, subject to judicial discretion.

Citizens Advice

Yes, a certificate should be issued even where all matters have been conciliated so this can be held on record by the parties involved.

Castlereagh Borough Council

There does not appear to be any indication in the consultation that a prospective claimant would be prevented from making a second referral to the LRA, after a certificate had been issued. We need clarity that this is not open to abuse.

CBI NI

There should be a written record of the outcome of the process as agreed between the parties...Possibly in the same way notice of a CO3 agreement is provided.

Donnelly and Kinder Solicitors

The primary aim of the new EC system is to avoid added complication and the potential for further legal argument and satellite litigation...this can be avoided by making it clear that all claimants must obtain a certificate from the LRA which must cover all potential claims and asking claimants on their referral form to indicate what the full nature of their dispute is...We agree with the issuing of a unique reference number which can be verified by the LRA. The precise details of how that information can be shared by the 2 bodies is a matter for them.

EEF NI

The EC certificate should only state that the EC process has been complied with...there should be no reference in the EC certificate regarding whether or not the EC process has been completed...there should be a clear demarcation between the EC process of dispute resolution and the legal process in the tribunal...the legal process should start afresh and therefore there should be no additional information contained in the EC certificate.

Employment Lawyers Group

Should record contact details and fact of compliance...We have a concern that if a summary of the issues referred to but not settled by conciliation is included in the certificate this may colour the approach of the tribunal...This could act as a disincentive to EC...No need for a certificate where all matters settled...Appropriate to consider how process will deal with multiple respondents. Solution: only require one respondent to be named, with LRA discretion to contact others.

Jones Cassidy Jones Solicitors

The certificate should simply confirm that the EC stage has been completed. It should not include a summary of the issues...the simplest approach would be for ET1 to be amended so that the claimant inserts the unique EC reference number provided by the conciliation officer. Equally, the form needs amending to identify those cases that are exempt from the EC certificate requirement.

Law Centre (NI)

The Party believes that the EC certificate should not contain details of issues discussed as this may affect the confidential nature of the process and have a negative impact on participation by the parties. The Party believes that if there is a conciliated settlement through the Labour Relations Agency settlement a certificate should not be necessary...sufficient information of participation in early conciliation should be provided on the certificate.

Labour Party NI

[The EC certificate] would contain details of the prospective claimant and respondent and a summary of the issues referred to but not settled by EC. There would be a statement confirming that the claimant has fulfilled their obligations in respect of the issues not settled by EC and would be signed and dated by the individual conciliation officer...This document would then be attached by the claimant to the ET1 form.

Labour Relations Agency

In all cases a certificate should be issued to outline the outcome from the process...It is suggested that a simple process could be developed e.g. each EC form is given a specific reference number and provision is made on the IT1 for [its] insertion.

Northern Ireland Civil Service Corporate HR

We consider the certificate should simply have the details of the parties and the unique reference number...the certificate needs to be absolutely clear about the dates of receipt of the EC form and the date of certificate. It would be helpful for the form to note the number of days by which the tribunal limitation period would be extended due to the EC process, the prospective claimant could then simply add this to the original tribunal deadline. The certificate itself should briefly explain the effect on time limits, and refer the claimant to more detailed sources of information on clarifying this...the claim form to the tribunal should ask for the EC certificate number.

Prospect

2.44 Peninsula Business Services considered that an employee should not be able to adduce additional matters in a later tribunal claim where such matters were not addressed at the EC stage. In accordance with this view, the EC certificate should be issued even where all matters are conciliated, and should clearly delineate for the employee the applicable time limits. It should also contain details of the issues discussed at EC such that it is clear that certain issues have or have not been settled. Peninsula also considered that, if one or other of the parties had declined to engage in EC, then this should be noted on the EC certificate, which should then be supplied alongside the ET1.

2.45 For Queen's University, Belfast, the EC certificate should be issued to both parties and to OITFET regardless of whether the claimant opts to engage in the process. The certificate should contain the detail of the key issues and should be issued to both parties in all circumstances, including where all matters have been conciliated. The EC agreement should be forwarded to OITFET.

2.46 For NICICTU, the information on the form should only contain details of the prospective claimant and respondent and, potentially, a reference number to avoid the kind of scenario in which a prospective claimant, coming to realise, only after EC, that an unfair dismissal had involved unlawful discrimination, would be unable to present a discrimination claim to the tribunal unless and until he or she had submitted the discrimination matter to EC.

2.47 Comparable views were expressed by others. For Thompsons Solicitors, the EC certificate should only state that the EC process has been complied with; it should contain no reference to the issues irrespective of whether they have been resolved. There should be a clear demarcation between EC and the legal process.

2.48 The University of Ulster was of the view that a certificate, whether in hard copy or electronic form and containing a unique reference, should be issued even where all matters have been conciliated, to inform situations where a claim is later lodged with the tribunal dealing with "the same/similar type issues".

Q9. Is the proposed approach to handling EC requests from prospective respondents appropriate? Should respondents be permitted to provide information by other means e.g. telephone?

2.49 While it was highlighted that most requests for EC would come from prospective claimants, there remained the possibility that they could be instigated by prospective respondents. To facilitate this, the LRA proposed to make available a respondent EC request form that could be submitted electronically or in hard copy, and on which the potential claimant's details would be disclosed. The LRA would register the form and pass it to a conciliation officer to instigate contact between the parties, in accordance with the same timescales as for an approach by a potential claimant. Views were sought on whether this approach was appropriate.

2.50 Two respondents considered that it was for the LRA to decide what the proposed approach should be:

This is a matter for the LRA to decide

Legal Island

We believe this can be left to the discretion of the LRA but would suggest that communication via e-mail would be the most appropriate and constructive way in which respondents could provide information

Thompsons Solicitors

2.51 Other views expressed were as follows:

Potential respondents should be permitted the flexibility of accessing conciliation without completing a form, as is currently the case...Introducing a requirement to complete a form may act as a disincentive to employers who may otherwise be well-disposed to exploring the conciliation and mediation services offered by the Agency as possible options for resolution

Alana Jones Workplace Solutions

We broadly agree with the proposed approach, although we would suggest that prospective respondents should also be allowed to contact LRA by telephone or via secure e-mail if this would not place too great a strain on LRA resources.

Citizens Advice

Respondents with disabilities should be afforded the same opportunity for reasonable adjustment as would apply to claimants with disabilities.

Disability Action

The process should be the same as that which applies to prospective claimants.

Donnelly and Kinder Solicitors

We have a real concern that the proposed EC process may be to the detriment of the current pre claim conciliation process actively used by our members to resolve issues where there is a dispute between the parties that could result in a claim. We firmly believe that the current process works very well whereby an Organisation can contact the LRA by telephone and provide brief details of the issue and engage the LRA's assistance in an attempt to reach agreement...The addition of any unnecessary administration (e.g. form filling) would in our view only result in a deterrent in organisations utilising the service.

Employers Engineering Federation

Respondents should be permitted to provide information by telephone in order to initiate a process although it may be sensible to require that this is followed up with a short form in writing.

Jones Cassidy Jones Solicitors

As a general principle, we think that the approach taken for respondents should mirror that for claimants. Therefore, the conciliation officer should take 'reasonable attempts' to contact both parties...Therefore respondents should not be permitted to provide information by telephone unless this option is also available to claimants.

Law Centre (NI)

The party believes that telephone referrals for early conciliation from respondents would not be appropriate. Information can be provided either in hard copy or by electronic communication. This would ensure that the Labour Relations Agency has the information that the respondent wishes to provide.

Labour Party NI

No issues with the proposed approach and agree that only the Claimant has the option to 'Stop the Clock'.

Northern Ireland Civil Service Corporate HR

It is suggested that electronic and hard copy requests are a good idea but telephone requests should also be an option. If an employer receives a complaint then it would be in line with EC practice if the employer could pick up the phone and seek to speak to someone immediately about resolving the matter. It is agreed that no 'stop the clock' provision need apply in these circumstances.

Peninsula Business Services

Prospect believes that a request by the respondent for early conciliation should 'stop the clock' in the same way as a request from the claimant. A failure to apply the same rules is likely to lead to confusion by claimants, consequently with time limits being missed. It is important that the process is as simple and consistent as possible to ensure that claimants are not denied access to justice.

Prospect

Respondents should provide information in writing only for the purposes of clarity.

Queen's University, Belfast

Broadly content with the approach as outlined in the consultation document.

NICICTU

Yes. And in relation to the provision for contact from respondents by phone re EC this should be facilitated. In essence it does not differ for conciliated discussions between parties that are not enacted statutorily and which the LRA currently engages.

University of Ulster

Q10. Please give your views on the proposed EC process as a whole. If any, what alternatives should the Department consider?

2.52 The Department invited views on the EC process, as to whether it had any advantages or drawbacks that had not been considered, and whether there were alternatives that ought to be explored.

2.53 The high number of responses i.e 26 in all, indicate that the issue of EC is important to stakeholders. It is apparent that there is support for the EC process as a whole, with the vast majority favouring the concept. The general view was that EC may provide quicker, cheaper, more efficient resolution of disputes without the need to engage OITFET.

2.54 A number of respondents expressed strong support, albeit that some wanted to see a stronger mandatory element.

I am in firmly favour of the proposal for EC.

Alana Jones Workplace Solutions

We welcome the introduction of early conciliation via the LRA. However, we would strongly support mandatory alternative dispute resolution at this stage to ensure that both parties are exhausting ADR and the expertise of the LRA.

CBI Northern Ireland

"We believe that all claims should, as a mandatory step, proceed to Early conciliation via the LRA...Early conciliation and mandatory ADR could provide quicker, cheaper determinations of low value and straightforward claims (e.g. in relation to holiday pay, unlawful deduction of pay) as an alternative to determining such cases as part of a traditional tribunal process

Construction Employers' Federation

A constructive proposal.

Employment Lawyers Group

The Institute welcomes the proposal for early conciliation through the offices of the Labour Relations Agency. We would suggest going further and requiring early recourse to Alternative Dispute Resolution (ADR) to be mandatory on both parties.

Institute of Directors

The purpose behind EC is to help the parties early, before complete entrenchment. Let the LRA decide how best to do it. 'Normal' conciliation could always be resurrected, if LRA policy decides. The parties will soon get used to any system and the LRA can be trusted to be flexible in the interests of the parties and reducing cost.

Legal Island

The party believes that early conciliation should assist in the early resolution of employment disputes provided that the Labour Relations Agency has sufficient resource to meet demand

Labour Party NI

The Agency considers that its model for re-routing claims to the Agency in the first instance will achieve the Minster's aim of encouraging the resolution of disputes without the need to go through a formal legal process. However the Agency is prepared to re-consider the model in the light of responses to the public consultation.

Labour Relations Agency

Speedy resolution can also be beneficial to employers who are less tempted to engage in an adversarial route which is potentially more damaging to employment relations...An approach, less likely to result in winners and losers and more likely to lead to resolution through mutual acknowledgement of the merits of the case.

Sinn Fein

Having an initial informal/formal conciliation service is essential in order to try and deliver a solution prior to the more formal routes of tribunal.

Individual respondent

We totally support measures, including the proposal for EC, which seek to ensure that employment disputes are resolved at the earliest possible stage without recourse to litigation. We believe that a properly structured system which encourages and facilitates such an approach can only have a positive impact on industrial relations and save on legal costs.

Thompson Solicitors

The proposals for EC are acceptable and make for common sense and hopefully quicker, cheaper, more efficient resolution of disputes without the need to engage OITFET.

University of Ulster

2.55 The majority of remaining respondents were also supportive of the concept but indicated that the detail of the process would be critical to its success. Some also expressed concerns about resource implications for the LRA and the potential for the process to become another layer of bureaucracy:

EC could be useful when there is still a relationship which could be repaired...In favour if this is less protracted than a claim at tribunal, however if this stage fails for whatever reason and it goes to tribunal will it effectively be a regurgitation of issues already covered. This could make a difficult situation worse as you would have expected each side to have shown their side of the argument during EC.

Castlereagh Borough Council

The Law Centre welcomes the concept of early conciliation. We are very much in favour of ADR efforts and believe that it is beneficial for parties to consider settling their dispute through conciliation before entering the tribunal process. Once legal proceedings are lodged, there can be an inexorable momentum towards the tribunal as adversarial positions are entrenched...We welcome the proposed EC process, which will hopefully encourage parties to consider conciliation at the earliest opportunity and crystallise any potential for settlement that may still exist.

However, our support for this proposal is subject to two caveats:
a) That the 'stop the clock' provision applies to any potential claims that might arise out of the employment relationship once EC has been triggered; and
b) That there is no requirement on the claimant to identify or set out their claim in the EC form.

Law Centre (NI)

Needs to be made clear that only referral to EC, not conciliation itself, is mandatory.

Equality Commission

Undoubtedly the 'devil will be in the detail' of any such scheme proposed. Even though it has been decided to introduce such a scheme in Great Britain in April 2015 the precise details of the ACAS scheme are still awaited. Given the experiences of the statutory grievance procedure it may be considered useful, before any final decisions are taken by the government in Northern Ireland, to not only carefully examine the final ACAS scheme and how it may

apply in Northern Ireland: but also to await a period to see how it develops and works in practice in Great Britain.

Council of Employment Judges

Citizens Advice broadly support the EC process proposed by the Department but is concerned that without appropriate LRA resources the process may become just another layer of procedure.

Citizens Advice

2.56 NICICTU gave EC a cautious welcome, suggesting that it be trialled for one year and that additional resourcing would be required for the LRA. There was some concern that the process could lead to settlement even where a tribunal would be more appropriate.

We would have concerns that confusion about the process and having to go through another level may put people off pursuing their complaint. Also, that it could add a further potential delay in the process of addressing an employer's unlawful behaviour.

NICICTU

2.57 Others, some of whom also had concerns about resourcing, expressed a range of views on time limits and the danger of the process being seen as a 'tick box' exercise.

If early conciliation is introduced all related statutory processes and time limits need to be considered so as to encourage and not deter individuals from engaging in the EC procedure

CIPD

generally supports the ethos behind a system of "compulsory" EC as a way to resolve cases at the earliest opportunity...However, there is the danger of the process being "used aa a tick box mechanism...Should revert to existing process review after two years finds it has been unsuccessful...LRA will require additional resources. Must not become: further appeal stage in a grievance.

EEF NI

NISMP is supportive of any attempt to seek conciliation between parties...However, in order for the process to be truly unbiased as intended, we believe that the EC process would need to be appropriately and adequately promoted among migrant workers as well as adequately resourced in order that the difficulties that many migrant workers experience in negotiating any formal process in an unfamiliar environment, such as language, cultural understanding and institutional knowledge can be minimised

NI Strategic Migration Partnership

The University would only support early conciliation if it is undertaken within the normal 3 month qualifying period and there is no detrimental impact on the length of time taken to deal with tribunal claims

Queen's University Belfast

The proposed timeframe to facilitate EC may prove problematic

Northern Ireland Civil Service Corporate HR

We believe that clear structures should be in place for employers and employees that will detail a formal procedure that encourages disputes to be resolved at workplace level and ensures that disputes cannot be escalated further to EC or otherwise unless the internal stage of the process has been attempted.

Peninsula Business Services

NAT does not believe that EC should be compulsory as for some claimants mediation may not be appropriate and would only lead to further distress and delay.

National Aids Trust

2.58 There were also a small number of respondents who did not support the proposals.

We are unsure if it is justified when all claims are routed through the LRA in any event and parties can always approach the LRA to try and resolve cases, prior to any litigation being commenced. Further, it may end up lengthening the process and complicating issues such as time limits.

Donnelly and Kinder Solicitors

We have serious concerns about the impact of mandatory early conciliation. We consider it is likely to create further complexities for claimants, may lead to genuine claims being struck out due to missed time limits, and potentially result in an increase in satellite litigation. We would rather see a greater promotion of the existing pre claim conciliation services...We are also concerned of the potential scope for satellite litigation. Also we believe that the effect on time limits may be confusing for some claimants...A simpler and much more effective approach would have been to simply extend and publicise the existing LRA pre claim conciliation procedures, these work well in our view although they are currently under used.

Prospect

Almac does not believe a process of EC will be successful and would not support it being introduced. We believe it will simply be a tick box process that applicants will be required to go through. Almac has used the LRA very effectively for non IT1s and believe this EC process may compromise the LRA to the detriment of the business user and the services it currently provides.

Almac

Departmental response

2.59 The Department, having considered the largely positive feedback in respect of early conciliation, will seek to introduce enabling legislation with a view to EC being made available by the LRA in 2016.

2.60 The Department welcomes the majority view that it will be appropriate to pause the normal tribunal time limit in order to provide parties with necessary

'breathing space' to explore resolution through EC. It is reasonable to set a maximum period for which the clock should stop, so that parties understand that they have a limited window to try to agree the way forward. That limited window is envisaged as one calendar month, with limited scope for extension by two weeks. Where it is clear that no progress is being made during that time, or that there is no interest in conciliation, the pause will be ended quickly to allow the parties to take the necessary steps in advance of tribunal.

2.61 The Department does understand the concerns expressed by some that the process must not be allowed to become a 'tick box' exercise, constituting just another 'hurdle' on the road to the tribunal. EC is intended to be light touch. Those who do not wish to engage will be supplied with an EC certificate enabling them to lodge their claim with a tribunal.

2.62 The value in the proposed system will be to establish the offer of LRA conciliation as the first port of call when a dispute cannot be resolved by way of internal workplace efforts alone. The requirement for a person to apply in most cases to the LRA in the first instance rather than to the tribunal will represent an important psychological shift, placing the services of the LRA front and centre and establishing the legal route as the secondary consideration. However it is important to be clear that a legal remedy will remain freely available for those who believe that it is appropriate to them. EC will not restrict access to the tribunals, but provide potential claimants and respondents with a very clear alternative once a dispute has left the workplace.

2.63 Turning to the content of the EC form, the Department does not consider it necessary or desirable for that form to deal, in detail, with the specifics of a complaint. Information provided in the form should be only that which is necessary to enable the LRA to make an effective and timely EC offer. EC is not intended to be a complex or bureaucratic process, but an easily accessible opportunity to gain LRA assistance in resolving a dispute that has the potential to lead to a tribunal process.

2.64 The Department acknowledges that LRA conciliation officers will not be able to enter into, or facilitate agreement on, settlement discussions with a prospective respondent without being able to explain to that prospective respondent what the prospective claimant considers the dispute to be about. However, there is nothing preventing the conciliation officer from being able to obtain, in conversations with the individual, the information that is needed. The existing pre-claim conciliation arrangements, which do not require claimants to provide written details of their dispute, demonstrate that the absence of written information is not a barrier to successful resolution.

2.65 It is understood that a consequence of this approach may be that a prospective claimant may include on a subsequent tribunal claim form a matter not raised during EC. However, it is anticipated that this will not be the norm. Moreover, to restrict an individual's tribunal claim to only those matters that have been raised with the LRA would be likely to lead to significant volumes of satellite litigation as to what has or has not been subject to EC. It is worth stating very clearly that the Department intends that the content of

EC, including an application for it, should not prejudice a later tribunal process. The Department will explore with the LRA and OITFET how best to achieve this objective in developing the detailed arrangements for EC.

2.66 The Department welcomes the general support for wide jurisdictional coverage for EC, including complaints relating to unlawful discrimination. While the Department freely acknowledges that some such cases are not readily resolved within the short time window for EC, and in some cases there may be matters of legal principle at stake which mean that EC is not taken up, it is reasonable to offer EC and leave it to the parties to decide whether or not to accept the offer. The Department will work with the LRA to monitor the effectiveness of EC and is open to reviewing the list of jurisdictions to which it applies if feedback suggests that this is warranted.

2.67 It is clear that there is no strong consensus of opinion around exemptions, other than that they should apply in some form. As regards multiple cases, the Department considers that the proposed approach is proportionate; however the need for clear guidance setting out when exemptions apply and how parties should proceed in relation e.g. to multiple cases is acknowledged.

2.68 To be clear, it remains the proposal that exemptions will apply where:

- *a prospective claimant is part of a multiple claim, but someone else who is part of that claim* has complied with the EC requirement;
- *the prospective respondent has contacted the Agency and asked it to conciliate the dispute*;
- *the dispute relates to an issue concerning which the LRA has no power to conciliate.*

2.69 The Department notes the support for written acknowledgment to be issued by the Agency to confirm receipt of an EC form, and accepts that there is a need for certainty with regard to implications for tribunal time limits. The Department will engage with the LRA to develop arrangements for acknowledging receipt that give certainty in relation to dates whilst avoiding unnecessary bureaucracy.

2.70 It is clear that there are differing views on what might constitute “reasonable” attempts to make contact in respect of EC. Flexibility will be important in ensuring that EC is not a bureaucratic ‘tick box’ exercise employing a ‘one size fits all’ methodology and delaying potential tribunal claims unnecessarily. An adaptable approach is appropriate. To that end, LRA guidance will indicate generally how the Agency will approach contacting the parties, and LRA conciliation staff will receive training to guide consistent but sufficiently flexible assessments of what is reasonable in the circumstances of each case.

2.71 The consultation sought views on whether it would be reasonable to issue an EC certificate in all cases and, having considered the arguments, the Department is satisfied that doing so will be appropriate in that it will provide certainty that EC requirements have been met.

2.72 Turning to the content of the EC certificate, the Department is clear that its purpose is to serve as evidence that EC has been offered, enabling OITFET to be assured that EC requirements have been met in relation to a claim. The Department shares the concerns expressed by some stakeholders that what has occurred during conciliation should not prejudice subsequent tribunal proceedings. Accordingly, it will work with the LRA and OITFET to ensure that the certificate is designed to require only the information that is essential for effective administration when OITFET receives a claim.

2.73 The Department accepts that there are differing views on the application of EC when it is initiated by a prospective respondent rather than a prospective claimant. As the 'stop the clock' facility can only be made available on one occasion and is most obviously of benefit to the claimant, who faces a time limit in applying to a tribunal, the Department does not intend to apply 'stop the clock' to respondent requests for EC. The LRA will be able to make prospective claimants aware that, in order to benefit from a pause in time limits they must themselves make an EC request, which will trigger the pause. This will be made clear in guidance and in written communication to claimants.

2.74 The Department considers it reasonable that first contact from a respondent may initially be via telephone or e-mail in much the same way as under the present pre-claim conciliation system. However, it will be important that the LRA has discretion to capture information in writing. It is noted that Acas currently advise employers who would like to start Early Conciliation to contact them by telephone. The Department, however, considers it reasonable that first contact from a respondent may initially be via telephone or e-mail in much the same way as under the present pre-claim conciliation system. It will also be important that the LRA has discretion to capture information in writing.

2.75 The Department, having considered the largely positive feedback in respect of early conciliation, will seek to introduce enabling legislation with a view to EC being made available by the LRA in 2016.

2.76 The Department welcomes the majority view that it will be appropriate to pause the normal tribunal time limit in order to provide parties with necessary 'breathing space' to explore resolution through EC. It is reasonable to set a maximum period for which the clock should stop, so that parties understand that they have a limited window to try to agree the way forward. That limited window is envisaged as one calendar month, with limited scope for extension by two weeks. Where it is clear that no progress is being made during that time, or that there is no interest in conciliation, the pause will be ended quickly to allow the parties to take the necessary steps in advance of tribunal.

2.77 The Department does understand the concerns expressed by some that the process must not be allowed to become a 'tick box' exercise, constituting just another 'hurdle' on the road to the tribunal. EC is intended to be light touch. Those who do not wish to engage will be supplied wtih an EC certificate enabling them to lodge their claim with a tribunal.

2.78 The value in the proposed system will be to establish the offer of LRA conciliation as the first port of call when a dispute cannot be resolved by way of internal workplace efforts alone. The requirement for a person to apply in most cases to the LRA in the first instance rather than to the tribunal will represent an important psychological shift, placing the services of the LRA front and centre and establishing the legal route as the secondary consideration. However it is important to be clear that a legal remedy will remain freely available for those who believe that it is appropriate to them. EC will not restrict access to the tribunals, but provide potential claimants and respondents with a very clear alternative once a dispute has left the workplace.

NEUTRAL ASSESSMENT

2.79 In addition to EC, the consultation also sought views on a new concept, 'neutral assessment' (NA). The consultation outlined that this would be an entirely voluntary process, allowing parties to explore, with an independent assessor appointed by the Agency, possibilities for settling a case. It was outlined that the essential difference between this service and those already provided by the Agency would be its ability to provide participants with an indication from an employment relations expert of the potential outcome of the case were it to be referred to the Agency's statutory arbitration service or a tribunal.

2.80 The LRA also suggested the possibility of making access to the service dependent on good faith efforts at conciliation already having been made. This would have the advantage of ensuring that only parties who had demonstrated a clear commitment to resolution would enjoy access to this secondary layer of assistance.

Q11. Should neutral assessment only be available where the LRA believes that the requesting parties have already made good faith efforts to resolve their dispute?

2.81 Overall fewer responses were received on the subject of neutral assessment than on EC; the issue attracted approximately half the number of comments and responses. There was still a sufficient number of responses to indicate that, as a concept, it was something which attracted the interest of stakeholders.

2.82 Of those who were in favour of NA, the responses included:

Yes, the Department states that neutral assessment should not be considered a first line service, and therefore the parties involved must demonstrate that they have already made serious attempts to resolve the matter before proceeding to neutral assessment.

Citizens Advice

This service should be widely available to ensure that parties are fully aware of their actions

Construction Employers Federation

We welcome the idea of neutral assessment in some cases. We agree that it should only be available where the requesting parties have used good faith to seek to resolve the dispute.

Prospect

it should be available regardless as this would be a very difficult decision for the LRA to make and may impact on perception of independence.

Antrim Borough Council

2.83 One respondent considered that NA should be available in wider circumstances.

One party may decline to engage in conciliation in the misplaced belief that they have a very strong case and in such circumstances neutral evaluation may provide the "reality check" which will then persuade that party to seek resolution.

Alana Jones Workplace Solutions

2.84 There were a number of respondents opposed to neutral assessment in its entirety. The Engineering Employers Federation was wholly against the proposal, which it believed would be likely to detract from the LRA's independence and impartiality. It considered that take-up was likely to be low. It continued that the process:

will involve a significant amount of preparatory work and a cost to the parties...the tribunal are best placed to do this as they have a full understanding of the legal case being presented. The tribunal's assessment offered, whilst not binding, has the advantages of being handed down by what is considered the "judge" and will not involve additional work by the parties but will be based on the facts as presented in the claim and response forms. This form of early neutral assessment should be allowed to be trialled and until then the LRA should abandon their proposal to offer any such system.

EEF NI

Given that neutral assessment is not being introduced in England and Wales, the University would not support the proposed process.

Queen's University, Belfast

2.85 There were a number of respondents who expressed some support for NA as a concept but detected shortcomings in the proposed implementation.

We are not sure that neutral assessment through the LRA would be appropriate and further would be readily used. This is something best left to a tribunal chair.

Donnelly and Kinder Solicitors

This may limit the effectiveness of this option as parties may be more inclined to conciliate on a more purposeful basis following the outcome of neutral assessment and on receipt of an indication of the strengths and weaknesses of their respective cases.

Education and Library Board Solicitors

The Law Centre strongly believes that neutral assessment should be mandatory and....that neutral assessment should be conducted by a tribunal chairperson. While parties who are voluntarily engaging in conciliation should be provided with all possible assistance and encouragement, such parties should not be the focus of neutral assessment. If this stage is going to effectively reduce the number of claims going before the tribunal for hearing, the target group must be parties who are not voluntarily engaging in conciliation and not receptive to other forms of ADR...Following neutral assessment, we believe that many parties will resolve their differences either through a private settlement or through a LRA service. We anticipate a considerable reduction in cases going to a tribunal hearing post neutral assessment

Law Centre (NI)

The Party believes that neutral assessment should not replace conciliation as a first point in the process – the Party would be concerned that if neutral assessment were easily available parties could and would use the process to delay resolution of disputes rather than enter early conciliation in a meaningful way

Labour Party NI

In principle NICS agree with the concept of neutral assessment but in practice it may be difficult to deliver consistency. How do you measure 'good faith efforts at conciliation'?

Northern Ireland Civil Service Corporate HR

It is submitted that good faith efforts are not a necessity here...If an individual did not engage in EC in good faith then that does not mean that it may not benefit from neutral assessment. If an employee, for example, did not engage in EC as they wish to secure financial compensation or "have their day in court" then a neutral assessment highlighting that they are unlikely to win or win much may encourage them to settle the matter before they engage in costly legal fees and before they waste employer and tribunal time.

Peninsula Business Services

This second tier should be available to parties after EC and in the event it is unsuccessful. Determining good faith would in itself be open to challenge. If the second tier is automatically advised it could have the benefit of bringing common sense/reality to the parties, from an independent expert, if the matter was to proceed to tribunal. Such a system was proposed a number of years ago but never, unfortunately, took off.

University Of Ulster

Q12. Should neutral assessment in writing be available as an option?

Q13. What are your views on the proposed focus and content of the neutral assessment process?

2.86 It was proposed that NA would be delivered by specifically trained members of the Agency's panel of arbitrators and that the terms of reference for any particular assessment process would be subject to agreement between the parties. One option, available only through agreement, would be an assessment made on the basis of written submissions without a hearing. It was also highlighted that the service would have an investigative and participatory focus rather than the adversarial approach that is normally associated with employment tribunals.

2.87 The majority of those who provided a response on this issue, who were supportive of NA generally, supported, to varying degrees, the possibility of determination on the basis of written submissions.

Yes, although written assessment may not be appropriate in every case, as some situations would require the parties to attend a hearing in person to answer questions which may arise from written submissions. If a party to the proceedings is identified as requiring assistance, or has requested assistance, this should be provided to them in drafting and submitting a written statement. As with EC, it may prove difficult to properly identify legal issues in a complaint, so written statements for the purpose of neutral assessment should not be used as evidence before a tribunal.

Citizen Advice

We believe that there should be flexibility built in to how neutral assessment is offered so that the process is conducted in a manner which is proportionate to the complexity of the particular case. Our preference is for neutral assessment to be conducted as a hearing. However, if both parties agree, it might be sensible for this to be a paper exercise in some cases.
Law Centre (NI)It is submitted that neutral assessment in writing should be an option. If the employee were required to submit sufficient detail prior to the EC stage then an arbitrator could identify from this information whether or not the matter could be handled via written submissions. For example, disputes of right regarding pay, annual leave etc. could be handled in this fashion.

Peninsula Business Services

We believe it would be helpful to have the neutral assessment in writing, as this would assist the parties in understanding the assessment and possibly in seeking further advice in the matter of their claim, should the matter not be settled.

Prospect

Congress would be concerned about this approach but would consent provided that it is only through agreement and that this provision should be the exception rather than the norm. Simultaneous exchange of such documentation between the parties is essential.

NICICTU

2.88 Reasons provided by respondents who did not support the proposals were as follows.

Has the potential to be a distraction from parties committing their resources to conciliation...conciliation is the best means by which employment disputes could be settled. There is a real risk that early neutral assessment could be used to deflect a party from the conciliation process. If there is a hearing the parties will have to prepare for this – there is therefore a question as to whether parties will be saving any preparation costs in engaging in early neutral assessment rather than making full effort at resolution through conciliation.

Labour Party NI

We do not believe this service should be offered by the LRA.

EEF NI

2.89 In relation to the focus and content of neutral assessment, those who responded were, in the main, in favour of the proposals outlined in the consultation document.

I am in agreement with the proposed focus and content but think that the provision of further detail would assist assessment.

Alana Jones Workplace Solutions

Supportive of the proposed investigative approach...[however] the proposed content of neutral assessment would mean that the majority of participants would require some form of legal representation, especially if submissions to the assessor are to include case law and legal argument. A legal representative would presumably already have advised their client on the strengths and weaknesses of their claim and the likely outcomes, making neutral assessment less useful. As legal aid is currently not available for employment tribunal representation, this may have a cost implication for perspective claimants and respondents.

Citizens Advice

CEF strongly supports the service of neutral assessment to demystify common misconceptions that exist amongst parties regarding the level of awards that are available via the tribunal. This is an important step in the process to educate parties on the validity of their case, merits and likely outcome if parties proceed to tribunal or arbitration. This service should be widely available to ensure that parties are fully aware of their actions

Construction Employers Federation

We consider this would be a positive development but query the extent to which parties would take cognisance of outcomes if they are not what they 'wanted to hear'.

Education and Library Board Solicitors

We strongly agree that neutral assessment should have an investigative and participatory focus rather than an adversarial approach. However, we do not agree that the parties should be required to provide written submissions,

expert reports or engage in other preparations...To require such further documentation and preparation is introducing a further layer of complexity and legality to the process when, in fact, we would see neutral assessment as part of a move towards simplification of the tribunal process.

Law Centre (NI)

We agree with the proposed structure and focus of the neutral assessment process. We see this as similar to a mediation procedure, although with more emphasis on the assessment of merits. The process would need to remain flexible to be amended in the light of the nature of the dispute and to take account of whether the claimant is represented. We believe this would be extremely helpful to the parties and would also benefit the tribunal service.

Prospect

2.90 Some respondents supported the concept but again had concerns about the practical implications:

The neutral assessment proposal is a good idea but it would need to be managed very carefully such that both parties were not required to engage in large volumes of meetings...If the employee was required to submit full details of their claim from the outset...then this would assist the LRA with their neutral assessment and it would reduce the need for excessive input from both parties up to this point...if the employee was restricted to the confines of their initial claim...then the neutral assessment process would be far more effective in settling all matters.

Peninsula Business Services

It is of limited value if the decision is not mandatory.

Queen's University Belfast

We would expect that the assessors would be appropriately skilled to consider [points about case law]. Simultaneous exchange of such documentation between the parties is essential.

NICICTU

2.91 There was one response which was unequivocal in its opposition to the proposal.

...we do not support any form of neutral assessment in any form by the LRA.

EEF NI

Q14. The Department would welcome views on whether and to what extent neutral assessment should be in confidence.

2.92 The consultation suggested that any assessment reached by way of the Neutral Assessment process would not be binding, would have no legal weight, and would not constitute a recommendation. It was emphasised that this would be made clear to the parties and what the parties did as a consequence of the assessment would be entirely a matter for them. The question that remained was whether the assessment should be treated as confidential.

2.93 Again the majority of those who responded to this question were in favour of the proposal that NA be in confidence.

Neutral assessment should be confidential with the exception that the assessment may inform subsequent conciliation facilitated by the Agency. I do not think it likely that the parties would agree to arbitration by the same individual who has conducted the neutral assessment as his/her views on the likely outcome will be known to the parties, nor do I think that it would be appropriate for the same individual to conduct both processes.

Alana Jones Workplace Solutions

One possible incentive [to participate] might be the disclosure of the assessor's opinion to a future tribunal, with disclosure being made after the tribunal had reached its decision, when considering the amount of any award.

Citizens Advice

We would agree with the LRA's recommendations outlined at 3.66 of the review document. Confidentiality could, if necessary, be disregarded in subsequent conciliation with the agreement of the parties.

Education and Library Board Solicitors

We believe that this should be a private process between parties. The session should therefore be confidential. If the case proceeds to a hearing, the assessment should not be admissible.

Law Centre (NI)

If the claimant has not instructed legal advice at this stage, the outcome may be very different to the outcome of a tribunal and therefore it is not appropriate for the tribunal or any arbitration officer to be informed of the outcome as it may unfairly influence the final outcome of the case.

National Aids Trust

The process needs to be open and transparent and fair to all parties. On this basis neutral assessments should not be held in confidence from either party within the dispute.

Northern Ireland Civil Service Corporate HR

It is submitted that the assessment ought not to be in confidence. However, it must be clearly stated that it is not binding. It is suggested that if a party did not engage in good faith in the EC process and then refused to settle that this should be made known at the tribunal stage. This will give the early resolution stages some actual teeth and prevent parties from treating them as a 'tick the box' exercise. The neutral assessment, while not a legal view, could adopt the same sort of process as a preliminary reference application before the Courts of Justice of European Union. The preliminary reference is not binding but it can be influential at a later full hearing of the case. Para 3.65 seems to suggest that a neutral assessment being somewhat influential to the outcome of the later tribunal hearing is something which should be avoided; I do not see why this should be the case. We should be placing substantial faith and respect into the persons engaging in early resolution efforts and their views

ought not to be ignored at a later point, especially where parties to a claim have not acted in good faith.

Peninsula Business Services

We believe strongly that the neutral assessment should be in confidence. This would ensure that the parties enter the process openly and in good faith. "We recognise the point made in the consultation document about the benefit of knowledge of the neutral assessment in future attempts at conciliation, however we do not think this is a strong enough argument to outweigh the compelling requirement for confidentiality to enhance the initial assessment process.

Prospect

If neutral assessment is introduced, the outcome should be made available to the Office of Industrial Tribunals and the Fair Employment Tribunal.

Queen's University Belfast

Congress firmly believes that the neutral assessment process and outcome remains totally confidential meaning that no reference to the process could be taken into consideration; for example, in any subsequent ADR or legal process

NICICTU

The Department has asked and in many ways answered the question in the consultation document. There is merit in the assessment being confidential and there is equal merit in it being non-confidential. Perhaps this is, ironically, a legal question?

University of Ulster

Given our comments above we do not support any form of neutral assessment in any form by the LRA. The current process trialled by the tribunal in our view is superior and likely to be much more effective than the proposed service by the LRA

EEF NI

Q15. The Department is inviting views on the proposed neutral assessment model which, like the LRA's arbitration arrangements, would be unique to Northern Ireland. What advantages and disadvantages does the proposal have, and how could it be improved?

2.94 It was highlighted that although NA is not itself intended to negotiate settlements, its core rationale is to facilitate them. Following an assessment, therefore, the LRA envisaged that parties would have options to revert to conciliation or agree to refer the matter to statutory arbitration. This, coupled with the unique nature of the neutral assessment proposal, prompted the request for views on the advantages and disadvantages of the concept.

2.95 The open nature of this question resulted in a wide range views being expressed In addition to those already proffered.

This could be very helpful for unrepresented parties in particular to ensure they fully appreciate the possible outcome of the case.

Antrim Borough Council

The process is another potentially useful tool in the tool-box for addressing disputes.

Alana Jones Workplace Solutions

Neutral assessment would allow parties with little understanding of employment law to get early expert assessment and allow them to decide the best way of dealing with their case.

Citizens Advice

This is similar to services already offered by LRA, the only difference is this would provide an indication only and not a decision and it would be a voluntary process...Therefore, it is questionable as to what value this additional service can add other than offering the parties involved another chance to have another opinion expressed on possible outcomes.

Castlereagh Borough Council

The service of neutral assessment has strongly been advocated by CBI to demystify common misconceptions that exist amongst parties regarding the level of awards that are available via the tribunal. This is an important step in the process to educate parties on the validity of their case, merits and likely outcome if parties proceed to tribunal or arbitration.

CBI Northern Ireland

Neutral assessment would be a beneficial part of any process in seeking the parties in dispute to consider all facts and the possible consequences of not reaching agreement

CIPD

we think neutral assessment should be conducted by the tribunal rather than the LRA...It safeguards the LRA's impartial reputation and recognises that it serves a unique function which is valued by all parties.

Law Centre (NI)

Neutral assessment should not be offered by the LRA...It should be part of a tribunal chairperson's duties to give indications like this, as they do in other circumstances by ordering deposits

Legal Island

The Party believes that the disadvantage of neutral assessment would be to divert efforts from conciliation. It is difficult for the Party to see any advantage in the model provided by the Labour Relations Agency given that there would be no definitive legal assessment. The Party believes that available funding should be directed to conciliation.

Labour Party NI

By extending the range of available options, neutral assessment would make ADR more attractive and thus make it easier to realise the Minister's objective of shifting the resolution of employment rights dispute in the direction of ADR

Labour Relations Agency

It is submitted that the option of neutral assessment is most certainly one that is worth exploring as there are very clear advantages to the model:

Peninsula Business Services

We welcome the introduction of the neutral assessment proposal and consider this would be very beneficial for both employees and employers.

Prospect

The University would not support the proposed process as it would be unique to Northern Ireland. In addition it would appear that there are zero benefits to introducing neutral assessment.

Queen's University, Belfast

With a highly trained dedicated independent assessor and all parties participating in the spirit of the process this could reduce stressful and damaging and costly tribunals...This process could be a model of best practice and rather than Northern Ireland being out of step with other jurisdictions, they may choose to adopt our way forward.

Individual respondent

Cautious welcome; trial for one year, recording pertinent information.

NICICTU

On the basis that the process is voluntary and has no effect on tribunal time limits, we see no disadvantages to the scheme...We understand that the tribunal is currently undertaking an informal version of early judicial assessment which creates the prospect of an element of duplication. In any event, we believe that the proposed LRA system still has merit as it can take place at an earlier stage without the need for any formal claim to the tribunal.

Thompsons Solicitors

This is a thorny issue. Again there are meritorious arguments for and against. If true independence is the goal then assessors and arbitrators should not be one and the same person ie there should be separate pools of each

University of Ulster

Departmental response

2.96 The Department accepts that there are mixed views on neutral assessment and is therefore taking a measured approach. It aims to legislate to give the LRA power to authorise NA where the parties to conciliation agree that they would like the process to be taken forward. This does not mean that the LRA will proceed to implement NA as soon as enabling legislation is passed. Initial work to implement early conciliation will take first priority. In addition, there is also a need for the Department to work with the Agency to review the statutory arbitration arrangements that were substantially updated in 2012. It

is important to get any new service right, and the Department is minded to proceed with due caution.

2.97 The Department accepts that it may be problematic to set as an entry requirement for NA a condition that conciliation has been undertaken in 'good faith', as this can be difficult to measure objectively. The Department therefore does not envisage imposing requirements or conditions as to when the LRA may offer NA, other than to specify that a request for it must be by common consent of the parties involved in conciliation. A decision as to whether a request for NA should be granted will therefore be a matter on which the LRA's experienced staff will need to exercise their judgment in a fair and transparent way.

2.98 The Department acknowledges the view in some quarters that NA would be better delivered through the tribunal system. It welcomes pilot work already being undertaken by the tribunal judiciary to offer 'early case management' which should assist parties to gain a clearer understanding of the issues in their case and what the tribunal expects. While this is not the same as NA, it is a development that has been welcomed. The Department hopes to formally provide for early case management within revised tribunal rules of procedure, on which public consultation will begin shortly.

2.99 The arguments for protecting the confidentiality of NA remain powerful. As the consultation document noted, confidentiality is appropriate if the matter subsequently proceeds to be considered by an arbitrator (if that arbitrator was not involved in providing the NA). It also makes sense in relation to tribunal proceedings, since NA does not provide a legal view. The Department is minded to provide that anything communicated as part of a neutral assessment should not inform subsequent conciliation, arbitration or tribunal proceedings except with the consent of the person who communicated the information.

2.100 Taking into account the differing views on the form and focus of NA, and given that this is a novel proposal and that other important LRA work is ongoing, the Department has concluded that it would be premature to mandate a specific approach or process at this time. Rather, the LRA will be given the necessary scope to develop a process that is capable of meeting users' needs in a way that builds on and learns from experience.

EMBEDDING GOOD EMPLOYMENT PRACTICE

2.101 The consultation document made reference to embedding good employment relations practice and, in particular, drew upon research carried out on behalf of the Department amongst small and medium enterprises (SMEs). The research suggested the need to embed good practice by raising awareness of the benefits of having in place good employment rights/relations systems, with a particular focus on developing performance management skills.

2.102 It proposed that SMEs could be assisted to embed good practice if the Department was to trial a pre-paid voucher scheme whereby the employer

would receive a certain amount of bespoke support to develop better systems (that might, for example, be used to assist in the upskilling of managers). The Department therefore sought views on what form such a subsidy should take.

Q16. If introduced, what form should a subsidy scheme take and how should it be targeted?

2.103 Two respondents expressed support for such a scheme.

A pre-paid voucher scheme would accord with other voucher schemes in vogue in Northern Ireland for SMEs. However a limited range of providers should be available for the sake of consistency – otherwise embedding will simply not happen in the way that the consultation envisages is necessary...The University is supportive of a subsidy scheme for small employers only".

University of Ulster

We welcome the suggestion of promoting good practice among SMEs and the pre-paid voucher scheme appears to be a good suggestion to do this. Prospect contends that in any promotion of good practice it is important to encourage employers to engage with trade unions and to recognise the positive effect of trade unionism within workplaces. We would suggest that detailed consultation is undertaken with the trade unions to develop this further.

Prospect

2.104 Alternative suggestions offered included the following.

One of the most strongly supported proposals amongst our members is the provision of one-to-one support for recruiting and employing someone for the first year – 35% of NI members nominated this potential option in surveys.

FSB

Introduce a subsidy scheme to embed strong employment relations, through the increased use of the LRA

Construction Employers Federation

The Department [should] consider developing employment law workshops working in partnership with LRA, Invest NI, FSB and other departments such as [D]ETI and OFMdFM. Also consider trade union and private sector input to such an exercise.

Individual respondent

2.105 Those who were not in favour of such an initiative were opposed on the following grounds.

We would be concerned if a subsidy scheme diverted resources from the LRA.

Jones Cassidy Jones Solicitors

Congress is amazed and strongly opposed to this subsidy scheme. If such resources are available they should be provided to the LRA to conduct this

work. This work falls most appropriately into the remit of the LRA, a body widely respected for its professionalism and independence. Congress would welcome discussions with the Department, LRA, and employer's organisations to explore how best to meet this undoubted need. It should be noted that Congress has serious concerns around the research document on which this proposal was made.

NICICTU

Q17. The Department would welcome practical suggestions on how information can be more effectively communicated to small employers so that they better understand the options open to them in dealing with employment rights/relations issues.

2.106 Research carried out on behalf of the Department has suggested that both information provision and efforts to embed good practice would be significantly strengthened by the promotion of closer working ties between the Labour Relations Agency and Invest Northern Ireland, with the emphasis on promoting good practice and communicating the message that legal action should not usually be the first port of call when a dispute arises. The Department took the opportunity, through the consultation, to seek opinions on how this could be achieved.

2.107 A key message emerging from responses, and perhaps an unsurprising one, is that SMEs do not have time or dedicated HR resources, so that support needs to be focused and straightforward. Proposals included those listed below.

Using key 'at a glance' documents on one A4 for the key issues such as, discipline, grievance, discrimination and other rights. Often SME are time strapped and have no dedicated HR person. Whilst there is a wealth of literature available to them it is difficult to digest in a short time frame. Even from a lawyer's perspective the guidance can be hard to digest and distil the key matters.

EEF NI

Information websites and helplines are not what members want. Indeed many of these already exist. Further work could be undertaken to promote them and increase usage – but it is by no means certain that this would help small business owners to make decisions to employ.

Federation of Small Businesses

Notwithstanding our support for any measure that promotes good practice, we think the real 'elephant in the room' for SMEs is the lack of affordable advice.

Law Centre (NI)

The challenge for the LRA is to become the first port of call for our predominately micro and SME economy who in most cases will not have union representation or a HR function...Training and up skilling our existing SME economy will be imperative to ensure they are connected with the development of employment law and proactively promoting alternative dispute resolution. CEF would strongly support a partnership approach between the

LRA and representative organisations, like CEF, to provide SMEs with expert advice and support to embed good employment relations.

Construction Employers Federation

The Labour Relations Agency is best placed to deliver the knowledge and advice for small firms on employment matters therefore any available resources should be directed to the Agency to enable them to develop capacity in front line supervisors and managers in small firms.

Labour Party NI

Any further incentive for employers to adopt and apply good employment practice should be concentrated on encouraging employers to utilise the services of the Agency. The Agency is anxious to extend and promote the service it provides to the SME and micro-firms sector of the NI economy...The Agency is strongly of the view that any resource available for a subsidy scheme should be re-directed to the Agency to raise awareness of the Agency among employers, particularly SMEs and micro firms and allow for an expansion of resource to encourage employers to introduce and implement good employment practice.

Labour Relations Agency

Codes of Practice are suitable for larger employers...There should be more effective communication between InvestNI and the Labour Relations Agency...Small businesses should be asked how they wish to receive information. The University would suggest running seminars which will allow for networking opportunities as well.

Queen's University, Belfast

Consider a development of a dedicated SME guide targeted at this area to cover the basics principles of the law.

Individual respondent

The criticism levelled at NI Business Info and INI accords with my own experience when directing SMEs to the respective websites for advice/guidance. There is a much more deep seated issue here for start-ups, fledgling entrepreneurs, SMEs in Northern Ireland. This type of advice should form part of the 'induction' for these individuals/SMEs right from the outset of their respective business plans, ie an HR management adviser/module/pack should form an integral part of their business orientation. Neither INI nor NI Business Info, in my view, is equipped to deliver this currently. Hence the significant uptake of LRA services by SMEs, quite often when it is too late. Perhaps it should be a compulsory element of a training programme for start-ups/SMEs who are seeking financial help for their business from INI.

University of Ulster

A centralised webpage directory containing all relevant information on rights, entitlements, procedures etc. including useful guidance booklets on same would really improve access to important information...The system would be far more user friendly if there was one centralised webpage combining all of these related websites. Information provided should also take account of the unique position of the SME or owner-managed business which does not have

the same degree of time to engage in all-encompassing HR practices, or the required numbers of management to ensure fair escalation of issues in procedures involving grievances, disciplinary hearings and appeals.

Peninsula Business Services

Q18. If subsidised mediation is trialled, how might be best be targeted to maximise coverage and effectiveness?

2.108 The consultation raised the possibility of a mediation pilot, the purpose of which would be to establish demand; develop an agreed pool of expertise to deliver the service; gauge the type of support to be delivered; and assess the costs and impacts associated with delivering such a service more widely. The objective would not be to subsidise mediation in the long term, but rather to test the market's receptivity to the development of mediation networks and services.

2.109 A small number of respondents expressed definite support for subsidised mediation for SMEs.

2.110 The Federation of Small Businesses suggested that any subsidised mediation should be targeted at smallest businesses.

2.111 Some respondents considered that the LRA had a key role to play in the provision of mediation to SMEs and development needs of SMEs.

subsidy upwards of £5,000 p.a. support for HR advice and expertise would be appropriate. However, we would strongly support this additional funding should be directed to the LRA so that the agency can become a critical partner for SMEs in embedding world class employment framework.

CBI

2.112 It was also suggested that "effective communication of the availability and benefits of the service to owners/directors/managers of SMEs would be key to increasing coverage and success, given the high proportion of SMEs lacking the support of an HR Manager" (Alana Jones Workplace Solutions).

2.113 The Labour Relations Agency, however, did not favour such a scheme being available in relation to workplace matters which are within the jurisdiction of an industrial tribunal as the Agency, under statute, already provides such a service. Instead:

The Agency would favour, if a subsidised mediation scheme is trialled that this is restricted to those workplace issues which are outside the jurisdiction of an industrial tribunal. The Agency would be of the view that any resource available for a subsidy scheme should be re-directed to the Agency to encourage employers to introduce and implement in-house ADR best practice.

Labour Relations Agency

Q19. Should the LRA proactively offer its services to respondents who have lost a tribunal case? If so, give the likely sensitivities, what approach should the Agency adopt?

2.114 Views were sought on whether, by proactively offering advisory services to employers who have lost a tribunal case, the LRA could deliver longer term employment relations benefits.

2.115 Of those who responded, a majority expressed some support for the concept.

> *There is merit in offering services proactively regardless of the outcome as there is always learning from any tribunal case.*
>
> **Antrim Borough Council**

> *We recognise that some employers will not be interested in learning lessons from an adverse finding in a tribunal, but many may genuinely find the experience as an eye-opener. We therefore agree with the proposal for LRA to offer its services to respondents who have lost cases. This could initially be through an approach shortly after the tribunal, reminding the employer of the advice and consultancy services available. We believe this is particularly relevant in discrimination cases, where the complex impact of the law will need to be fully understood and there are very often lessons to be taken on board for the wider workforce.*
>
> **Prospect**

2.116 It was highlighted by other respondents that such an approach would require sensitive handling.

> *Correspondence outlining the services available is recommended, perhaps followed by a phone call after a "cooling off" period.*
>
> **Alana Jones Workplace Solutions**

> *It may be helpful for the LRA to proactively offer its services to respondents who have lost a tribunal case....Respondents would have the option of turning down the services of the LRA following a tribunal, if it is offered on terms that indicate that there is no obligation to engage.*
>
> **Citizens Advice**

2.117 Others, while supportive in principle, provided qualified support for this proposal.

> *The LRA should offer its services but with over 50% of respondents having adverse decisions at tribunal there is a question of resource for the LRA in helping with good practice. Also the LRA would need to be careful that such a role would not be perceived wrongly as being an extension of the tribunal and therefore an 'enforcing agency'.*
>
> **University of Ulster**

> *we are sceptical that this will very often be welcome. In practice running the case tends to entrench positions and even with a detailed written decision*

losing respondents tend to feel hard done by...Do not divert resources unless extending the service is likely to have particular benefits in a given case.

Jones Cassidy Jones Solicitors

...any such service such be offered by an employer led organisation which will also ensure that the independence and impartiality of the LRA.

EEF NI

2.118 The observations concerning the use of LRA and its resources appeared to be a driver for those respondents who did not support the proposal. For the Employment Lawyers Group, the Agency should "concentrate on other things". Others took a similar view.

The University's experience of the tribunal system is that a tribunal decision will make specific reference to areas of concern. Furthermore, the services of the LRA are available to all employers at any time.

Queen's University, Belfast

It is suggested that this would be a waste of resources given that virtually every employer is aware of the LRA and its purpose and are free to approach the LRA for advice. By and large, the employer will receive sufficient information in a tribunal outcome as to where they went wrong and the only real benefit this proactive service could provide is to identify procedural flaws; if for example an employer dismissed an employee for an offence that was not gross misconduct then they did so as they felt that strongly about the matter. To proactively chase them up afterwards will do little to change their mind on the root issue.

Peninsula Business Services

Departmental response

2.119 The Department is struck by the fact that only a comparatively small number of respondents opted to answer the questions dealing with support for SMEs. This, in part, may be reflective of the profile of respondents, many of whom are not directly engaged in the sector.

2.120 It is clear that there is a measure of support for a SME subsidy; however, it is also evident from consultation responses in the round that stakeholders do not wish to see resources diverted from the LRA which, in the view of NICICTU for example, is the body which ought to lead on providing advice and support services.

2.121 It is also evident that the proposal for a mediation pilot has received a lukewarm reception, and that there are reservations about proactively offering advice to respondents who have lost a tribunal case, especially given that a tribunal decision should be clear about where the respondent went wrong.

2.122 Given the concerns of stakeholders about resourcing of the LRA, and the present budgetary constraints, the Department has concluded that there is insufficient justification to invest in a bespoke pilot work in any of these areas.

2.123 The LRA is perceived as a valued source of good practice information and the Department will work with the Agency to consider how engagement with SMEs can be improved to ensure that they are made aware of opportunities that the LRA already provides to upskill managers in employment rights/relations; to provide mediation in the workplace setting; and to advise employers on how they can improve their systems to minimise potential future tribunal cases.

2.124 The Department understands the call for clear, concise 'at a glance' guidance and will explore the possibility of producing, with input from the small business community, a Northern Ireland version of the 2012 Department for Business, Innovation and Skills (BIS) document 'Employer's Charter'[7]. It will also seek input on how networks can be developed so that SMEs better understand where information can be obtained when they need it.

7 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32147/employerscharter.pdf

3 Unfair Dismissal Qualifying Period

3.1 **In Great Britain, the unfair dismissal qualifying period (the period employees must work before they become entitled to exercise the right to lodge a tribunal claim for unfair dismissal) changed from one year to two years in April 2012. The stated policy intention was to improve business confidence to hire employees, consequently promoting employment and economic growth. It was also considered that this would decrease the number of unfair dismissal claims to employment tribunals.**

3.2 The qualifying period in Northern Ireland currently stands at one year. This means that an employee must have served one year with their employer before he/she can make a claim for unfair dismissal. Employees do not have to meet the qualifying period requirement if the reason for dismissal relates to discrimination or assertion of a statutory right.

3.3 The employment law review consultation sought views from stakeholders on whether the qualifying period should be retained at one year in Northern Ireland, or whether it should change. The Department also included a labour market analysis which assessed the historical impact of unfair dismissal qualifying periods on economic growth, employment levels and tribunal claims, and asked consultees for any further evidence to support their views. Finally, the Department asked consultees for their views on a range of possible qualifying periods.

3.4 There were 35 responses on the unfair dismissal qualifying period. Of these, 20 favoured retaining the one year qualifying period and 14 supported an increase to two years. One consultee wished for the Department to take note of its views, but to keep the content of its response confidential.

Q20. Northern Ireland has, for the most part, maintained the same unfair dismissal qualifying period as Great Britain. Do you consider that retaining parity in this area is desirable, considering that employment law is devolved to the Northern Ireland Assembly? Please give reasons for your answer.

3.5 There were two main schools of thought on this issue – those opposed to maintaining parity in this area who wished to make appropriate use of devolution, to provide a system that more accurately reflected the structure of the Northern Ireland economy whilst providing adequate protections for workers; and those in favour of retaining parity in relation to the unfair dismissal qualifying period, who argued that this would, at the very least, bolster confidence that Northern Ireland was remaining competitive in a UK and global context.

Opposed to parity

We believe that the unfair dismissal qualifying period should reflect the commercial, economic and political climate of Northern Ireland...and suggest that it may not be appropriate to retain parity with Great Britain in this area.

Citizens Advice

...the Northern Ireland Assembly should retain the current arrangements. Any change may have the effect of discouraging employees from moving from one employer to another because of the loss of employment protection, and this may have a detrimental impact on skills being matched with jobs.

Labour Party NI

The ELG takes the general view that there is no need and no evidential basis for increasing the unfair dismissal qualifying period from one year to two years. The ELG believes that one year is sufficient for an employer to assess the capability and performance of its employees.

Employment Lawyers Group

Given that a direct link cannot be evidenced, Disability Action queries the validity of altering the unfair dismissal qualifying period.

Disability Action

...we believe the 1 year qualifying period should be retained here. There is no evidence that increasing same impacts positively on business growth or development or significantly reduces the number of claims lodged. Further it may result in more claims being lodged on other automatically unfair grounds.

Donnelly and Kinder Solicitors

3.6 The Northern Ireland Committee of the Irish Congress of Trade Unions (NICICTU) provided a comprehensive response to this question, stating:

- *there is clearly no evidence that increasing the qualifying period will increase competitiveness;*
- *such a change will increase job insecurity and encourage bad employment practices and mistreatment at work;*
- *the proposal is likely to be discriminatory;*
- *there is no correlation between employment protection legislation and employment levels;*
- *the argument that one year is insufficient to allow an employer to fully assess an employee's performance is "nonsense"; and*
- *increasing the qualifying period will encourage poor performance management techniques by employers, lead to an increase in unfair treatment in the workplace and will result in increased recruitment and training costs for employers.*

NICICTU

...it is submitted that there are a wide variety of extraneous factors which are far more relevant, such as the economy as a whole, the willingness of financial institutions to provide credit, current and expected levels of business activity, whether profits can sustain additional staff, etc.

Peninsula Business Services

We welcome DEL's commitment to evidence-based policy making...We feel strongly that the existence of a 'perception' should not form the rationale for such a significant change in the law...An extension of the qualifying period will have the greatest effect on, and be most detrimental for, young people, who are already bearing the brunt of economic recession.

Law Centre (NI)

The main empirical evidence, quantified by internationally recognised bodies such as the Organisation for Economic Cooperation and Development and the World Bank does not support the assertion that relaxing employment protection laws will increase employment and grow the economy.

Sinn Fein

Favouring parity

The rationale provided by BIS for making this change was that the existing accrual period for unfair dismissal rights brought the additional risk to an employer of an unfair dismissal claim which was great enough in some instances to deter firms from employing additional people and was therefore a barrier to growth and employment. That argument is also relevant to NI and the differential between here and GB could represent the deciding factor in an assessment by a potential FDI company of the comparative merits of setting up here or in GB.

Institute of Directors

We are a strong proponent of increasing the qualifying period for unfair dismissal from one to two years. Although we do not believe that this proposal in isolation will contribute significantly to employers' confidence to recruit it is important to retain the perception that Northern Ireland remains a good place to do business.... There was also a strong feeling amongst EEF NI members whereas good behaviour might be expected and easily obtained during a probationary period of up to 1 year that a 2 year period gave the employer a better opportunity to ascertain the behaviour of employees.

EEF NI

Almac strongly believes that the qualifying period for unfair dismissal should be increased from one to two years. The business benefits we see include the following:

1) *A greater desire to employ locally in N Ireland, rather than in the US where employment law is significantly more flexible*

2) *A greater ability to successfully cover maternity leave which is typically of 12+ months duration without unintended consequences from temporary or fixed term cover arising*

3) *The ability to enable local HR practitioners to operate in a unified employment law scenario rather than one in each of England, Scotland and NI, which is unnecessarily complex*

Almac Ltd

[one year] is too short a period, particularly for our majority micro business economy in Northern Ireland with limited or no human resources capacity, and acts as a deterrent to them taking on new employees. The extension of the qualifying period will have a positive impact on marginal hiring decisions, particularly in smaller firms and will send a strong signal from Government that it is committed to reducing the burden of employment regulation.

CBI NI

The current qualifying period for unfair dismissal in Northern Ireland is one year, we believe this is too short for the majority of our micro business, and can act as a deterrent to taking on new employees. We believe the period should be extended to two years to increase our competitiveness and to encourage inward investment and indigenous growth. It also harmonises our position with the rest of the UK.

NI Conservatives Economy Group

Small businesses would seek a longer qualifying period for employees, not only to have a longer period in which to assess performance and suitability, but also to ensure that they have sufficient resources to fund the post on a long-term, permanent basis.

The FSB in Northern Ireland undertook a Snap Poll of members, conducted over a period of one week, (20-26 February 2013) by mass e-mail. The following summary is extracted from an initial analysis of the data.

- *Over a quarter of the respondents had been subject to a claim in their time as employers.*
- *Of these claims, 9.4% were within the last two years.*
- *2.8% of respondents had experienced more than one claim.*
- *71 percent of the claims of unfair dismissal were settled or withdrawn prior to tribunal hearing.*

- *72% of the claimants had been employed by the company for two years or less when they brought their complaints; 28% had been employed for over two years.*

- *Nearly half of respondents said an extension to the period before an employee could bring a complaint of unfair dismissal would make them more likely to employ more staff.*

- *Over 78% of respondents believe that the qualifying period before employees can claim unfair dismissal should be extended.*

A similar number felt that it should be extended to two years.

FSB

Q21. Do you have any comments on the Department's labour market analysis?

Q22. Do you have any alternative sources of quantitative data which could be considered by the Department?

3.7 Most respondents did not respond to, or answered 'no' to, these questions. Many argued that there was little quantitative evidence available to support change in this area. There were a range of competing views expressed about the potential impact that employment regulation may have on the economy, with some suggesting that it is a real barrier to employment growth while others argued that there is no evidence of any correlation between length of qualifying periods and economic wellbeing. The following comments were received:

[The labour market analysis] seems accurate. We'll take your word for it. Qualifying periods are a distraction from the major issues.

Legal Island

If the Department cannot make a direct link why try and fix something that does not need fixing for the sake of it.

Individual respondent

I think we need to start realising that Northern Ireland is competing in an international marketplace and as such we must be employer-friendly.

McGimpsey Brothers (Removals) Ltd

...the Department's labour market analysis is inconclusive and in any event the data is unreliable as it does not capture the number of occasions where employment is terminated under a compromise/settlement agreement because an employer is under threat of a UD claim. EEF NI does not have any alternative sources of quantitative data.

EEF NI

It seems clear that there is no real evidence suggesting a link between changes in the unfair dismissal qualifying period and the number of jobs in the economy so it would seem sensible to leave the system as it currently stands.

National AIDS Trust

It is particularly of note that the OECD report shows that the UK scores especially low on ease of dismissal. This does, in our view, support the contention that there is little evidence that the existing employment protection provisions have any detrimental effect on the UK's economic effectiveness internationally. This does not support the argument for further weakening of employee rights.

Prospect

While the Department's labour market analysis suggests that NI, or the UK, is lightly regulated in comparison with some other countries, the perception of indigenous NI businesses is somewhat different. Our members tell us through our regular survey programme that they are reluctant to employ people or to expand their workforce because they fear being taken to tribunal, and they feel that current employment legislation is framed to protect individual employees rather than to encourage greater employment. Disparity with Great Britain will add to that reluctance and alienation, and will do nothing to grow the NI economy (even if the statistics are inconclusive).

An FSB member survey conducted in June 2012 found that the biggest barriers to taking on staff, apart from the difficulties associated with the economy, are 'regulation in general' (32%) and 'employment law' in particular (29%). The survey was repeated in June 2013 and produced vey similar results, with 30% of respondents saying that the biggest barrier to taking on staff is 'Employment Law/ Regulations'.

...this is a damning state of affairs. If every small business employer in Northern Ireland was to take on just one more employee, it could take nearly 40,000 people off the dole queue. This potential should not be ignored.

FSB

As the analysis has shown, the qualifying period for unfair dismissal is not a large bearing on the economic performance of the country itself. Indeed, to place such a heavy onus on such an item, considering the diverse nature of the economic climate and vast number of variables contained within the same would be inaccurate.

Peninsula Business Services

Sinn Fein agrees with the department's labour market analysis and in particular the recognition that rather than too much regulation, Britain and by extension the north of Ireland currently has one of the least regulated labour markets by international standards.

Sinn Fein

Q23. Do you have any comments on the Department's finding that it is very difficult to estimate the contribution of the unfair dismissal qualifying period on employment growth?

Q24. Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and employment growth?

3.8 As with the previous question, most respondents agreed that it was difficult to estimate the contribution of the unfair dismissal qualifying period on economic growth, and no quantitative information was offered to prove any causal link.

The information doesn't exist. Even if it did, qualifying periods are not applied in a vacuum, so you will not be able to show cause and effect with any degree of accuracy.

Legal Island

Citizens Advice agrees with the Department's assessment that it is difficult to establish the role of changes in employment legislation in bringing about an increase in employment.

Citizens Advice

Overall, we consider it difficult to prove any link between qualifying period and levels of employment. Typically, employers make decisions on a wide range of factors, of which this sort of employment issue would be only one.

Jones Cassidy Jones Solicitors

The Department's finding is probably a reasonable assumption.

University of Ulster

3.9 Some, however, did acknowledge that a causal link was difficult to prove, but that the perception for businesses was more important than the need to provide evidence:

I feel that the 2 year qualifying period would be a significant help to small companies similar to our own. We would definitely be keen to employ many more people if the employment conditions were more favourable and the 2 year period would be a significant step in that direction.

McGimpsey Brothers (Removals) Ltd

We agree that it is difficult to quantify, and we agree that wider economic and social conditions can have a discernible impact on employment growth. A key factor depressing the jobs market at the moment is undoubtedly the state of the economy generally, which leads to consumers and buyers restricting demand for goods and services. Social conditions, such as optimism following the Belfast Agreement, are also important, and it follows that current uncertainty is likely to have the opposite effect. This is all the more reason to encourage the private sector to see employing people as a positive move, and to reduce their anxieties regarding the threat of a claim of unfair dismissal. It is vital that every available measure is taken to rebalance and rebuild the economy.

FSB

Q25. Do you have any comments on the Department's analysis regarding the contribution of the unfair dismissal qualifying period on inward investment?

Q26. Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and levels of inward investment?

3.10 Some respondents were agreed that no causal link between the qualifying period and inward investment could be proved, while others contended that a different qualifying period could undermine Northern Ireland's competitiveness in a UK context.

We do not think the two are linked. All of our discussions with customers indicate that there is little, if any, link between the two.....We think other matters, such as infrastructure, wage rates and qualifications/experience of workforce are much bigger considerations for those considering inward investment and our discussions with customers bear this out.

Legal Island

...there is limited independent evidence to support the perception that any changes to the qualifying period would have an adverse impact on competitiveness, or our ability to attract Foreign Direct Investment.

Labour Party NI

It seems clear that changes to the unfair dismissal qualifying period have no proven link to inward investment.

National AIDS Trust

...even with a one year qualifying period, NI would still rank as "lightly regulated" in terms of employment regulation compared to the majority of other EU countries.

Law Centre (NI)

3.11 As for the considerations in respect of employment growth, some respondents argued that perception was important for potential investors:

...the differential between here and GB could represent the deciding factor in an assessment by a potential FDI company of the comparative merits of setting up here or in GB.

Institute of Directors

An increase in inward investment may potentially be enhanced with an increase of the qualifying period to two years. International investing parties may be more inclined to invest in a region whereby there is flexibility in managing performance of staff, and having an enhanced opportunity to effectively appoint and exit the appropriate staff as and when required, and within less rigid timeframes with the legislative framework.

CIPD NI

3.12 No evidence was provided by any consultees to prove a causal link between the unfair dismissal qualifying period and levels of inward investment:

It is not possible to make any reasonable assumption between the qualifying period and levels of inward investment.

University of Ulster

Q27. Do you have any comments on the Department's finding that it is very difficult to estimate the contribution of the unfair dismissal qualifying period on claims to tribunal?

Q28. Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and claims to tribunal?

3.13 Whilst there was broad agreement on the inability to estimate the contribution of the qualifying period on claims to tribunal, some respondents disagreed on the potential effects of a change in the qualifying period.

3.14 However, some were optimistic that an increase in the qualifying period would reduce the numbers of tribunal claims.

I do feel that if the two year period was introduced that it will substantially reduce claims in the future. Two years allows employers to be 100% sure that the entire employer/employee working and performance relationship is working.

McGimpsey Brothers (Removals) Ltd

We agree that it is difficult to estimate the contribution of the qualifying period for unfair dismissal on claims to tribunal. However, again we would say that this is not sufficient reason not to make every effort to encourage employment. Micro businesses typically employ fewer than 10 people, where a single employee equals 10% or more of the entire workforce. .....They are concerned that when they employ people, they may need to dismiss them again – for poor performance, poor attendance, misconduct, etc. Dismissing someone carries a risk of that dismissal being challenged through the tribunal system, and a significant proportion (30%) are therefore of the view that there is less risk in not expanding and not employing more people.

FSB

3.15 Alternatively, some respondents were not convinced that there would be a reduction in tribunal claim numbers.

As the qualifying period has remained static at one year since 1996, it is difficult to measure any link between qualifying period and tribunal claims. It is the view of CIPD NI that it will be difficult to avoid claims that are not genuine.

CIPD NI

We agree that it is very difficult to draw a clear link, partly because employees may well attempt to bring other types of claims, such as automatic unfair dismissal and discrimination claims to avoid the qualifying period.

Prospect

Congress notes that the statistical data from the LRA on this issue...confirms DEL's conclusion that there is no causal link between the unfair dismissal qualifying period and claims to tribunals.

NICICTU

...the data provided at para 5.25 [of the consultation document] is evidence enough that to extend the qualifying period would have no material impact on the volume of unfair dismissal claims and it would instead just lead to uncertainty coupled with an initial cost in terms of communicating an unnecessary extension to NI employers.

Peninsula Business Services

We note that the Department is aware that increasing the qualifying period could result in an increased number of claims in respect of discrimination. We share this concern. We believe that a worker who believes that she has been unfairly dismissed and who does not qualify for unfair dismissal but who has a strong sense of grievance is likely to look for alternative routes into the tribunal. Discrimination is one such route...It is our experience that discrimination claims are more complex and take more resources to resolve than unfair dismissal claims and present particular risks in terms of potential adverse publicity for employers. An increase in such cases would place additional demand on the tribunal system and would result in significant costs to the public purse.

Law Centre (NI)

Q29. Should the unfair dismissal qualifying period remain at one year? Please provide reasons for your response.

Q30. Should the unfair dismissal qualifying period be increased to two years? Please provide reasons for your response.

3.16 These questions provoked similar responses to the earlier question on whether it was better to maintain parity with Great Britain.

3.17 Those favouring the retention of a one year period cited factors including lack of convincing evidence for change, a need to protect jobs, potential increases in tribunal claims concerning unlawful discrimination, and detrimental impacts on more vulnerable workers.

[There is] absence of convincing evidence that raising the period would increase employment and investment.

Alana Jones Workplace Solutions

One year is twice as long as most probation periods...There are far bigger fishes to fry in this review if the real concern is inward investment or the need to reduce tribunal claims.

Legal Island

It should remain as is. Given the labour market it is essential that employees retain realistic rights.

Individual respondent

Yes, one year is a suitable period of time for both parties to judge the success of the employment relationship...government should be focusing on making it easier to hire employees than dismiss them. Citizens Advice is aware of no convincing evidence that a one year qualifying period is a potential barrier to growth and development.

Citizens Advice

...the qualifying period should remain at 1 year. Any increase would risk creating a two tier workforce, and generate volatility across the NI labour market.

Labour Party NI

The time period was reduced before from two years to one year, by reason of concerns of sex discrimination following Perez v Seymour-Smith*. We understand challenges in GB on this and other bases are likely. We suggest that any change should not take place prior to clarification of these points by the courts in GB.*

Jones Cassidy Jones Solicitors

Yes...there is no need for, and no evidential basis for, increasing the unfair dismissal qualifying period.

Thompsons Solicitors

NISMP has indicated that by increasing the qualifying period for unfair dismissal, there is a risk that already vulnerable migrant workers could be made more vulnerable for a longer time...In the absence of clear evidence that there are negative impacts on inward investment and hiring practices, we recommend that the unfair dismissal qualifying period remains at one year.

Northern Ireland Strategic Migration Partnership

From the evidence available there appears to be no case for change and employers should be able to reach a decision regarding suitability for employment well before a year.

Antrim Borough Council

Prospect fundamentally opposes any increase in the qualifying period for unfair dismissal for any employees. The evidence and analysis quoted in...the consultation document does not show any rationale in increasing the period and there appears to be no evidence of sound economic arguments to do so...the qualifying period...should remain at one year (or ideally be reduced further)...As employment law is devolved in Northern Ireland we do not see

any need for it to be the same as the rest of the UK...We do not believe this is a problem of itself that needs to be addressed.

Prospect

Sinn Fein's preferred option would be the introduction of a shorter qualifying period but in terms of the options currently under consideration by the department, we support the retention of a one year qualifying period. The department's own information shows there is no evidence to support a claim of any adverse impact on growing the economy and even shorter qualifying periods.

Sinn Fein

We believe that the one year unfair dismissal qualifying period should be retained as there is no evidence that increasing same impacts positively on business growth or development; or significantly reduces the number of tribunal claims lodged. It may lead to more claims being lodged.

Donnelly and Kinder Solicitors

The unfair dismissal qualifying period should remain at one year as extending it would disadvantage both employers and employees.....Many employees who would have brought a claim for unfair dismissal would instead bring a claim for discrimination which has no cap on the length of service or awards, and is more complex and difficult for an employer to defend. It is unlikely that extending the qualifying period would benefit employers greatly; it is the cost of employment and recruitment that most influences whether a business can take on more employees, not the risk of tribunal claims for unfair dismissal. Increasing the length of the qualifying period is likely to impact disproportionately on young people, women and migrant workers who are more likely to have shorter periods of qualifying service. This could potentially have wider equality implications.

Citizens Advice

NAT does not believe that extending the qualification period would build employer confidence to employ more staff and encourage employers to create jobs. Indeed there may be substantial disadvantages for employers and the tribunal service. It may encourage employees with short service to bring artificially constructed complaints of discrimination which would necessarily be more complex, expensive and time consuming than a simple unfair dismissal claim. Changing the qualifying period would in practice mean allowing employers to dismiss staff without good cause for the first two years of employment, provided they do not breach discrimination law. This may have the unintentional effect of stagnating the job market, as employees will not want to take on a new role where they have little job security.

National AIDS Trust

The Housing Executive...has no issue with the current qualifying period of one year for bringing a claim of unfair dismissal.

NI Housing Executive

...the qualifying period for unfair dismissal should remain at one year.

Employment Lawyers Group

3.18 Those arguing for a two year qualifying period referred to the benefits of consistency across the UK. In this view, Northern Ireland must not be perceived to have employment law disadvantages for the purposes of attracting new investment. Arguments were also advanced that reduced 'red tape' would pose no risk to employees who perform effectively and would encourage employers to recruit more staff in the confident knowledge that they could dismiss poor performers more easily than at present.

The University believes that there should be parity between Great Britain and Northern Ireland as this will allow for consistency within the Higher Education sector.

Queen's University, Belfast

Parity and consistency is required across the UK.

University of Ulster

It is recommended that consideration is given to increasing the qualifying period to two years so that legislation is aligned with GB. A capable member of staff is highly unlikely to be dismissed within the two years.

CIPD

We would...urge the Department to act now to remove this particular differential [between Great Britain and Northern Ireland] and extend the qualifying period in Northern Ireland to two years.

Institute of Directors

It is recommended that consideration is given to increasing the qualifying period to two years so that legislation is aligned with Great Britain. If employers have a capable member of staff it is highly unlikely that they will be dismissed within the two years. There is the risk of course of unfair dismissal due to subjective factors and with very little evidence to back up the dismissal.

CIPD NI

CBI Northern Ireland members...believe that it is more important that the qualifying period should increase from one year to two years for all firms in Northern Ireland to allow us to compete with other regions within the United Kingdom.

CBI NI

Contracts would be extended to 102 weeks instead of 51 weeks (little difference); gives the employer more time to work with an employee who may not be performing well; for SMEs without dedicated HR support, allows them more time although it could be argued they will already know within a few months if an employee is not suitable, however this undeniably gives more time to work with employees with potential to see if training and other support is enough to improve.

Castlereagh Borough Council

Randox fully support the proposal that NI should follow the position in GB and increase the qualifying period to two years. In certain roles such as sales, we recognize that it can take a person more than one year to become confident

with the products, processes and customer base, and be able to make a meaningful contribution. However with the high costs involved in sales if the early signs are not encouraging then we can be forced to make a decision on that person's employment based on a snapshot of performance, which with the benefit of longer service and more experience and mentoring may correct itself.

Randox

We feel that the qualifying period should increase to two years. We are a small company with a team of 40 employees but if the qualifying period was increased we would be more than keen to try and double our workforce. If it remains at one year – we are not prepared to chase more contracts and employ more people.

McGimpsey Brothers

3.19 For the Labour Relations Agency, evidence was key:

In the Agency's opinion any change in the qualifying period should be based on considering whether there is a substantiated link in NI between the length of the qualifying period and the following factors: growth in employment; level of inward investment; and volumes of tribunal claims.

Labour Relations Agency

Q31. Should the unfair dismissal qualifying period be increased to two years for employees in SMEs? Please provide reasons for your response.

3.20 There was very little support for this option. Most consultees were concerned that this would create a two tier workforce; could introduce unwelcome complexity to the labour market and could also be an anti-growth measure.

No. The impact of dismissal on an individual is the same whether or not they are employees by a small or large employer. The focus should be on supporting SMEs more effectively in embedding good employment practices.

Alana Jones Workplace Solutions

No – SMEs should be given help regarding employee engagement, so employees stay and grow the business. They shouldn't be encouraged to take the lazy route to dealing with employees just because they are busy – it's a false economy.

Legal Island

No...develop a user friendly short guide for SMEs on employment law.

Individual respondent

Northern Ireland has a small business economy with the majority of those employed in the private sector working for businesses with fewer than 250 employees. Extending the qualifying period for SMEs would include such a high proportion of the workforce, so we cannot support this proposal. We have not seen any evidence to show that SMEs are disproportionately affected by unfair dismissal rules. We would also argue that extending the qualifying period for SMEs would reinforce the opinion that it is difficult and burdensome

for a small business to dismiss an employee fairly. Instead, more guidance should be given to SMEs to increase their awareness of the need to give fair warning of dismissal or redundancy. Citizens Advice considers that any 'two tier' employer responsibility framework would act as an unnecessary barrier to growth and cause avoidable bureaucratic and regulatory burdens.

Citizens Advice

We strongly oppose the proposal to have a higher qualifying period for those working in SMEs. The introduction of a two tier system in this way would be unjust, but may also impact on recruitment abilities for SMEs who would be seen by potential recruits as offering less employment protection and be an unattractive employer.

Prospect

The FSB recommends that the unfair dismissal qualifying period should be changed to two years for all employees. However, if the Department is reluctant to introduce such a change for all employees, then the two year qualifying period should be introduced for employees in all micro, small and medium private enterprises.

FSB

Congress believes that removing rights from staff in small businesses will turn them into second class citizens at work and is likely to generate a 'hire and fire culture' in NI. Line managers will feel free to sack workers without a valid reason and with virtually no notice. Congress is also not convinced that such proposals would be beneficial for small businesses for reasons including:

The proposals are likely to create reputational damage for small firms, who will increasingly be perceived as bad practice employers.

This will make it harder for smaller firms to recruit good staff, particularly during any economic recovery. Employees are unlikely to be attracted to working for a firm if it means they will lose out on basic job security rights and can be dismissed arbitrarily at any point.

Small businesses would also have a clear disincentive to expand and to employ more staff.

This is likely to have a serious impact on job security and workforce morale and therefore have a negative impact on productivity.

The removal of basic unfair dismissal rights will almost certainly increase the number of discrimination and automatically unfair dismissal claims which are brought against small businesses. Such claims are more complicated, expensive and time-consuming for employers. They are also more expensive for employment tribunals to determine.

NICICTU

Whatever approach is adopted it is submitted that the approach should be uniform for all employers and not to draw unnecessary distinctions with SMEs. This would just lead to legal challenges and complicated determinations on

what constitutes an SME. A differential approach could also lead to a great disparity among workers operating within a two tier unfair dismissal system.

Peninsula Business Services

This would create a two tier system which would not be advantageous.

Antrim Borough Council

We have concerns in relation to a proposed extension of the qualifying period in unfair dismissal cases from one year to two years. We had previously recommended that the Department considers whether or not extending the qualifying period will have a disproportionate impact on Section 75 equality groups; particularly women, and people with dependents. Following on from the principles set out in the House of Lords decision in the case of R (Seymour-Smith) v Secretary of State for Employment[8]*, it is important that an extension of the unfair dismissal qualifying period does not cause a considerable disparity of impact on any particular equality group. If there is such a disparity of impact, this must be capable of objective justification; i.e. extending the qualifying period is a proportionate means of achieving a legitimate aim.*

Equality Commission

No. SMEs should be supported and encouraged towards applying best practice in employment relations. Extending the qualifying period for SMEs only would send out a negative message that SMEs are somehow "exempt" from good practice. It is notable that the qualification period for unfair dismissal is not a priority for SMEs according to the Department's own research.[9]

Law Centre (NI)

3.21 One consultee provided unequivocal support for this option:

Yes, the qualifying period should be increased to two years for SMEs. As per the consultation document, advantages of this include:

An aligned qualifying period would apply to all sizes of employer;

It would address 'confidence to hire' issue;

It would address issue of longer 'probation' period, as identified by some stakeholders in the discussion period.

Current and new employees would be clear of their position.

CIPD NI

3.22 Two other consultees expressed some enthusiasm for the idea, with a concern about the possibility of a two-tier workforce:

[8] ECNI *Response to DEL discussion paper on Employment Law* July 2012, www.equalityni.org
[9] DEL Research into Employment Rights and Support for SMEs survey

Some CBI members expressed support for this option, although pointed out that this may create a two tier system and may discourage small firms from growing.

CBI NI

Q32. If you support this option, how should SME be defined in legislation?

3.23 As there was very little support for applying two-year qualifying period to SMEs, the responses to this question were largely academic. There was broad agreement that an SME should be defined as a company with fewer than 250 employees. Concerns were also expressed that the need to provide a definition pointed to the risk of satellite litigation:

N/A – but it highlights the problem of increasing complexity and the satellite litigation that will arise from same if you have to create definitions for exceptions.

Legal Island

We do not support this option, however if it is chosen by the Department we expect the standard definition of businesses with fewer than 250 employees should be used.

Citizens Advice

...the European definition of SME which is less than 250 employees should be used.

CBI NI

We do not favour an extension for SMEs only, because of difficulties of definition, and because a set cut-off of a particular number of employees creates a potential disincentive to grow beyond that number.

Jones Cassidy Jones Solicitors

Q33. Should the unfair dismissal qualifying period be increased to two years for new start employees? Please provide reasons for your response.

3.24 Again, the CIPD was the only consultee to support this proposal.

Yes, advantages include:

- *Addressing inward investment concerns.*
- *Addressing issue of longer 'probation' period, as identified by some stakeholdersFurther incentive for inward investors.*

CIPD NI

3.25 Other consultees who responded to this question were opposed to the idea of putting in place a two-year qualifying period for new start employees citing discrimination against certain groups of people.

No. I do not perceive good grounds for treating new starts differently and this proposal may well be discriminatory against younger workers.

Alana Jones Workplace Solutions

...the period should be the same for all employees irrespective of whether they are new start or otherwise. Over complication of the system is to be avoided at all costs.

EEF NI

... increasing the period for new start employees would unfairly discriminate against young people and women and be open to challenge in the courts.

Citizens Advice

Setting up a two tier system for new start employees would be unfair.

National AIDS Trust

The introduction of a two tier system in this way would be wholly unjust and very likely to be unlawful indirect age discrimination. There is no evidence to support any argument that the raising of the qualifying period in this way would be a proportionate means of achieving a legitimate aim, such as to justify any discriminatory impact.

Prospect

We are not sure what this refers to. If it refers to employees who are in their first jobs then we believe such a policy could be challenged on grounds of age discrimination and we do not believe that any such discriminatory policy could be objectively justified.

Law Centre (NI)

Q34. Should the unfair dismissal qualifying period be increased to two years for employees in inward investor companies? Please provide reasons for your response.

Q35. If you support this option, how should 'inward investor companies' be defined in legislation?

3.26 Due to the apparent absence of a causal link between the qualifying period and levels of inward investment, most respondents were opposed to this option. It was also suggested that this could disadvantage indigenous companies.

No – inward investor companies tend to be big firms, with HR capability. Why encourage bad habits? [This proposal] highlights the possibility of satellite litigation where you have to define all these exceptions. Keep it simple.

Legal Island

We do not support this option; many European countries have even shorter qualifying periods for unfair dismissal than the one year Northern Ireland currently requires. We believe that increasing the qualifying period in order to attract inward investors would create an unwelcome two-tier system.

Citizens Advice

CBI Northern Ireland members believe that it would create an unfair balance to allow FDI an increased qualifying period over indigenous micro and SMEs businesses.

CBI NI

Absolutely not – we do not wish to encourage a two tier system which favours some employees at the cost of employees' rights.

Thompsons Solicitors

...whatever approach is adopted it is submitted that the approach should be uniform for all employers and not to draw unnecessary distinctions with SMEs, inward investor companies etc. This would just lead to legal challenges and complicated determinations on what constitutes an inward investor company. A differential approach could also lead to a great disparity among workers operating within a two tier unfair dismissal system.

Peninsula Business Services

No. All companies should be supported and encouraged in applying best practice in employment relations. Extending the qualifying period for inward investment companies only would send out a negative message that they are somehow "exempt" from good practice. In addition, potential employees might be deterred from applying for jobs in companies where they would have less employment protection.

Law Centre (NI)

Sinn Fein does not support the extension of the qualifying period to 2 years for employees in inward investment companies. There is no evidence to support an increase in the qualifying period for employee in inward investment companies. Two tier regulations introduce unfairness and disparity in relation to workers' rights which is not conducive to parity of esteem.

Sinn Fein

Q36. Should the unfair dismissal qualifying period be increased to two years for employees in start-up businesses? Please provide reasons for your response.

Q37. If you support this option, how should 'start-up business' be defined in legislation?

3.27 In line with most of the other options, consultees were generally opposed to increasing the qualifying period for employees in start-up businesses as it could potentially create a two-tier system.

We appreciate that new start businesses have particular challenges. However, we do not believe that increasing the qualifying period for these types of business would be helpful in the long-term. It would instead create a two-tier system with many grey areas; for example, the length of time a business would be considered a new start, and whether the rules should apply to all new-start businesses or only those under a certain size. Similarly, larger companies could potentially create spin-off entities to secure the benefit of alternative rules designed for start ups. This would be open to abuse and

create confusion generally to employees and employers, as well as particular regulatory and administrative problems for the Department.

Citizens Advice

We strongly oppose the proposal to have a higher qualifying period for those working in start ups. The introduction of a two tier system in this way would be unjust, but may also impact on recruitment abilities for start-ups who would be seen by potential recruits as offering less employment protection and be an unattractive employer.

Prospect

We do not recommend a different qualifying period for employee of start-up companies. However, start-up companies should have access to tailored employment support and assistance.

FSB

Congress is firmly opposed to this proposal.

NICICTU

3.28 One consultee was in favour of this option.

Yes...this would address 'confidence to hire' issue, would address issue of longer 'probation' period, as identified by some stakeholders potentially be a competitive step. Start-up businesses should be defined as those with under 5 employees trading for under 3 years.

CIPD NI

Q38. Should the unfair dismissal qualifying period remain at one year for all potentially unfair dismissal reasons, with the exception of redundancy, which could be extended to two years? Please provide reasons for your response.

3.29 In its response to the Department's 2012 discussion paper on the review of employment law, Legal Island had suggested that a compromise might be to extend the qualifying period to two years for redundancy purposes only, and not to extend it for other statutory potentially fair reasons. This would give employers, who are nervous about expansion, two years to assess how the new business is developing. However, it would require them to use the first year of employment to assess the individual qualities and performance of employees. It would also tie in with the existing right to qualify for redundancy payments after two years' continuous service. Legal Island considered, however, that, whichever way one looked at this, a two-year qualifying period makes little sense.

3.30 The Department decided to put this idea to consultees, but the proposal received little support among respondents:

Yes, keep the UD qualification period to one year, although we're not convinced extending redundancy UD to 2 years is very clever. You'll end up with employers calling every dismissal over one year but under two 'redundancy', there will be pre-hearings to determine the reasons for

dismissal and tribunal jurisdiction, and employees will challenge every 'redundancy', whether valid or not where they have less than 2 years' service. It's a satellite waiting to happen and it complicates things. We recognise the link with two years' service to qualify for a redundancy payment but it's not a big issue and not worth creating an exception for.

Legal Island

No. This proposal could put NI based employees at disadvantage if it comes to a choice of closing a department located in Birmingham or a department located in Belfast.

Alana Jones Workplace Solutions

EEF NI can see no logical reason to only extend the qualifying period for redundancy.

EEF NI

...we fail to see why redundancy should be treated in a different way from other potentially unfair dismissal reasons.

Citizens Advice

...why should this be different to other reasons for unfair dismissal?

CIPD NI

No – because to extend the qualifying period for redundancy only, will...lead representatives to consider other, more complicated claims.

Jones Cassidy Jones Solicitors

As stated above we are fundamentally opposed to any increase in the qualifying period. This option would also have practical difficulties in identifying whether the one or two year period applied in cases where the issue of whether or not there was a genuine redundancy situation or whether redundancy was the reason for dismissal. We believe having different qualifying periods would lead to confusion and uncertainty.

Prospect

No this would be unworkable. Such a proposal would result in significant satellite litigation arising from issues as to whether the reason for dismissal was redundancy.

Law Centre (NI)

Q39. What is your favoured option from the list provided?

3.31 As would be expected from consultees' answers to questions 31-38, the views of consultees were split between retaining the one-year qualifying period, or increasing it to two years across the board.

Q40. Do you have any alternative options for consideration? Please support any new options with available quantitative evidence.

3.32 One consultee reiterated views expressed in response to previous questions.

You are aware that there is no quantitative evidence available. There may be some anecdotal. We are aware of one UK-wide employer who argued they would not have put a new service in NI if they'd known the qualifying period was different from GB because the risk of a new venture failing is higher i.e. there might be more chance that they would have to make some dismissals for employees between 1-2 years' service in the second year, so the possible cost could be higher. They said they were comparing like for like but I find it hard to believe that UD qualification period was the only difference between, say, Belfast and Glasgow or Belfast and Birmingham.

Legal Island

3.33 Two consultees favoured qualifying periods shorter than one year.

Sinn Fein supports the introduction of a shorter qualifying period and, in consideration of the evidence, sees no verifiable reason to deny employees protection from unfair dismissal for any longer than 3 months.

Sinn Fein

As mentioned above we believe there should be no qualifying period for unfair dismissal and all employment protection rights should apply from day one, including the right not to be dismissed without a fair reason.

Prospect

Departmental response

3.34 There was scant appetite for any of the alternative options proposed as set out in the preceding chapters, alongside the two main options. Several respondents believed that these options overcomplicated the proposal, could be open to abuse and create confusion generally for employers and employees as well as regulatory and administrative problems for the Department. The main message from responses to these proposals was to "keep it simple and encourage best practice".

3.35 The Department does not intend therefore to move forward with any of the alternative options as it considers that the there would be risks in doing so, including:

- *the creation of a two-tier workforce, with accompanying unfairness;*
- *equality issues; for example, in treating someone differently because of their age or experience; and*
- *added complexity for employers, employees, and the tribunal system, in terms of uncertainty in definitions, with the high possibility of increased satellite litigation.*

3.36 On the central issue of the length of the qualifying period for unfair dismissal, it is evident that opinion is divided. While many do want to see the status quo retained in the form of a one-year qualifying period for all employees, a significant number of employer representatives in particular want to see a move to a two-year qualifying period.

3.37 Given that there is no meeting of minds, and that no credible compromise position exists, the Department must return to its original tests, as outlined in the consultation document, namely whether it is possible to establish a causal link between the unfair dismissal qualifying period, and:

- *employment growth;*
- *inward investment; and*
- *volumes of tribunal claims.*

3.38 A shift to a two-year qualifying period could realistically only be justified by convincing evidence that substantial improvements in each of these areas would be likely to be forthcoming. Benefits to be gained must be considered in light of the impacts that could arise from reducing the effectiveness of an important employment right.

3.39 The Department took the view in the consultation that it was unable to establish any causal link between the unfair dismissal qualifying period and employment growth, inward investment and volumes of tribunal claims, but retained an open mind, seeking evidence from consultees as to whether such a link could be established.

3.40 It is now clear that no new significant evidence has been provided by consultees that establishes a causal link. The Department acknowledges that some employers and employer representatives believe that the qualifying period is an issue of perception, and that increasing it to two years may have the potential to create a more business-friendly environment for employers to create jobs.

3.41 However, the Department cannot proceed on the basis of perception alone, especially when there are competing perceptions as to the potential detrimental effects of such a change.

3.42 In respect of employment growth and inward investment, it appears to the Department that the qualifying period is very much a peripheral issue, and that fiscal and macroeconomic issues are considerably more important to employers and investors.

3.43 Arguments that would-be tribunal claimants, unable to bring an unfair dismissal claim would instead be more likely to take discrimination cases (which do not require an employee to have served a qualifying period) are a source of concern. The Department would wish to avoid a potential increase in complex litigation around alleged discrimination.

3.44 Two consultees advocated qualifying periods shorter than one year. The Department does not consider that this is a realistic option, given the need to ensure that employers have the ability to have an adequate ‘probationary period’ in place for employees. Employers are used to, and comfortable with, the one-year qualifying period.

3.45 Having taken all views and the available evidence into account, the Department will not be taking any action to amend the unfair dismissal qualifying period in Northern Ireland. The unfair dismissal qualifying period will therefore remain at one year.

3.46 The Department considers that new evidence may yet be forthcoming that would warrant a re-evaluation of this position. Currently changes to the qualifying period can be made by regulations which come into operation on a prescribed date, to be confirmed by the Assembly within a six month period. Given the sensitive and contentious nature of this policy the Department will put in place provision to ensure that any change to the qualifying period will be made only with the prior agreement of the Assembly and therefore intends to use the Employment Bill to amend the procedure for changing the unfair dismissal qualifying period, to require Assembly approval prior to any operational date.

UNFAIR DISMISSAL – LIMITS ON COMPENSATORY AWARDS

3.47 **As part of the employment law review consultation, the Department sought the views of stakeholders on four questions dealing with the amount of compensation that can be awarded in respect of a tribunal claim for unfair dismissal.**

Q41. Is there evidence of unrealistic expectations about tribunal awards in unfair dismissal cases and, if so, how can these be addressed?

Q42. What are the potential benefits and drawbacks of introducing a 12 month pay cap on the compensatory award for unfair dismissal?

Q43. Should the overall cap on unfair dismissal (currently £74,200) be reviewed? Why?

Q44. Should the Department consider any other possibilities in relation to unfair dismissal awards?

3.48 Most respondents were of the opinion that there were unrealistic expectations in relation to tribunal awards; however, there was some divergence as to whether there is evidence to support such an assertion.

3.49 A number of respondents were of the opinion that there was.

EEF NI are strongly of the view that there are unrealistic expectations about tribunal awards in unfair dismissal cases.

EEF NI

There is strong evidence of unrealistic expectations about tribunal awards in unfair dismissal cases. We would urge DEL to issue more detailed OITFET statistics regarding average awards per jurisdiction, which are currently available in GB via the Department of Justice. CBI NI would also support that

median awards are published on tribunal forms so that claimants get a reminder as they claim, which is currently the case in GB.

CBI NI

ELG agrees that there is evidence of unrealistic expectations about tribunal awards in unfair dismissal cases

Employment Lawyers Group

We are clear from the range of clients that we meet that there is widespread misunderstanding about the likely amount of tribunal awards. This is understandable given that it tends to be larger awards which make headlines. Claimants often have unrealistic expectations, which a good representative will try to address.

Jones Cassidy Jones

We believe there is from our experiences as a conciliation officer and employment lawyer. Many people see £74k, or a maximum award and think they will get that. Others hear of discrimination awards and think they apply to UD cases.

Legal Island

3.50 By contrast, some respondents advised that they considered that the lack of evidence on unrealistic expectations was an issue which required attention.

We do not have any additional evidence to suggest that potential claimants have unrealistic expectations of tribunal awards. However, we would suggest that, if the Department believes unrealistic expectations do exist, greater publicity needs to be given to the current caps on the amount of compensation that can be awarded at tribunal. This information could be made available through the LRA, Citizens Advice Bureaux, trade unions and media outlets.

Citizens Advice

We would refer to literature available from HM Courts and Tribunals Service in England and Wales which highlights the average awards for discrimination and unfair dismissal claims across all the types of claims to potential claimants in this regard and believes this could provide a template for similar material in Northern Ireland.

Thompson Solicitors

3.51 Others considered that it is the cap itself which creates unrealistic expectations.

The compensatory cap ..... £74,200 [at the time of writing] is slightly unrealistic. The cap of 12 months' pay plus reinstatement is much more realistic. Capable individuals in the labour market should not be out of employment for any more than 12 months and if they are they should be prepared to be reinstated in the case that they are successful in their tribunal case.

CIPD NI

The existing cap of £74,200 [at the time of writing] sets an unrealistic expectation among claimants for unfair dismissal as the average successful claim is less than £5,000, and clearly demonstrates the difference between the cap and reality. It also creates equally unrealistic fears among business owners, who may choose not to take on an employee as a result. We would therefore strongly support the introduction of a 12 month pay cap on the compensatory award for unfair dismissal.

NI Conservatives

3.52 Those who did not consider that there was unrealistic expectation advised as follows.

We do not think...that claimants tend to have unrealistically high expectations in respect of potential compensation. Rather, the majority of people we advise on our advice line were in low paid work prior to losing their jobs and are usually in severe financial difficulty as a result of their loss of employment.

Law Centre (NI)

We do not believe that a significant number of employees currently have unrealistic expectations of tribunal awards. Research in GB has found employers' expectations on settlement were more unrealistic than employees'. We do not believe that the setting of a reduced and arbitrary cap would make a difference to the perceptions.

Prospect

3.53 When considering the benefits and drawbacks of the unfair dismissal cap, some respondents, such as the Construction Employers Federation and the Engineering Employers Federation suggested that a benefit of introducing a cap would be the management of expectations of employees.

Strongly support the introduction of a 12 month pay cap on the compensatory award for unfair dismissal. At its [at the time of writing] current level of £74,200 the cap serves as an aspirational figure for what claimants hope they might receive rather than a limit on what the tribunal may award. According to BIS (2008) only 5% of unfair dismissal claimants received an award in excess of 12 months' salary.

CBI Northern Ireland

3.54 Other benefits which respondents suggested included:

transparency which will ensure both parties are aware of the maximum awards from the outset of the case.

Queen's University Belfast

employers gain more certainty of the limits of the potential penalty to them, which may encourage them to be more likely to employ.

Federation of Small Businesses

genuine claims against very bad employer decisions could properly reward wronged claimants and may act as a deterrent to rogue employers.

University of Ulster

3.55 Potential drawbacks included:

average awards increase unnecessarily and again expectations are raised.

University of Ulster

3.56 Citizens Advice, while recognising that "a 12 month pay cap would give both parties greater certainty of outcome and could allow them to make a more informed choice when deciding how to resolve an employment dispute" cautioned against unintended consequences:

introducing a 12 month pay cap could allow unscrupulous employers to dismiss employees without just cause, in the knowledge that they would not have to pay out more than 12 months' salary as compensation. Potential claimants might believe the introduction of a 12 month pay cap meant they were automatically entitled to 12 months' pay.

Citizens Advice

3.57 A number of respondents expressed strong opposition to the concept of a cap on unfair dismissal.

Congress is concerned that in the current economic environment it will be more common for people to be out of work for longer periods. The cap will therefore disproportionately affect those unfair dismissal claimants who suffer the longest period of loss.

NICICTU

Prospect is fundamentally opposed to the introduction of a cap of 12 month's pay. We firmly believe that where an employee has been unfairly dismissed they should recover a sum to reflect their full losses.

Prospect

Compensation for unfair dismissal currently takes into account a range of circumstances including the number of years of service of an employee. A 12 month pay cap doesn't allow for consideration of this and a range of other factors.

Sinn Fein

Given the need for adequate compensation for an employee who has lost their job through their employer acting unlawfully, we do not believe that there are any benefits to a 12 month pay cap.

Thompson Solicitors

We do not support this proposal. Introducing a 12 month pay cap could have a disproportionate impact on groups of workers who may find it hard to get another job.

Law Centre (NI)

3.58 Some respondents strongly favoured reviewing the current cap.

It is too high and does not enable the business to make sensible business/management decisions. Quite often as an HR team, we have to undertake elongated processes, spending large proportions of our own and managers' time, in managing employees who should exit the business, rather than managing the growth of the business itself. Clearly there needs to be a balance, but a cap of 2 years' loss of earnings would ensure this.

Almac

Shockingly high and can easily put an SME out of business, or at best prevent them employing other staff for a long period of time if they do have insurance to cover. Obvious bias in NI tribunal service towards the former employee usually makes an award a foregone conclusion.

Castlereagh Borough Council

The overall cap should be reviewed as it is unrealistic

CIPD NI

Yes, the current cap should be reviewed and it should be reduced to a maximum of one years' salary.

Federation of Small Businesses

It should always be kept under review to make sure that it reflects median earnings. Further, it may be better to have one cap in place rather than 2 separate caps.

Donnelly and Kinder Solicitors

EEF NI believe that the overall cap on unfair dismissal which stated above went from £12,000 to £50,000 in 1999 should be reviewed annually as at present.

EEF NI

There should be a simple maximum amount of two years' or 18 months' salary (assuming 18 months' wages would be accepted at EU level as adequate compensation for discrimination cases

Legal Island

3.59 Other respondents were equally strongly opposed to such a measure.

No, we believe the current maximum is set at an appropriate level...Most workers will currently receive less than the current cap however, where the circumstances of the case justify it, we believe the tribunal should have the power to make an award of this level.

Citizens Advice

We strongly disagree with this suggestion for the reasons...the compensation for unfair dismissal is a limited remedy and we oppose any steps which might further restrict the remedy – particularly as this would effectively be sending out a message that the unlawful practice of unfair dismissal is not viewed as a particularly serious matter.

Law Centre (NI)

Congress would oppose any erosion of the current cap and would insist, while it exists, that it continues to rise as per the current formula.

NICICTU

3.60 Additional views which were expressed were:

ELG opinion is divided on whether or not the cap should stay the same, be reduced or be removed completely. The ELG believes that the overall cap on unfair dismissal should be reviewed in future. The ELG considered that it would be appropriate to review the cap in three to five years when the other efforts to streamline OITFET put forward in this consultation have been implemented and their effect can be assessed.

Employment Lawyers Group

The Party believe that the cap should be removed in its entirety, and that an employee who has been unfairly dismissed should be fully compensated for their losses, and strongly opposes any changes to lower the existing limits

Labour Party NI

if there is any argument for a review, it should be on the removal of any cap as in discrimination cases and other compensation claims.

Thompson Solicitors

Increase the burden on the former employee to prove their allegations. This will also mean those that progress are genuine cases and therefore worth the time. Fewer employers would settle and more claimants are likely to opt to use EC.

Castlereagh Borough Council

The ELG suggests monitoring the position in England to see whether or not the UK Government decides to utilise the powers included in the Enterprise and Regulatory Reform Act 2013 before reviewing the position in NI

Employment Lawyers Group

For micro firms (with ten or fewer employees), we propose the introduction of compensated, no fault dismissal for micro firms In Northern Ireland

Institute of Directors

Consideration should be given to possible exemptions to this capped rule, including direct discrimination, public interest disclosures etc.

Peninsula Business Services

Congress would suggest a radical step would be to lift the cap on compensation for unfair dismissal altogether.

NICICTU

The High Court alternative for breach of contract as an alternative to unfair dismissal claims is outside the jurisdiction of the review of the tribunal system.

University of Ulster

Departmental response

3.61 The Department has accepted that there is a need to modify the formula, linked to the retail prices index (RPI), which allows the maximum amount of an unfair dismissal award (and other employment rights related payments, such as the weekly rate for the purposes of calculating a statutory redundancy payment) to be revised so that changes more accurately reflect movements in the RPI.

3.62 However, the Department has not heard persuasive arguments favouring significant change to the present upper limit for an award. There is no clear consensus on the proposal to place a limit on the maximum amount of an unfair dismissal award equal to 12 months' salary, or on any other option.

3.63 Unfair dismissal can be a very serious matter, and in the absence of strong consensus or a convincing evidential base to the contrary, it is suggested that making a substantial change to the limit (by lowering it) could send out the wrong message about the seriousness with which the dismissal of an individual should be treated.

3.64 The Department has also not received strong evidence that there are unrealistic expectations among potential tribunal claimants which encourage them to enter the tribunal process. It does concede, however, that the absence of statistical information on awards has the potential to encourage such expectations, and will therefore seek to include relevant information within future statistical publications provided by the Office of Industrial Tribunals and the Fair Employment Tribunal.

3.65 Given the want of consensus, and the lack of persuasive arguments for significant change, the Department's sole proposed legislative change in this area will be to seek to amend the formula for calculating annual RPI based changes to employment rights related payments, including the maximum award for unfair dismissal.

4 Review of consultation periods for collective redundancies

4.1 **Northern Ireland, as part of the UK, is covered by the EU Collective Redundancies Directive ('the Directive'). The aim of the Directive is to provide protection for employees in large-scale redundancies, without preventing employers from taking necessary steps to restructure. Its purpose is not to prevent collective redundancies from taking place, or to delay entry into the jobs market once agreement has been reached, but to require that all employers consult with representatives of their employees when large-scale redundancies are planned.**

4.2 The consultation must begin in good time, be conducted with a view to reaching agreement and, as a minimum, must seek to address ways of:

- *avoiding the dismissals;*
- *reducing the numbers of employees to be dismissed; and*
- *mitigating the consequences of the dismissals.*

4.3 In accordance with the Directive, the employer must also notify government[1] of the proposed redundancies. Whilst the Directive does require that notification to government takes place at least 30 days before redundancies take effect, it does not stipulate the minimum time periods relating to consultation.

4.4 In Great Britain (GB), the consultation periods that apply to collective redundancies of 100 or more employees reduced from 90 days to 45 days from April 2013. The 30-day consultation period for collective redundancies affecting between 20 and 100 employees remains unchanged.

4.5 In Northern Ireland, the consultation periods for redundancies of 100 or more employees remains at 90 days, and 30 days for redundancies affecting between 20 and 100 employees. The consultation period for all collective redundancies in the Republic of Ireland (ROI) is 30 days.

4.6 Although the consultation explored options that could require legislative changes, the Department recognised that improvements to the current regulatory regime do not necessarily require a legislative solution. With this in mind, the Department consulted on a range of legislative and non-legislative options, with the purpose of trying to achieve substantive improvements in the quality of consultation that will benefit both employees and employers.

4.7 The Department sought views on the following options:

- *retention of the existing consultation periods;*

- *reduction of the current 90-day minimum period for collective redundancies of more than 100 employees to a 45-day period, in line with GB; or*

- *applying a minimum consultation period for all proposed collective redundancies (i.e. for more than 20 employees) of 30, 45, or 60 days.*

4.8 The Department also sought views on the need for:

- *improved guidance to increase certainty about how to define an 'establishment' and treatment of fixed term appointees;*

- *a Code of Practice which will address a number of key issues around the processes that currently detract from quality consultation, and which would seek to facilitate a positive relationship between the employer and the employees' representatives; and*

- *improved guidance on the support offered by DEL, to ensure employers and employees better understand how they can manage the wider implications of a redundancy situation, and engage Jobs and Benefits Offices and Jobcentres at an early stage, without undermining the consultation.*

4.9 The following pages set out the questions that were asked in regard to collective redundancy consultation periods and a general overview of the tenor of the responses received together with some indicative summaries of, or quotes from, responses.

Q45. Do you feel the current arrangements are sufficient to meet the needs of business and employees in redundancy situations?

Q45a (in Q&A Booklet) – Do you agree with DEL's overall approach to the rules on Collective Redundancy consultation?

4.10 Twenty consultees responded to these questions. Most agreed with DEL's overall approach. Responses throughout generally reflected the view that it is not the duration of consultation that is important, but rather the nature and quality of consultation. Indicative comments are set out below.

[We] consider the presentation by the Department of the arguments relating to the consultation periods for collective redundancies to be fair and reasonable [and] ... that a minority of redundancy cases involve more than 100 redundancies.

Labour Relations Agency

employees want to know how much will I get, and when can I leave. In any scenario, be it 1 individual or up to 100 employees, truly meaningful consultation has always ended within 2 – 4 weeks maximum. It is frustrating for all parties advising employees that we are not in a position to provide them with formal notice of dismissal as the requisite number of days has not passed. Almac believes that a 30 day consultation process is sufficient.

Almac

4.11 The **EEF NI** considered that DEL's overall approach to the rules on Collective Redundancy consultation is constructive.

4.12 Another consultee, however, did not believe that there is a need for any substantial change in the current arrangements, and that the 90-day period should be retained in large redundancy situations, to provide time for appropriate detailed consultation.

This also allows time for state intervention. Successful state intervention, such as that seen when the MG Rover Group went into administration in GB in 2005, where people were retrained and found other jobs, can save government money in the long term. Where the consultation can be completed within a shorter period, there should be a system whereby it can be brought to an early end by both sides certifying that agreement has been reached.

Thompsons Solicitors

4.13 This position was echoed in most of the trade union responses. Prospect were strongly opposed to any change in the collective redundancy rule. Likewise, NICICTU firmly opposed any plans to reduce the minimum consultation periods. NICICTU commented that the consultation could have provided greater comparative detail in respect of collective redundancy models in other EU States, and felt that the Department had, in its use of the table entitled 'Collective Redundancies Requirements in other countries', focused on the length of consultation, instead of the significantly greater requirements on employers in other EU countries when they are contemplating redundancies.

4.14 The Law Centre did not think the case had been made for changing the framework governing collective redundancies in Northern Ireland. They shared others' concerns that the consultation document compared Northern Ireland's collective redundancy timeframes to other jurisdictions.

On the face of it, it seems that NI's 90 days is much longer than in other countries. However, these timeframes do not take into account the fact that many of the other countries have Works Councils which do a lot of preparatory work and negotiation before the official redundancy period begins.

Law Centre (NI)

4.15 Sinn Fein were also concerned about comparisons with other Member States, suggesting that like was not being compared with like.

4.16 Some respondents were in favour of a review of the rules on collective redundancies, as they were keen that the arrangements in NI should be amended to ensure parity between the employment law provisions in Great Britain, to ensure consistency. The point was particularly made by Queen's University Belfast in respect of the higher education sector.

4.17 Citizens Advice agreed with the consultation's proposal that engagement in redundancy situations should be extended to part-time workers, those on different shift patterns, and those who are absent from work through holiday, ill health, maternity or paternity leave. They also agreed that a reduction in the consultation period would damage the trust between employers and employees, and would compromise the Department's strategic efforts to promote good employment relations. A Code of Practice and improved guidance on the support on offer from DEL would provide clarity on good practice, and provide greater certainty for both employers and employees on what they can expect to happen during redundancy situations.

Q46. If the 90-day minimum period is to be replaced, which of the proposed option should replace it?

Option 1: retention of the existing consultation periods;

Option 2: reduction of the current 90-day minimum period for collective redundancies of more than 100 employees to a 45-day period in line with GB?

Option 3: applying a minimum consultation period for all proposed collective redundancies (i.e. for more than 20 employees) of either, 30, 45 or 60 days

4.18 One third of the 27 respondents who commented on the length of consultation periods for collective redundancies wanted to retain current arrangements. A third favoured a 45-day consultation period for redundancy situations involving 100+ employees (as in GB) and a further third were firmly of the view that a minimum consultation period of 30 days should apply for collective redundancies of more than 100 employees.

4.19 In addition to the 90-day consultation period being retained**,** NICICTU considered that the 20 employee threshold for information and consultation rights on collective should be removed:

The current threshold means that employees working in small firms do not have the right to be informed and consulted where redundancies are being considered. As a result employers in small firms are less likely to take employee's insights into account before making redundancies. This may lead to missed opportunities to rescue the organisation or to save jobs.

NICICTU

4.20 Prospect did not believe that the proposals would improve the quality of consultation; allow employers to restructure effectively in response to changing markets; or to balance the interests of redundant employees with

those who remain. They considered that the 90-day period is already very short for genuine consultation involving large numbers of redundancies. They were concerned that a 'weakening' of workers' rights would encourage poor employers to dismiss staff more quickly, rather than seeking ways to reach agreement on restructuring or affecting economies and that this, in turn, would have a negative effect on the general economy, leading to more people becoming unemployed and increasing the welfare bill.

4.21 Thompsons Solicitors also commented that the 90-day period should be retained in large redundancy situations, to provide time for appropriate detailed consultation.

4.22 Respondents who were of the view that a minimum consultation period of 30 days should apply for collective redundancies of more than 100 employees (**Option 3**) argued that, given that consultations involving between 20 and 99 employees are currently set at a 30-day minimum, this option would have the effect of equalising the arrangements for all consultations involving more than 20 employees.

Reducing from 90 days is welcomed given redundancy is usually the last resort and this is actually the minimum period for consultation. Momentum can be lost and a process dragged out just to meet the 90 days to avoid penalties for a business already under severe pressure. The period should be reduced to 30 days as a minimum period, because it can go beyond that if needed.

Castlereagh Borough Council

4.23 These comments also reflect the views of Antrim Borough Council.

4.24 Another consultee strongly recommended that the 90-day consultation period be reduced to a minimum of 30 days, stating:

the current 90 day period is such a lengthy process it has the effect of prolonging the agony, with employees having to wait three months to know where they stand, and if they leave during this period of uncertainty they receive no redundancy payment.

NI Conservative Economy Group

4.25 The EEF NI suggested that:

a 30 day consultation period is adequate for all redundancies. The law as it stands currently is far too complex. The law should be reformed so it is clear and straightforward and applicable to real situations. This is in line with the desire to remove unnecessary red tape and regulation.

EEF NI

4.26 The Institute of Directors stated that it would support the reduction of the 90-day consultation period for collective redundancy to 30 days (in line with Ireland), or at most 45 days as is the case in Great Britain.

4.27 A number of respondents favoured a 45-day consultation period for redundancy situations involving 100+ employees (**Option 2**). Both Queen's

University Belfast and the University of Ulster considered that this would have the benefit of bringing arrangements into line with the way the legislation has been amended in Great Britain.

4.28 Commenting on their preference to reduce consultation periods from 90 to 45 days for collective redundancies involving more than 100 employees, one consultee stated that:

whilst of the view that 30 days is likely to be insufficient for 100 or more redundancies, I do not perceive a need to increase the statutory minimum above 30 days where less than 100 redundancies are involved.

Alan Jones Workplace Solutions

4.29 A slightly different view was expressed by others.

"We continue to promote simplicity and would recommend 45 days for all collective redundancy exercises involving 20 or more employees, unless the social partners agree otherwise.

Legal Island

4.30 The Construction Employers Federation recommended that the 90-day consultation period be reduced to a *maximum* of 45 days on the basis that, while meaningful consultation is important, such a lengthy process is to the detriment of everyone involved.

From a competitive standpoint, Northern Ireland's consultation period is now three times higher than the Republic of Ireland, Germany, Spain and Holland and twice as high as Great Britain and Italy ... The collective consultation period can be a particularly stressful time for both employees and management and during this time the effect on staff morale can lead to a reduction in productivity within the firm. A shorter, quality and engaging consultation period can reduce the stress and financial burden for all parties concerned ... We would be supportive of reducing the length of the consultation period for collective redundancies to a maximum of 45 days.

Construction Employers Federation

4.31 A small minority of respondents (the Employment Lawyers Group and the NI Housing Executive) while supportive of a reduction, were undecided as to whether the reduction should be to 45 or 60 days.

4.32 Two further consultees did not state a preference. The FSB commented that, although the Northern Ireland economy is dominated by micro-businesses which are less likely to be in a position of having to make at least 20 people redundant, they would support a reduction in the statutory minimum consultation period, but they did not state by how much. The Labour Relations Agency also noted that a minority of redundancy cases involve more than 100 redundancies, but did not state a preference for any of the options.

Q47. Do you agree with the Department's proposals to address issues regarding the meaning of 'establishment' in guidance? Please provide comments to support your answer?

4.33 Since the Department's consultation paper issued in July 2013, there have been a number of developments relating to case law and the meaning of 'establishment'.

4.34 The requirement to consult arises where 20 or more redundancies are proposed at a single 'establishment' in a 90-day period. Neither the Collective Redundancies Directive, nor the implementing legislation, provides a definition of an 'establishment'.

4.35 In July 2013, the GB Employment Appeal Tribunal (EAT) ruled in *USDAW -v- Woolworths*, that the reference to a single 'establishment' should be disregarded, and where there are more than 20 employees in a single business, their location should become irrelevant.

4.36 The Government's appeal against the EAT decision to compensate Woolworth's and Ethel Austin staff who worked in stores where there were fewer than 20 employees, was heard in the Court of Appeal in January 2014. The Court of Appeal decided that it will need the opinion of the Court of Justice for the European Union (CJEU) before it can decide if the Woolworths and Ethel Austin employees are entitled to a collective redundancies protective award. The Court of Appeal made a referral, to request that this case is joined with the *Lyttle -v- Bluebird* case, which relates to the same issue.

4.37 A number of responses were received to the question on the value of guidance in relation to clarification on the meaning of 'establishment', and some of these respondents took the opportunity to provide their views on the meaning of 'establishment' and on recent case law'. While some respondents were keen to see clarification and guidance on the meaning of 'establishment', because of the ambiguity created by the recent case law, others were in favour of deferring the update of guidance until outstanding issues in relation to case law were settled.

4.38 One consultee considered that:

Given the global context of employers, inward investors, the definition of establishment should clearly be linked to the parent company and not individual static working units.

Individual respondent

4.39 Thompsons Solicitors considered that the decision in the recent *USDAW -v- Woolworths* case was correct, as did the Law Centre, who commented:

the decision of the EAT in USDAW v Ethel Austin was correct and that the phrase "at one establishment" should be deleted from Art 216 of the 1996 Order so that the collective consultation obligations are triggered once 20 or

more employees are to be made redundant within a 90 day period irrespective of where such employees are located. We believe that such approach is in accordance with the CJEU's views in Chartopoiia AE -v-Panagiotidis and others so that any interpretation of the Directive by member states does not lead to the exclusion of categories of workers from the protection intended by the Directive.

Law Centre (NI)

4.40 Prospect also believe that the position adopted by the UK EAT in the USDAW case should be adopted as being compatible with the European Directive:

We ... recommend that the test of establishment should be removed from the legislation and the duty to consult should apply in respect of all employees where the employer proposes to dismiss 20 or more employees regardless of their location

Prospect

4.41 However, the Construction Employers Federation considered it vitally important that the principle of 'establishment' remains in Northern Ireland.

The USDAW -v- Woolworth's case in Great Britain has disrupted a long standing understanding of the principle of establishment. The fact that the Secretary of State has been given permission to appeal is to be welcomed.

Construction Employers Federation

4.42 The Federation of Small Businesses was also opposed to a definition of 'establishment' as meaning an entire enterprise if a company operates from more than one site

This is the reality for a number of small businesses which operate from more than one location for the purposes of trading, including not only retailers but also those in the construction sector, or businesses comprising both manufacturing and packaging components, for example.

4.43 Alana Jones Workplace Solutions stated that as much clarification as possible should be provided in guidance, and it should be updated regularly to reflect domestic and European case law developments. Antrim Borough Council agreed that guidance would be helpful to employers, and the University of Ulster considered that guidance would be of use due to the conflicting European case law and UK case law decisions.

4.44 However, the Employment Lawyers Group considered that it would be: "*futile to try and produce any guidance until the case of* Lyttle & Others -v- Bluebird UK Bidco 2 Ltd *is decided*", and these comments were echoed by Thompsons NI Solicitors, Peninsula Business Services, NICICTU, and Donnelly and Kinder.

4.45 Jones Cassidy Jones Solicitors were concerned by the outcome of the *Woolworths* case and, if the EAT ruling on the meaning of 'establishment' were to survive appeals against it, then the retention of the 90-day

consultation period for redundancies of over 100 employees in Northern Ireland, would be even more problematic.

"Following the Woolworths case which removes the geographic restriction on 'establishment' (subject to appeal) it is clear that collective consultation is required in a range of situations that may involve GB, Northern Ireland, the Republic of Ireland and indeed elsewhere. In practice, given the substantial number of employers who have shops, branches or operations in a mixture of the three jurisdictions we expect considerable legal difficulty if the consultation period where more than 100 employees are affected [that is 100 across the organisation and no longer just not in any one establishment] remains at 90 days in Northern Ireland only. We are already advising on significant legal difficulties for employers arising as a direct result of this. We also consider there is a risk of discrimination issues occurring because of the differential treatment between NI and GB.

Jones Cassidy Jones Solicitors

Q48. Do you consider that the inclusion of fixed term employees in collective redundancy consultations represents 'gold plating' of the Directive?

4.46 Roughly equal numbers of respondents to this question either agreed or disagreed that the inclusion of fixed term employees in collective redundancy situations represented 'gold plating'.

4.47 The Employment Lawyers Group stated that the majority of its members considered that the exclusion of fixed term contracts from the requirements of collective redundancy consultations was a rational position. Castlereagh Borough Council were very clear that fixed term contracts should be excluded from redundancy situations, whereas Antrim Borough Council did not agree that the inclusion of fixed term employees was 'gold plating', and that their inclusion in redundancy consultations was in line with other protections afforded such workers.

4.48 In the view of another respondent:

This would amount to gold plating as the inclusion of fixed term employees in collective redundancy consultations creates additional uncertainty for permanent employees. It can result in permanent employees being brought into a redundancy pool, when this may not otherwise have been the case. There should be no additional protection whereby employers are required to extend fixed term contracts temporarily until the conclusion of a 90 day consultation process. This strings along fixed term employees who may ultimately be made redundant anyway and it may result in permanent employees being similarly strung along when they would not ultimately be selected for redundancy.

Peninsula Business Services

4.49 For the Federation of Small Businesses:

A fixed term contract should mean exactly what it describes – the employment of a person for a fixed period of time, which should be specified in the contract

of employment. When the fixed period ends, the contract is terminated. This is not a redundancy, as it was never considered to be a permanent position. If there is a further requirement for the work conducted by that person to be continued, the contractor should assess whether this will be a permanent or continuous need, or if it is for a further finite period.

FSB NI

4.50 The CBI NI position was very similar to that of the FSB, and they were of the view that the inclusion of fixed-term contracts in collective redundancy consultation is 'gold plating' of the Directive.

4.51 However**,** Thompsons Solicitors did not view the inclusion of fixed term employees was 'gold plating', as they considered that this presupposes that all fixed term workers can automatically be fairly dismissed at the end of their fixed term contract, which is very often not the case.

4.52 Prospect, Donnelly and Kinder Solicitors, the Law Centre, Citizens Advice, Sinn Fein and an individual respondent were amongst those who did not agree that the inclusion of fixed term employees in collective redundancy consultation represents 'gold plating'.

4.53 **Legal Island** were also of the view that:

There are some benefits for employers in employing Fixed Term Contracts but few for employees because notice periods are included in almost all of them. Removing protection for an already more vulnerable group of employees is not good employer practice. If an FTC is ended because it is no longer needed for a reason other than the agreed advance reason for termination then it is likely to be for redundancy. Why remove protections from any redundant employee or treat them less favourably, when EU laws specifically protect the?

Legal Island

Q49. Do you believe that a legislative amendment in a similar vein to Great Britain, should be taken forward to address issues around fixed term employees? Or can the issue be addressed in guidance?

4.54 Despite there being roughly equal numbers of respondents in agreement and disagreement that the inclusion of fixed term employees in collective redundancy situations represented 'gold plating', the majority of respondents to this question were in favour of a legislative amendment in a similar vein to that made in Great Britain. However, some preferred a legislative amendment to guidance, only if it was inevitable that the arrangements would be changed.

We consider that the termination of fixed term contracts on their expiry is a different issue from proposals for redundancies. There are certain sectors which make considerable use of fixed term contracts. We do not think it is helpful that in establishing the number of employees proposed for redundancy this includes those on fixed term contracts where the contract will expire at its end date, rather than being brought to an end early. We should amend the law to exclude naturally expiring fixed term contracts from being included in

the numbers that trigger collective consultation and time periods of consultation.

Jones Cassidy Jones Solicitors

4.55 Prospect were strongly of the view that it is right to include dismissals by means of the non-renewal of a fixed term contract, in the requirement for collective consultation:

Dismissals by this means have very similar implications for the workers and it would be an abuse of the consultation provisions to artificially remove such job losses from the duty to consult.

Prospect

4.56 Legal Island did not think a legislative amendment was necessary, as a reduction in the consultation period would, they believe, improve any perceived 'gold plating' issues. The Law Centre considered that while case law on the applicability of collective consultation obligations to the termination of fixed-term contracts is clear, they would not oppose legislative amendments for further clarity. Sinn Fein stated that, as they believe that employees on fixed term contracts should remain within the scope of collective redundancy consultations, they would not support change, either through legislation or the introduction of guidance.

4.57 NICICTU explained its views in some detail, stating that the duty to inform and consult on collective redundancies should continue to apply to both permanent and fixed term employees.

Congress recognises that the Collective Redundancies Directive does not apply to the termination of contracts for limited periods of time or to complete specific tasks. However it is important to recall that this Directive has not been reviewed since the adoption of the Fixed Term Worker Directive which provides fixed term workers with the right to equal treatment including in redundancy situations...Congress believes that excluding fixed term contracts from collective redundancy consultation rules would create significant uncertainty for employers, unions and employees. It could also encourage employers to ignore temporary employees' rights to equal treatment during redundancy exercises. This would generate unnecessary Employment tribunal claims.

NICICTU

4.58 However NICICTU was also concerned at the Department's reference to higher education in the Employment Law Review Partial Regulatory Impact Assessment Consultation, with the precise numbers of fixed term appointments not known. NICICTU stated that the numbers of persons employed on fixed term contracts is known by each higher and further education institution in Northern Ireland. They were concerned that it could be inferred from the Department's statement that the perceived lack of quantification contributed to an administrative burden of substantial, but unknown, costs upon the employers in the sectors.

Q50. Have we got the balance right between what should be contained in legislation, and what should be addressed in Departmental guidance and a Code of Practice?

4.59 In its consultation paper, the Department asked for views on whether many of the changes required to improve the approach to collective redundancy consultation could be addressed through guidance, rather than a legislative solution. Fewer responses were received to this question, but most of these reflected positively on the Department's approach.

4.60 There were sixteen responses to this question, and most of these reflected positively on the Department's approach. An individual respondent suggested that employers require clear guidance on the matter and what consequences they face if they do not comply. Similar views were held by another consultee:

The ELG agrees that Departmental guidance is necessary in this area. However there is no agreed view in relation to a Code of Practice. The majority of the ELG are not in favour of a Code of Practice as they consider that it will be another set of guidance for the tribunal to consider which is unnecessary. The minority of the ELG believe that a Code of Practice would provide useful assistance.

Employment Lawyers Group

4.61 Peninsula Business Services suggested that, given the comprehensiveness of this review, legislative amendments ought to be adopted where possible, to give proper legal effect to the recommendations; albeit these may be supplemented by the provision of Codes of Practice in line with those available in GB. They supported the proposals set out in the consultation paper as to what to include in a Code of Practice and welcomed the suggestion of including case studies.

4.62 Queen's University, Belfast commented that there should be no additional provisions to those which are in place in Great Britain, and any proposed additional provisions should be included in guidance.

4.63 The EEF NI favoured a Northern Ireland version of the Great Britain Code of Practice, as did Citizens Advice who commented that guidance should be available in accessible formats and be widely available without charge.

4.64 FSB, on the other hand, recommended extensive use of guidance, accompanied by proactive advice and support, and were opposed to the use of statute and the introduction of legislation unless absolutely necessary.

4.65 Thompsons Solicitors agreed that, as in other areas of industrial relations, guidance and/or a Code of Practice can provide useful assistance and this would be their position even if the current law remains unchanged.

4.66 Jones Cassidy Jones Solicitors were concerned that either Departmental guidance or a Code of Practice in relation to consultation would create a new layer of provisions in addition to the Regulations, as well as case law that employers, employees and tribunals have to take into account. This runs the

risk of creating complex interactions or, at worst, 'gold plating' under the European Directive, or indeed under TUPE/Service Provision Change requirements.

4.67 Prospect supported the production of more detailed guidance for redundancy consultation, as long as this would supplement legislative provisions (rather than replace them), and they would welcome the opportunity to consider and comment on the detail of proposed guidance.

4.68 For another respondent:

the reality will be that any Code of Practice will become a benchmark for tribunals and will be referred to and expected as a minimum. Not sure that further guidance/Code of Practice is necessary given existing principles/COP/Case Law that exists.

University of Ulster

4.69 As with other references to guidance, the Labour Relations Agency considered that, in order to ensure consistency of practice, any Code of Practice should be issued by the Agency. CIPD agreed that the LRA needed to assist with this.

4.70 NICICTU stated that they would be very willing to work with DEL to develop the new guidance, as suggested in the consultation document. They considered that guidance should raise awareness amongst employers of their obligations to inform and consult, including the benefits and importance of early and meaningful consultation and negotiation with trade unions; the need to negotiate and agree redundancy policies in advance of redundancy situations; that employers should seek to avoid redundancies unless absolutely necessary; and that employers should be encouraged to assess and monitor the effect which restructuring has on the health and well-being of staff. They also thought that guidance should ensure that employers are aware that they are under a legal duty to consult with a view to reaching agreement.

Q51. What changes are needed to the existing Departmental guidance to support employees who are made redundant?[1]

Q52. Do you consider that a Northern Ireland version of the Great Britain Code of Practice will be adequate for Northern Ireland purposes? How can we ensure the Code of Practice helps deliver the necessary culture change?

4.71 Questions 51-52 were asked in respect of the use of guidance and Codes of Practice which could be used to assist employees facing redundancy situations. A small number of respondents answered these questions, and all were in favour to varying degrees of the need for guidance and/or a Code of Practice to assist all parties in redundancy situations.

4.72 Jones Cassidy Jones Solicitors suggested that, if there is to be a Code of Practice, and given that most of the relevant case law comes from the EAT in

Great Britain, it would be helpful if Northern Ireland were to follow the GB Code. This position was echoed by Queen's University, Belfast who considered that, if Northern Ireland legislation mirrored that in Great Britain, the Great Britain Code would suffice. FSB made a similar point, stating that the GB Code of Practice could provide a framework for Northern Ireland, but that it should be adapted for NI circumstances and take into account any learning from its application in GB.

4.73 Donnelly and Kinder stated that there is a need for input from those who have been involved in collective redundancy situations, and a need to consider issues which have arisen in previous cases. As such, any guidance should underline the importance of proper consultation.

4.74 The University of Ulster thought that a revised Code of Practice or a new Code of Practice which mirrors the ACAS Code of Practice would be useful to employers, employees and trade unions and that:

to get buy-in to the Code of Practice...Employers and trade unions should be asked to sign up to the Code of Practice, perhaps via the LRA...This will be the standard expected and will be a benchmark for tribunals. If employers and trade unions sign up then the culture change will occur over time.

University of Ulster

4.75 Legal Island believed that guidance and a Code of Practice would be useful, but that Codes on collective issues should be discussed between the social partners, with the assistance of the LRA.

4.76 The Labour Relations Agency, in accordance with its statutory remit to publish Codes of Practice, stated that it would be prepared to produce a new Code of Practice and accompanying Advisory Guides, to encourage and promote good employment practice in the handling of redundancies. The CIPD underlined the need for the LRA to assist.

4.77 NICICTU suggested that DEL should consider the establishment of an Early Intervention Unit, possibly including representatives from the LRA and NICICTU, that could assist businesses that are considering job losses or even closure of the operation. NICICTU further consider that trade union representatives recognise the importance of dealing with equality-related issues during the consultation processes, including ensuring that redundancy selection processes are non-discriminatory, and that disadvantaged groups are fully consulted and their interests protected.

Q53. Are there other non-legislative approaches that could assist; e.g. training? If yes, please explain what other approaches you consider appropriate.

4.78 Once again a relatively small number of responses were received to this question. Most of these were in favour of some other non-legislative approaches to assist those facing redundancy and some suggestions as to what these might be are indicated in the following paragraphs.

4.79 Peninsula Business Services pointed out that there is a European-wide consultation into the suitability of apprenticeship schemes throughout Europe:

Any such proposals in respect of additional support should be cognisant of proposals and conclusions into such apprenticeship schemes. Incentives to get redundant employees back into education are also recommended coupled with employer incentives for taking on employees.

Peninsula Business Services

4.80 An individual respondent suggested setting up a mobile Departmental task force that is available to go to the assistance of an employer, and proactively manage change, rather than being reactive. Antrim Borough Council agreed that the availability of training would be beneficial, as would workshops/conferences to enable employers to share experiences would also be beneficial. Queen's University, Belfast would be supportive of training, which may need to take place outside of normal business hours to facilitate SMEs.

4.81 However, the FSB commented that the provision of training is of limited value to micro and small businesses, if the Department is considering 'training' to mean the provision of courses which employers volunteer to attend.

Clear information on redundancy rules should be made available, and small and micro businesses encouraged to seek, and be able to access, tailored advice should a redundancy situation arise. It is unlikely that a small business would attend a training course or seminar on redundancy unless they were giving serious consideration to making them; and in that situation, they may be reluctant to attend such a session, in order to maintain confidentiality and avoid the early concern of their staff. However, it is important that training is available to all potential business advisers, and that proactive measures are taken to make them aware of its availability.

FSB NI

4.82 For another respondent

a combination of some high-level, in camera discussions and a symposium, where all interested parties are invited to develop ideas might be helpful. We get the impression that some employers think decisions on redundancies should be their domain alone. That is wrong and short-sighted. Early consultation and involvement at individual and collective level is good for business.

Legal Island

4.83 Citizens Advice commented that training on any new guidance should be offered to employer and employee bodies, and rolled out across Northern Ireland, to provide an even geographical spread across the region. Promotion could be facilitated by the advice sector, particularly agencies that provide employment advice, for example, through printed materials and online information. The Labour Relations Agency stated that it would be willing to consider, in discussion with DEL, the services it provides in this area in light of comments received. The Labour Party NI believed that training and advice

would be helpful to all, and CIPD considered that training is critical for both employer and trade union sides.

Q53a. [Q53 In Q&A Booklet] Has DEL correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.

4.84 The very few respondents who answered this question considered that DEL had identified the impacts correctly, or stated that they had no further evidence to quantify impacts, or that consideration needs to be given to the impact on worker's rights and that these are not eroded.

Q54. If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement? How could the current processes be improved?

4.85 A few respondents provided information on the length of time taken to reach agreement in collective redundancy consultations in which they had been involved. Comments included that sometimes agreement cannot be reached and that it is the quality and effectiveness of the consultation that was important, not the length of the consultation.

4.86 Almac advised that, in their extensive experience, 14 days is the typical time taken to reach agreement by all parties. It is not clear, however, how large scale these redundancies were.

4.87 Queen's University, Belfast recounted its non-compulsory redundancy exercise in 2011. The relevant trade unions engaged in the consultation process, but the University did not seek to conclude 'agreement' on the matter:

It would be unusual for a trade union to 'agree' any reduction in staff as a result of a compulsory redundancy exercise. The current process could be improved by: 1. removing the 'gold plating' in relation to fixed term employees. 2. increasing the staffing headcount which determines the period of consultation required, i.e. 45 days when more than 150 employees will be affected.

Queen's University, Belfast

4.88 Prospect stated that they have been involved in many redundancy consultation exercises, and the appropriate time can vary enormously, depending on a range of factors. However, effective consultation usually takes more than 90 days in large scale redundancies.

4.89 The University of Ulster advised that consultation has not taken long in one respect, but seldom is agreement is reached.

trade unions have an ideological position when it comes to redundancy. The agreement is often reached quicker whereby the redundancies can be achieved by voluntary means. Where this cannot be achieved and compulsory

redundancy is enacted then agreement inevitably is not reached. But this is covered by the existing terminology whereby consultation takes place in relation to redundancies with a view to achieving agreement; this does not mean that agreement has to be reached. But the consultation must be reasonable and meaningful.

University of Ulster

4.90 Another consultee, having been involved in many collective redundancy situations over the last five years on behalf of members, recalled that:

The period for reaching agreement was not related in any of these matters to the length of the statutory consultation but rather the effectiveness and quality of the consultation. Agreement may not be reached but effective and good consultation will at least allow the parties to come to their respective positions without undue delay.

EEF NI

Q55. If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

4.91 A small group of respondents provided information on the effect on their regular business of any collective redundancy consultation carried out in the last five years. One view expressed was that the 90-day period is the biggest problem and is the issue within the Employment Law Review which is 'most ripe for change'. Others commented that the process can be destabilising for employer and employees and that maintaining a focus on running the business was difficult during this process.

4.92 **Almac** advised that carrying out a collective redundancy consultation is significantly destabilising for all, and takes the relevant managers out of running the business for 50% of their time for 30 days, which is unacceptable.

4.93 Another respondent considered that:

Given the nature of our organisation acting in an advisory capacity, we have advised clients on their rights and obligations in several collective redundancy processes. There are two over-arching conclusions that can be reached: (1) the majority of employers do not realise their obligations in respect of collective redundancy consultation, and (2) employers fail to understand why such lengthy consultation processes are required...The common trend is that the majority of SMEs will consider redundancy as the absolute last option given the relationship they have with their staff. Once all these options have been explored and the employer then believes they may have no option to consider redundancy they then discover that they are supposed to engage in extensive consultation periods notwithstanding the fact that they have been seeking suitable alternatives to redundancy for a long time in advance. The consultation requirements as they exist currently place an onus, in effect, on employers to put employees at risk of redundancy from the outset of any difficulty and discuss potential alternatives through consultation.

Peninsula Business Services

4.94 Jones Cassidy Jones Solicitors advised that, in practice, the consultation period is nearly always stretched out to cover the full minimum period allowed by legislation, even in circumstances where there is a significant measure of agreement and consultation has in practice been completed.

4.95 Although Legal Island has not been involved in a collective redundancy consultation, they have, through consultation with many employer customers, taken the view that the 90-day period is the biggest problem and is the issue within the Employment Law Review which is 'most ripe for change'.

4.96 EEF NI commented that, during the many consultations in which they have engaged over the last five years, they have found that during the period of consultation, it was difficult for their member companies to remain focused on the running of their business especially in longer consultation periods.

Departmental response

4.97 The consultation asked whether the minimum period of 90 days consultation remains appropriate; whether that period should be reduced to 45 days; or whether a period of 30, 45 or 60 days should cover all situations where more than 20 employees are made redundant.

4.98 Support for each of the consultation period options was fairly evenly divided. Advocates for the retention of the current consultation periods argued that this provided much needed time for employers and employee representatives to explore all available non redundancy options and also to facilitate effective collective and individual consultation. Supporters of a change to the current consultation periods argued that in 'real life' redundancy situations consultation took place over a more concentrated time than the statutory minimum requirements. There was, however, consensus on the need to improve the quality and effectiveness of the consultation process.

4.99 Currently, the statutory arrangements that govern collective redundancies in Northern Ireland differ to the regimes that apply in GB and the ROI. Unlike the unfair dismissal qualifying period, which deals with an individual right, it could be argued that the anti-competitiveness argument presented by some stakeholders has validity in relation to collective redundancies. In a redundancy situation, employers operating on a UK wide and ROI basis currently face differing requirements based on the location of staff; and need to familiarise themselves with two and potentially three different systems. The ROI system is much more restrictive and therefore the option of mirroring the GB model would seem to be the most appropriate way forward.

4.100 The Department acknowledges the comments made that there has been an over emphasis in the Department's consultation paper on comparisons made of the length of consultation periods with other jurisdictions. We also appreciate the concerns of those respondents who considered that any reduction in consultation periods would have a detrimental impact on workers availing of their employments rights.

4.101 However, a strong theme emerging was that it was the quality and not the length of consultation that was important. The Department is also mindful that large scale redundancies represent around 10% of all redundancy situations in Northern Ireland, affecting around 37% of all individual employees made redundant. It is likely that a significant number of the affected companies will operate on a UK-wide and/or ROI basis. Having reviewed all of the arguments in favour or against each option, the Department considers that a reduction in the consultation period for 100+ redundancies from 90 to 45 days is the correct approach and it intends to legislate along those lines.

4.102 Having reviewed the arguments in favour of each option, the Department intends taking power in the Employment Bill to reduce the consultation period for 100+ redundancies from 90 to 45 days.

4.103 The Department will also make an amendment to the relevant enabling power so that any future changes to the provisions relating to collective redundancies will be subject not to the confirmatory or negative resolution Assembly procedure but to the Affirmative Procedure which will ensure that there will be debate in the Assembly.

4.104 The consultation also sought views on whether fixed term employees (subject to certain exceptions) should be excluded from the count in determining what level of consultation is appropriate, as it has been argued that their present inclusion represents 'gold plating' of the Directive.

4.105 There were some concerns expressed that the number of fixed term employees, particularly in further education colleges, had not been assessed correctly and that the regulatory burden of including fixed term workers in consultation periods for collective redundancies may therefore have been overstated. However, a majority of consultees favoured the option of removing fixed term employees (with exceptions) from the count for the purposes of collective redundancies, and many stakeholders considered that their current inclusion did amount to 'gold plating'.

4.106 The Department will therefore legislate in line with Great Britain to exclude the expiry of fixed term contracts from a count of employees for the purposes of collective redundancy consultation periods. The exclusion will not however, apply where the employer is proposing to dismiss the employee as redundant, and the dismissal will take effect before the point at which it was agreed in the contract that it would expire.

4.107 The Department considers that this approach would again reduce the complexity for companies operating in the rest of the UK and the ROI where fixed term employees are not included in the count for consultation purposes.

4.108 In its press release (No.47/15) of 30 April 2015, the CJEU clarifies the term 'establishment' in connection with collective redundancies. The Court finds, first, that the term 'establishment', which is not defined in the directive itself, is a term of EU law and cannot be defined by reference to the laws of the Member States. It must, on that basis, be interpreted in an autonomous and uniform manner in the EU legal order. The Court states that, where an

undertaking comprises several entities, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment'. The decision As such each store (eg Woolworths) is deemed a separate establishment.[10]

4.109 The Department will liaise with the LRA in relation to necessary guidance as a result of the CJEU guidance.

4.110 Aside from the legislative changes that the Department also intends to respond positively to the call from consultees on the need to improve the quality and effectiveness of the consultation process. The Department will therefore commission a Better Regulation project to develop guidance that will facilitate meaningful consultation.

[10] http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150047en.pdf

5 Review of compromise agreements and possible introduction of a system of protected conversations

5.1 **Compromise agreements are currently used as a means of ending an employment relationship by mutual agreement between an employer and an employee. At present, negotiations towards a compromise agreement can only be carried out on a 'without prejudice' basis, where there is an existing employment dispute. The Department sought views on whether a new system of 'protected conversations' should be introduced, whereby an employer and employee could negotiate a compromise agreement even in the absence of an employment dispute, with the knowledge that these negotiations would be inadmissible at an industrial tribunal. The Department also sought views generally on the operation of compromise agreements in Northern Ireland, including whether they should be renamed to 'settlement agreements'.**

Q56. Do compromise agreements currently work in practice in Northern Ireland?

Q57. Are compromise agreements widely used in Northern Ireland?

5.2 There was general consensus on the answers to these questions, with the majority of consultees confirming that these agreements do work well and are used to bring closure to a significant number of disputes.

5.3 Thompsons Solicitors, Donnelly and Kinder Solicitors, Peninsula Business Services, Castlereagh Borough Council, the University of Ulster and an individual respondent all agreed that compromise agreements currently work in practice, and are widely used, in Northern Ireland. Antrim Borough Council also agreed that compromise agreements currently work in practice.

5.4 Other, more detailed answers were as follows.

Yes, in conjunction with LRA non-ET1 agreements, which are much simpler and just as effective in removing claims from the system.

Legal Island

Compromise agreements do currently work in Northern Ireland. [They] are effective...but we believe both the content and process could be simplified. Compromise agreements are widely used in Northern Ireland.

EEF NI

Almac uses compromise agreements on a very regular basis supported by the LRA. They work very well currently and we see no reason to make any changes. We do not engage with independent lawyers to conduct these for us typically, as the process then becomes more complex and of course carries a cost. The LRA provides a great service here.

Almac

The party takes the view that the conciliated agreements undertaken by the Labour Relations Agency are trusted by the parties involved in employment disputes and this should be maintained. The party understands that there is a high take-up of conciliated settlements by those involved in employment disputes.

Labour Party NI

5.5 Other consultees expressed some minor reservations with the current compromise agreements process.

It depends [whether they work]. If an employer has sought to resolve a situation through a thorough dispute resolution process and the situation still does not improve and the employment relationship has broken down then a compromise agreement can be used as an alternative way of resolving workplace disputes. The process should not be the first port of call in dispute resolution.

Figures are not available for NI, however the CIPD reported in a survey of UK employers in 2011 that more than half of companies have used compromise agreements in the past 2 years as a means of resolving workplace disputes.

CIPD NI

The employment framework would work more efficiently for all parties – employees, employers and government – if more disputes could be settled through conciliation or mediation. Faster resolution of disputes reduces the expense of legal representation and the risk of suffering emotional distress as a result of lengthy legal proceedings, and releases resources within the system to address more complex disputes. Therefore compromise agreements – which by definition must be mutually acceptable – are simple and easy to use. A fair settlement early in a case is a better outcome for all parties. A formal system (Calderbank offers) for making offers to settle, and advising the tribunal when a reasonable offer has been turned down, should be put in place. At the conclusion of a hearing in tribunal, the panel would be made aware of the existence and nature of the Calderbank Offer and where appropriate would routinely order costs in respect of the expenditure incurred by the Respondent following the Calderbank Offer.

CBI NI

ELB Solicitors have found compromise agreements to be a useful option where an employment dispute arises and, in practice, can be an effective means of settling disputes.

Education and Library Board solicitors

In our view, they are working. We are not in a position to comment on how widely compromise agreements are used outside of our own practice. We would tend to use LRA conciliated agreements in the majority of cases but we would use compromise agreements particularly in the following instances:

- *where the parties want to stay proceedings pending implementation of settlement terms; and*
- *where the employer is in potential financial difficulty.*

Law Centre (NI)

It is the experience of Congress that at present, in workplaces where a union is recognised, an employer who is in the process of dismissing a worker may invite the worker's union representative for an off-the-record meeting. The employer may make a settlement offer to the worker, sometimes a generous offer, which (if accepted) cuts off the possibility of a protracted dispute, saving both sides time, distress and money. This conversation is off the record because otherwise it might prejudice a party making an interim concession for the purposes of settlement only. For example an employer might say "for today, I'm willing to consider that the dismissal is unfair, in order to work out how much it might be worth, and so that I make a credible offer". That concession does not mean the employer actually thinks the dismissal is unfair, and if the worker was able to rely on it in later proceedings, you would never get any settlement discussions at all at this stage...It is the experience of Congress that compromise agreements are not widely used outside of the LRA conciliation process.

NICICTU

Q58. Should any change be made to the process/conditions of compromise agreements as currently used?

5.6 Most respondents answered 'no', or did not comment on this issue:

Not really – most people in employment law understand them.

Legal Island

The ELG does not consider that there is a requirement for any change to be made to the process/conditions of compromise agreements as currently used.

Employment Lawyers Group

5.7 Five respondents advocated some form of change or reform:

EEF NI believe that the process conditions of compromise agreements currently used are over complex and subject to scrutiny by the courts beyond the intention of the parties. We would welcome simplification in this area so that the agreement could be aligned to that of the Agreements issued by the LRA whereby the individual is aware that they are compromising all claims arising out of the termination of employment with the usual ability to make exemptions for personal injury and pension claims.

EEF NI

When compromise agreements are used at the moment, we believe that in the majority of cases this is likely to have followed a period of dispute and that the employer, and perhaps also the employee, will have sought and / or engaged legal assistance.

We are of the view that introducing the concept of compromise agreements as a specific area of dispute resolution would provide small and micro businesses with an option of which they may not previously have been aware.

The FSB supports this initiative as a step in the right direction to ensuring costly employment tribunals are a last resort. In the unfortunate event that an employment relationship can no longer continue, it should enable a business and an employee to part ways in a manner acceptable to both sides. By doing so, this will help to reduce the fear that many small firms have about taking on an employee.

For settlement agreements to work and appeal to employers, they must be simple and straightforward to use and inspire confidence among employers.

We believe that further thought needs to be given to when offers of settlement can and should be made (eg. whether or not this should be encouraged in the absence of a dispute or grievance and appropriate procedures) and how the 'without prejudice rule' will be treated in subsequent tribunal hearings. As the proposals stand, we feel that they introduce a degree of uncertainty for the employer and could be detrimental to business.

FSB NI

Q59. Should compromise agreements be allowed to contain 'non-compete' and confidentiality clauses?

5.8 Most consultees were in favour of retaining non-compete and confidentiality clauses in compromise agreements:

Why not? Employees and employers are adults and should be allowed to agree what they like.

Legal Island

The Party believes that the terms of the settlements are for the parties to the dispute to agree.

Labour Party NI

We believe businesses should have the flexibility to use compromise agreements to resolve a workplace dispute before it has escalated to a formal dispute. These should contain the non-compete and confidentiality clauses.

CBI NI

Yes. Confidentiality and non-compete clauses are required to protect unpublished research, intellectual property, and other sensitive business information from being disclosed.

Queen's University, Belfast

5.9 There were some comments dealing with the interaction of compromise agreements with the original contract of employment.

Yes – issues around non-competition and confidentiality are in many circumstances drivers for persuading employers that a matter should be resolved at an early stage. We see situations in practice where the refusal of the claimant, or his/her representative to accept a confidentiality clause has blocked a resolution which has then only been achieved much later in the process, or by the tribunal. If the general thrust of the employment review is to encourage early conciliation it simply makes no sense to remove factors that may help achieve this. If non-compete or confidentiality clauses are not permitted in a compromise agreement then we would expect to be advising clients to require that the employee into another, separate, contractual agreement. The resulting complications would be good for lawyers, but no-one else. Non- compete and confidentiality clauses are often already included in contracts of employment in any event, where they can have an important and legitimate role to play.

Jones Cassidy Jones Solicitors

We accept that in reality the employer will virtually always require a confidentiality clause and that they are thus an integral part of virtually all compromise agreements. Non-compete clauses should be allowed only to the extent that they mirror any restrictive covenants in the contract of employment.

Thompsons Solicitors

Yes...we need to return the "contract" element to employment contracts and allow employers and employees to conclude mutually beneficial arrangements which terminate the employment relationship.

Peninsula Business Services

Compromise agreements can lawfully include various types of restrictive covenants including non-competition, non-solicitation, non-poaching, etc. Given the strict requirements for independent legal advice on compromise agreements we believe that parties should have the freedom to agree terms of a compromise agreement. We recognise that confidentiality clauses are problematic for DEL because they reduce the Department's ability to know the nature of disputes, keep accurate statistics, etc. However, ultimately, confidentiality clauses are a matter for negotiation between parties and we do not think this will change.

Law Centre (NI)

5.10 A small number of consultees did not agree with, or had concerns about, confidentiality and non-compete clauses.

Congress is totally opposed to the use of non-compete clauses as they can limit the ability of the worker to gain suitable alternative employment. Congress is concerned about the use of confidentiality clauses as they may protect recidivist employers who continually mistreat employees and flout their employment rights.

NICICTU

5.11 The overwhelming view of consultees, however, was that these types of clauses should be retained in compromise agreements.

Q60. Should the term 'compromise agreement' be changed, perhaps to 'settlement agreement'?

5.12 A number of consultees were ambivalent on this question.

It is not a big issue. None of the customers we consulted could care less about the name, provided they continue to be effective in removing claims.

Legal Island

The name of the agreement is less relevant than its use by small businesses.

FSB

This does not matter as long as the parameters remain intact.

University of Ulster

5.13 Whilst half a dozen consultees were opposed, others were in favour of changing the name.

Changing the term 'compromise agreement' to 'settlement agreement' might provide clarity as to the purpose of the agreement, and remove negative connotations associated with the term 'compromise'.

Citizens Advice

Yes. The term settlement agreement is a more accurate representation of what the agreement encompasses and would be a more widely understood term due to its use in contract terms.

CIPD NI

Yes. The University believes that there should be parity between the employment law provisions in Great Britain and Northern Ireland as this will allow for consistency within the higher education sector.

Queen's University, Belfast

Q61. Should Northern Ireland simply maintain parity with Great Britain?

5.14 Most consultees considered that compromise agreements worked in Northern Ireland, and that a system of protected conversations should not be introduced. As such, most consultees did not consider that Northern Ireland should simply maintain parity with Great Britain and, by extension, should use the benefits of devolution to establish and maintain a system of employment relations suitable for Northern Ireland:

The Party believes that Northern Ireland should develop employment legislation that improves employment relations in Northern Ireland.

Labour Party NI

NAT would note that when these proposals were announced in Great Britain there was a great deal of concern that it may allow unscrupulous employers to push employees into agreeing protected conversations and then harassing them without fear that such behaviour may become part of a legitimate subsequent claim in the employment tribunal. We would therefore not recommend the adoption of this process in Northern Ireland.

National AIDS Trust

Protected Conversations are good in theory but will be difficult and could create more problems in practice. Employment legislation is already complicated enough without the employer having to work out which part of their conversation is protected and which part isn't and what happens when the employee disagrees isn't considered and the time spent resolving it. Perhaps there should be more in terms of placing a duty on the employee to approach the relationship with their employer on a more mature footing of mutual trust and respect so conversations can be held that are in the interests of the business and not distorted or manipulated. For example, burden of proof must be on the employee to prove malicious intent. Plenty of legislation exists to deal with unscrupulous employers.

Castlereagh Borough Council

As a large employer the Housing Executive believes that the introduction of a system of protected conversations as part of the use of compromise agreements may complicate discussions on grievance, disciplinary, absence or performance management issues.

NI Housing Executive

After extensive consultation with Members, EEF NI is of the view that protected conversations have the potential to be of enormous advantage to both the employer and employees. We believe that there are few exceptions to the principle that an offer of settlement should be allowed to be put forward on a protected basis. A frank exchange of views would be helpful to both parties to the employment relationship. In particular we believe that the way that protected conversations have been implemented in Great Britain make them of little practical value. Having regard to the potential interpretation for example of "inappropriate behaviour" this would seem to our Members to give little realistic prospect of such conversations being unchallenged and furthermore leading to the determination of the meaning of same by courts and tribunals. This is not helpful to real conversations in the workplace.

EEF NI

5.15 Other consultees were more amenable to the concept of parity between Great Britain and Northern Ireland, but some did highlight concerns about the way in which they have been introduced in Great Britain, particularly with regard to the risk of satellite litigation:

Northern Ireland should adopt parity with Great Britain only if the systems in place there are appropriate to our particular circumstances, and are able to adequately recognise the small business dominance of our economy.

FSB

It is suggested that developments in GB should be mirrored in Northern Ireland but that additional provisions are made in respect of when "without prejudice" talks can occur and an extended broader definition of a "formal dispute".

Peninsula Business Services

On this one, why not? No-one cares about the name. 'Settlement' is slightly more obvious and neutral and slightly less potentially pejorative than 'compromise', which can sometimes be viewed as a barrier to some literal parties but it's not a big problem. NI should not introduce protected conversations, however, for whatever jurisdictions might be covered.

Legal Island

Q62. Should an employer be able to make an offer to terminate an employee's contract in the absence of a formal dispute?

5.16 Consultees were divided on whether an employer should be able to make an offer to terminate an employee's contract in the absence of a formal dispute, which could have been a possible outcome in the event of the introduction of a system of protected conversations.

5.17 Some consultees were in favour.

It is somewhat concerning that the "contract" element of employment law has been dissipated by numerous pieces of employment legislation and tribunal pronouncements. In contractual relationships unrelated to employment law, parties can engage in talks on terminating contracts without fear that they will be liable to compensatory awards simply for addressing the topic. This Review Process is a prime opportunity to being the contract element into what is a contractual relationship. Where an employer offers a compromise agreement then it is open for the employee to accept it or reject it. If they reject it then it should not be construed against the employer or adduced at a later date in evidence against that employer. A formal dispute should be extended explicitly such that an actual legal dispute or claim is not required. For example, situations whereby an employee has a formal grievance process against the employer, they have exhausted internal procedures but yet still feel aggrieved. This is a very common scenario whereby the employment relationship is becoming untenable and the employee may not have a case for constructive dismissal, the employer may not have a case for dismissing the employee and the relationship has broken down. It seems only logical that a compromise agreement may be proposed by an employer at this point without fear that the employee would then resign and claim constructive dismissal.

Peninsula Business Services

5.18 Most other consultees who expressed a view were either opposed outright to this proposal, or had serious reservations.

Arguably there is a dispute of some sort if an employer is seeking to terminate? Parties already use compromise agreements and non-ET1 agreements in such circumstances. Any such discussions should be done via and/or in the presence of Union representatives and/or the LRA.

Donnelly and Kinder Solicitors

Whilst there may be occasions when this could be effective there are a number of difficulties with this which may be too complex (it is noted that ACAS provided hefty guidance as this is a complex subject for employers) and do not provide employers with protections. If there are genuine issues there are already a number of approaches to resolving these which provide better protection for both parties than any settlement agreements would.

Antrim Borough Council

No, we strongly object to the concept of 'protected conversations', which we feel flies in the face of good employment practice. We reaffirm the comments we made last year on this matter:[11] We take the view that the concept is essentially a short cut from due process. The disciplinary and capability procedures permit employers to lawfully terminate an employment relationship and do so in an above-board manner that allows all issues to be properly ventilated and considered. It is important to recognise that employment legislation and case-law emphasise the importance of proper processes for very good reasons. They ensure basic procedural fairness for the employee, but also ensure that employers make decisions that are based on awareness of all the facts, preventing mistakes being made with snap judgements. Anything that seeks to circumvent due process should therefore require powerful justification, but the concept of protected conversations seems only to have the convenience of impatient employers, who cannot be bothered to follow due process, in its favour.

Law Centre (NI)

We have some concerns about the proposal to allow either side to propose settlement even when a formal dispute has not yet arisen. While this option might appear attractive to many employers, it effectively means that an employer might make an offer of settlement without any problem in the employment relationship hitherto arising. This strays into the territory of Compensated No Fault Dismissal, a proposal with which the FSB disagreed. For employers, it could create further uncertainty as to the point, and circumstances, in which the 'without prejudice' rule does or does not apply. We feel that many employers would simply not be confident proposing an offer of settlement if no dispute had arisen, since it could increase the risk of litigation at a later stage (if the employee refuses settlement).

FSB

[11] Law Centre response to Employment Law Discussion paper 2012. See www.lawcentreni.org

Responsible employers should not terminate an employee's contract in the absence of a formal dispute – doing so undermines mutual trust and confidence in the workplace which may result in consequences for organisational performance and competitiveness and a reduced level of employee engagement.

CIPD NI

In Great Britain, the main feature of a settlement agreement is to waive an individual's right to make a claim to a court or tribunal on the matter specifically covered in the agreement. It is important that employees have full understanding of this waiver and the impact it will have on their ability to exercise their right to have their case heard by a tribunal. This should be communicated to them in clear and certain terms, along with information on where to seek further advice on their employment rights, such as being directed to their local Citizens Advice Bureau, or the LRA. A cooling-off period could be introduced to allow the parties to seek advice about the agreement, for example, three weeks. This would increase fairness for employees, providing them with the opportunity to seek independent advice, and ensure equality of arms between the parties. The ELG does not support the proposal in relation to protected conversations. However, it does support an extension to the scope of the use of 'without prejudice' discussions as set out in the answer to question 64 below.

Employment Lawyers Group

Q63. In what circumstances should it be possible for an employer to make an offer of settlement to an employee to end the employment relationship? Examples could include attendance, conduct, performance, retirement, workforce planning, etc.

5.19 This question drew on the development in Great Britain of a draft ACAS Code of Practice on Settlement Agreements, which included possible templates for the use of settlement agreements between an employer and employee in cases of, for example, problems with attendance, conduct, or performance. The Department asked consultees whether it was appropriate to include these as acceptable reasons for conducting a protected conversation, if such a system was to be introduced; and whether protected conversations/compromise agreements could also be used in cases of retirement and workforce planning.

5.20 A wide range of views was presented.

After all options of resolution have been exhausted and with the support of a tribunal as a final resolution.

Individual respondent

Almac strongly supports protected conversations being introduced that enable frank discussions to be held with employees. Almac however believes that these conversations must apply to all scenarios rather than just unfair dismissal. It would be very hard for an HR practitioner to be able to determine quite what the claim may look like before the employee had given it further

thought and subsequently lodged a claim. I am also concerned about how the wording "reasonable" and how this may be interpreted.

Almac

Almost any circumstances, absent unlawful discrimination.

Jones Cassidy Jones Solicitors

On the basis of one of the potentially fair reasons for dismissal.

Donnelly and Kinder Solicitors

Any situation that is in the interest of the business, or potential health and wellbeing of the individual.

Castlereagh Borough Council

We believe that the existing law around "without prejudice" discussions is adequate to allow parties who wish to come to a compromise (rather than follow grievance, disciplinary or dismissal procedures) to do so. However, a culture of good employment relations should be focused on encouraging above board, open discussions between employers and workers, rather than encouraging a practice of "behind the scenes" payments "to make problems go away". Without prejudice resolution of disputes should remain a limited practice when there are good reasons why the parties cannot otherwise find resolution.

Law Centre (NI)

Q64. Should the inadmissibility principle be extended to negotiations leading to termination of employment where no dispute exists?

5.21 The extension of the inadmissibility principle to discussions where no dispute exists would effectively introduce a system of protected conversations in Northern Ireland. Whilst 'without prejudice' discussions can be held by parties where there is a dispute, and no detail from those discussions can be used in evidence, discussions where there is no dispute can be invoked as evidence in future tribunal actions.

5.22 There was a large degree of support for this proposal from a number of consultees.

IoD would recommend the introduction of a system of protected conversations, which would allow employers to raise issues such as poor performance or retirement plans in an open way without fear that these discussions could be used as evidence in a subsequent tribunal. This would benefit both employees and employers. It would help to circumvent time consuming, expensive and stressful (for both employer and employee) processes by helping to air grievances and misunderstandings in an informal environment.

Institute of Directors

It is clearly sensible that the employee and employer should be able to have a 'without prejudice' discussion to explore the options for an agreed parting of the ways, rather than letting the situation fester until discipline or some other

dispute arises. As matters stand one party has to "engineer" an artificial dispute in order to have a 'without prejudice' conversation. Some ELG members have advised on just that. The ELG supports an extension of the without prejudice rule to cover employment situations where there is no dispute, but where one party wants to raise an issue with a view to compromise.

Employment Lawyers Group

In cases where trust and confidence has irretrievably broken down, with mutual agreement a termination of employment may be in the interest of the employee and employer.

CIPD NI

5.23 Other consultees were strongly opposed to such a development.

Employers are already free to hold 'without prejudice' discussions with employees, and vice versa, allowing conversations to take place without fear of what was said being brought before an employment tribunal. Compromise agreements could allow for an employer to have a conversation with an employee about sensitive issues, on the basis that those conversations would not be admissible at a tribunal hearing. Employees must be given independent advice to ensure that they are aware the agreement that they are signing, or the conversation they are having, cannot be brought before a tribunal. Any new system of protected conversations must be clear on what will and will not be considered to come under the remit of any legislation, so that employers and employees alike have certainty about what may be admissible as evidence before a tribunal. Any system that might be introduced would have to be carefully and clearly constructed in order to protect both parties. .....Suggested exemptions to the new rules include, for example, dismissal for whistle blowing, discrimination cases, or breach of contract. The latter in particular could present a very large range of material, which itself could become the subject of litigation as its extent and scope is tested. If there is insufficient clarity in the legislation, tribunals may see an increase in preliminary hearings to ascertain whether a conversation is admissible or not, culminating in more lengthy proceedings, higher cost, and added stress and anxiety around the tribunal process.

Citizens Advice

We are strongly opposed to the introduction of a system of protected conversations, as we believe this is unjust and would legitimise employers' bad practices of bypassing existing disciplinary and performance procedures.

Prospect

No ... we strongly believe that "without prejudice" discussion should remain limited to circumstances where there is a dispute and the parties cannot otherwise find resolution. We do not believe the Government should be encouraging the practice.

Law Centre (NI)

Q65. Should the protection apply in respect of potential unfair dismissal claims only, or in other circumstances?

5.24 This question presupposed that consultees were in favour of introducing a system of protected conversations in Northern Ireland.

5.25 Most consultees were in favour of extending the protection beyond potential unfair dismissal claims.

If they apply to any, they should apply to all. There are existing options in none-ET1, compromise agreements and without prejudice discussions. Applying a special protection to one jurisdiction (UD) is a recipe for disaster. Satellite litigation will abound.

Legal Island

If it is to be effective it must extend beyond the circumstances of unfair dismissal claims, otherwise it has severely limited value.

EEF NI

It is our understanding that while offers of settlement agreements and subsequent pre-termination discussions will be inadmissible as evidence in any subsequent unfair dismissal claims (a point we support), this does not apply to automatically unfair claims or claims relating to discrimination, breach of contract or wrongful dismissal. It is therefore possible that a claimant will simply assert, for instance, an automatically unfair reason for the claim in order for the evidence to be considered. It would also seem that if a discrimination claim is brought at the same time as a connected unfair dismissal claim, the 'protected conversation' can then be taken into account. An employer will not always be able to foresee, at the point the discussion is initiated with the employee, what type of claim he or she might later bring and therefore it will not be safe to assume that evidence of that conversation will be withheld from any subsequent tribunal. There is also no guarantee that having a protected conversation with an employee, followed by an offer of settlement, will result in a clean break. The employee could reject the offer and then the employer is back to square one in having to follow a fair dismissal process, and with the added risk that the employee will try to introduce the pre-termination discussions into evidence in any subsequent ET claim that goes beyond ordinary unfair dismissal. We would therefore question whether the current proposal provides sufficient security for employers. Consequently, we suggest that the extent to which settlement agreements are cited in automatically unfair, discrimination and other claims is monitored Any exceptions to the protection of inadmissibility should reflect those identified in GB, in the first instance, until or unless these are clarified or amended in light of practical application.

FSB

5.26 Two consultees considered that protected conversations should be restricted to potential unfair dismissal cases.

It is submitted that the protection is better suited to unfair dismissal scenarios and ought not to extend to cases where the settlement is motivated on discriminatory grounds.

Peninsula Business Services

Q66. What are the equality/discrimination risks in creating a system of inadmissible offers of settlement?

5.27 There was a frequently-expressed view that there would be a number of equality and discrimination risks for employees in creating a system of protected conversations:

The Commissioner welcomes a debate on how best to ensure that there can be open and meaningful discussions between employers and employees about an individual's plans, particularly in relation to retirement. The Commissioner welcomes any process which supports the above aim so long as this is done fairly. Additional barriers however should not be introduced for complainants alleging discrimination and current protections against discrimination must not be diluted as a result of the introduction of protected conversations or other proposed systems. Should protected conversations be introduced, there will be a need for better guidance, perhaps in the form of a Code of Practice, setting out safeguards to ensure that the rights of individuals to these proposed discussions are protected.

Commissioner for Older People

While safeguards to minimise equality/discrimination risks are outlined in the consultation document, the risk remains that the proposed system of protected conversations may, either intentionally or unintentionally, be employed more frequently by employers to terminate the employment of more vulnerable employees, including migrant workers, who may not be as aware of employment rights and alternative courses of action. NISMP would advise that the use of protected conversations be monitored and an equality impact assessment regarding their use carried out.

Northern Ireland Strategic Migration Partnership

They are many. This is one of the many reasons why Congress is firmly opposed to protected conversations.

NICICTU

5.28 One employer considered that no risks would exist.

There are none as long as approval has been agreed by both parties under the new system.

McGimpsey Brothers (Removals) Ltd

5.29 Some consultees considered this question from the point of view of the risks to employers.

Settlement agreements in the context of without prejudice conversations do nothing to protect an employer from discrimination or constructive dismissal claims if they act improperly.

CIPD NI

...t is worth remembering that the original intention of "compromise agreement" was to provide a method whereby employers could reach an Agreement which provides certainty that they will not thereafter be sued. The protection is only useful if it is essentially a complete one. Similarly, a protected conversation is only helpful to an employer if it can be sure that it will not be brought up later. The provisions in GB simply do not achieve this. In GB an employer may seek to enter into a protected conversation under Section 111A of the Employment Rights Act, but if the employee perceives that the underlying motive is a discriminatory one, or an automatically unfair one, then the conversation becomes admissible. In practice the employee can therefore decide whether the conversation is to be inadmissible. It is hard to see when any careful lawyer would suggest to an employer that such a conversation provides adequate cover, and we would continue to advise our clients to assume that any such conversation may be admissible. A protected conversation will only be useful if it is completely protected, rather than perhaps protected for some purposes.

Jones Cassidy Jones Solicitors

Q67. BIS has stated that if an employer wants information about an individual's plans for workforce planning purposes (e.g. retirement), they are already able to ask in an open and trusting management conversation. Is this your understanding of the law after the abolition of the default retirement age?

5.30 The original intention behind protected conversations was to enable employers to safely discuss workforce planning issues with older staff, following the abolition of the default retirement age in 2011. The Department sought views as to whether protected conversations could, in fact, be used for this purpose. Consultees were generally divided into two camps:

Yes. Asking age-appropriate questions is not unlawful. It's no different than asking a sick employee about their health or an apprentice about their training. It is sensible management to take different circumstances into account. That said, all employers should ask all employees about future plans and pensions, especially as auto enrolment extends to cover all employees. However, discussions about retirement should be restricted to those who might be eligible.

Legal Island

This would be our understanding of the law. However, we are aware through our dealings with our clients that there is a lot of uncertainty and fear amongst employers who believe that addressing anything surrounding retirement leaves one exposed legally in respect of age discrimination and also leaves one exposed locally in terms of a disgruntled employee who feels that the company are trying to oust them. Any developments in this area and the area of compromise agreements would need to be cognisant of this. It needs to be

factored that employers have operated for decades on the basis that retirement ages were perfectly legitimate and indeed this stance still exists throughout the European Union. Employers ought not to be held to ransom on the issue of retirement, particularly given the uncertainty that surrounds having an objectively justifiable reason for retirement. If discussions surrounding compromise agreements in respect of employees nearing contractual retirement age were deemed to be "without prejudice" then there would be far less uncertainty for employers and employees alike.

Peninsula Business Services

The suggestion that employers are able to ask employees about retirement plans "in an open and trusting management conversation" is false. .....There is therefore a pressing need for the ability to have a clearly delineated framework for a protected exchange of facts – not, however, for performance reviews as some have feared. Allowing an employer or employee to initiate a protected conversation – a discussion about an employee's retirement plans, for example – would begin with an initial request for information by either party, with a view to a discussion taking place. The introduction of such a system would be useful in addressing the business uncertainty created by the abolition of the default retirement age. CEF recommends that a working group is established to develop a mechanism for a "protected conversation solely for retirement planning". We believe this to be an achievable goal.

Construction Employers Federation

5.31 Four consultees provided more nuanced answers to this question.

Yes. But not just to one individual. Advice indicates, if asked, it should form part of a wider questionnaire set that applies to all employees, irrespective of their age and should not refer directly to age or retirement but rather should ask about their respective plans over perhaps a five year period.

University of Ulster

While this may well be the case, small businesses may not be aware or confident of what they can discuss with their employees, and they may have concerns that raising any issue relating to age or retirement may make them vulnerable to a claim of discrimination. For this reason, any guidance or Code of Practice produced must include details of what can and cannot be discussed, with examples of how such conversations might proceed.

FSB

It is right to suggest that an employer can ask – but this wholly ignores the concerns about the practical effects of so doing if the employee decides to treat the conversation as evidence of, for example, age discrimination. This is especially the case where the employee is older, and employers have real concerns about this. More generally, we consider that the ACAS Code of Practice, far from clarifying the position on Settlement Agreements (apart from pre-dispute Agreements) has actually complicated it, introducing a new and parallel concept of "improper behaviour", which is different from "unambiguous impropriety". The reference in the Guidance to a 10 day period following receipt of the written agreement for consideration by the employee runs counter to practical timescales and the dynamic that is often taking place in

the context of discussions. In GB there is a 24 paragraph Code of Practice and 88 pages of Guidance from ACAS explaining it, which suggests a significant degree of complication. (In fairness this includes helpful model letters and a model Agreement). Article 245, 3 a-d of the Employment Rights (Northern Ireland) Order 1996 sets out four different categories of persons who can be a relevant independent advisor to the employee, and who can therefore sign off a compromise agreement. When introduced it was envisaged that often this need not involve lawyers. Regrettably, although perhaps understandably, trade unions and other organisations who assist employees have largely declined to authorise or certify members or staff as relevant independent advisors, leaving little practical choice except for lawyers.

Jones Cassidy Jones Solicitors

Employees don't understand it. More should be done in terms of placing a duty on the employee to approach the relationship with their employer on a more mature footing of mutual trust and respect so conversations can be held that are in the interests of the business and not distorted or manipulated. For example, burden of proof must be on the employee to prove malicious intent. Plenty of legislation exists to deal with unscrupulous employers.

Castlereagh Borough Council

Q68. If such a system was to be introduced, should it be underpinned by legislation, or a code of practice, or by guidance, or a combination of these?

5.32 In line with Better Regulation principles the Department considers that, as a general rule, legislation should only be considered as a last resort in addressing policy questions. We therefore asked consultees if they considered that legislation was necessary, or if protected conversations could be instituted by a Code of Practice, or less formal guidance.

Some sort of good guidance might be useful. Why complicate things with Codes or legislation? Set out a list of good questions and good management techniques or practices. Too often managers get advised on what not to do. What they really need is advice on how to do things.

Legal Island

EEF NI believes that legislation and a Code of Practice would be of assistance. Overall we favour a Code of Practice which is succinct and signposts readers to more detailed non-Statutory Guidance.

EEF NI

A combination of these. Without, there is the potential that employers may be misled about the extent of protection afforded. The Code of Practice should include best practice principles.

CIPD NI

It should be underpinned by a combination of guidance and a Code of Practice. Any such publications should be accompanied by short clear guides

and proactive advice and training provided, and minimise the seemingly necessary legal input required to prepare and defend a case.

FSB

Such a system should be underpinned by a Code of Practice.

Queen's University Belfast

Congress is firmly opposed to protected conversations. Congress is also deeply concerned at the content of the ACAS Settlement Agreement – A Guide, particularly in relation to the template letters and model agreements, but also with the fact that, according to the understanding of Congress, it goes beyond the content of the wording of the GB Legislation.

NICICTU

Q69. What safeguards should be enacted to ensure that the rights of parties to these negotiations are protected? (An example may include withdrawing inadmissibility on grounds of improper behaviour. Please provide suggestions on any definitions required).

5.33 If a system of protected conversations was to be introduced, it would be important to ensure that any new processes could not be abused. The Department sought views as to how to protect the rights of employers and employees.

We do not believe that it will be possible to introduce 'protected conversations' without over-complicating the position or adding so many caveats that the protected parts become meaningless. Turn this idea on its head –

1. Enshrine the right of managers to discuss performance issues with employees or workers in law and set out good management practice, so that the absence of same might lead to a negative inference.

2. Remove any negative connotation from either party initiating discussions and encourage engagement at an early stage.

3. Develop agreed guides between the CIPD and NIC-ICTU along the lines of 'This is what a good manager does' and 'This is what a good manager says' and 'This is what a good manager looks like' or something similar.

Encourage contact; effectively remove the right to complain about a manager managing, and you won't need to worry about inadmissibility.

Legal Island

Anything that dilutes the confidentiality of settlement discussions will severely inhibit employers from entering into the discussions and increase the likelihood of claims. The current test for introduction of evidence about without prejudice conversations, of unambiguous impropriety, would be best.

Jones Cassidy Jones Solicitors

5.34 The Equality Commission provided a very detailed answer to this question, by way of a general response to the questions on protected conversations. The

Commission is not clear that the introduction of such protected conversations will significantly "add value".

Firstly, as raised in our earlier response, it is important, as is the case proposed in Great Britain, that there are exceptions to the confidentiality principle, for example, claims made on grounds other than unfair dismissal, such as discrimination. We note that in Great Britain that there are restrictions to the inadmissibility principle where there is "improper behaviour by a party". We note that it is for a tribunal to determine what constitutes "improper behaviour" but it is clear from the ACAS Code of Practice on Settlement Agreements[12] *that some examples of improper behaviour include discrimination on a wide range of equality grounds including age, sex, race, disability and sexual orientation.....it is important that if such a system is introduced, it does not create additional barriers for complainants alleging discrimination. .....*

.....We are of the view that an employer can initiate a discussion about a worker's future plans provided it is raised in a neutral way and does not treat anyone less favourably because of their reply. We agree that if protected conversations are introduced, that there should be detailed and clear guidance for both employers and employees so as to mitigate against the risk against an employer inadvertently acting improperly. We also agree that there is a risk of satellite litigation against employers on issues, for example, related to whether or not an employer's conduct amounted to "improper behaviour". In addition, as taken forward in the ACAS Code of Practice, it is important to have clarity for employers on when employers can rely on the "without prejudice" principle which covers situations where there is an existing dispute between the parties.

We also note that under the without prejudice principle, as regards discrimination claims, discussions are not admissible in evidence unless there has been some "unambiguous impropriety". The ACAS Code states that as the test of "unambiguous impropriety" is a narrower test than that of improper behaviour, discussions that take place in the context of an existing dispute will not be admissible unless there has been some "unambiguous impropriety".

The Commission considers that these different standards which apply in relation to discrimination issues have the potential to cause confusion between employers and employees. We also note from the ACAS guide that whilst it is not a legal requirement. employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. It would therefore appear that the complainant has little recourse to redress if an employer decides not to follow good practice and refuses to allow an employee to be accompanied to the meeting.

Equality Commission

5.35 Other views included the following.

[12] ACAS Code of Practice for Settlement Agreements July 2013, www.acas.org.uk

It will be important to clearly define "improper behaviour", with examples. Otherwise, the fear will remain that any reference to any equality ground or performance issue will open a path to claims of improper behaviour, unlawful discrimination or unfair dismissal.

FSB

There is already extensive guidance on unambiguous impropriety and improper behaviour. The guidance outlined in the ACAS Code of Practice could be adopted. Definitions could include: restrictive covenants, improper behaviour, what constitutes a dispute, contemplation of a dispute, inadmissibility, undue influence, duress, unconscionable bargain etc.

Peninsula Business Services

Q70. How do we ensure that there is an equal balance of power between employers and employees in settlement negotiations?

5.36 In the consultation document, the Department identified a number of key principles for parties to adopt in the event that a system of protected conversations is introduced. One such principle was that there should be an equal balance of power between the parties in compromise or settlement negotiations. The Department sought views as to how this could be achieved:

EEF NI believes that in any employment relationship both parties should be free to initiate such conversations and that with the appropriate safeguards ensure a balance of power in settlement negotiations.

EEF NI

The Party believe that the Right to be Accompanied should be used in any such discussions.

Labour Party NI

There needs to be transparency, consistency and accountability. A Code of Practice or guidance would provide good practice to ensure fair play.

CIPD NI

As explained in the consultation document, settlement negotiations are usually initiated by the employer, thus suggesting an inherent power balance in favour of the employer who wishes to terminate the employment of the employee. In order to minimise this, NISMP would recommend that information on employment rights and related Northern Ireland specific contacts is disseminated to migrant workers who have been given, or are about to be given, permission to enter the UK and work in Northern Ireland. We would further recommend that a small number of employment support hubs, following the model of the Ethnic Minority Support Unit in Newry and Mourne Council, are set up to act as a liaison between migrant workers, who are notoriously difficult to contact, and advice and support organisations.

Northern Ireland Strategic Migration Partnership

This cannot be done with protected conversations. Congress is firmly opposed to protected conversations. However, because of the very serious

nature of the discussion, the risks of abuse, the difference in relative bargaining positions and the fact that emotions may run high, it would help if the employee had the right to be accompanied at that meeting by a trade union official.

NICICTU

We do not think that there is much DEL can do to 'ensure' an equal balance of power by introducing a "protected conversation". Such conversations are the antithesis of equality as they will much reduce an individual's right to make a claim to the tribunal.

Law Centre (NI)

Q71. How do we avoid satellite litigation?

5.37 The intention behind the introduction of a system of protected conversations, as with many employment law reforms, would be to reduce the number of claims to tribunal. The Department sought views as to whether and how this could be achieved, and received a range of opinions on this issue:

The inclusion of good practice and template letters could minimise the possibility of satellite legislation. Providing examples of improper behaviour could provide clarity and avoid satellite litigation.

CIPD NI

By not introducing protected conversations however designated.

Thompsons Solicitors

Satellite litigation would be avoided by clearly defining the rules relating to protected conversations.

Queen's University Belfast

It is submitted that compromise agreements are highly unlikely to spawn satellite litigation. In fact, they are more likely to reduce satellite litigation in employment dispute matters in addition to reducing case decisions being appealed. As such, compromise agreements should be encouraged. There is, of course, a lot of potential for satellite litigation in the event that pre-termination negotiations do not result in a settlement and tribunal proceedings follow. In these circumstances there is potential for satellite litigation about whether what was said in those negotiations is covered by the principles of confidentiality normal 'without prejudice' principles, or is admissible. In addition there is the potential for satellite litigation as to what constitutes "improper behaviour". On this basis there needs to be clear guidance on relevant terms and requirement governing and framing the area of compromise agreements. In addition, if the LRA were to provide a robust compromise agreement template in line with the new developments then this would help reduce the likelihood of satellite litigation. Bearing in mind the above we need to be cognisant of the fact that compromise agreements are far more likely to reduce the number of cases proceeding to tribunal even factoring in the possibility of satellite litigation occurring.

Peninsula Business Services

I do not think it will be possible to avoid satellite litigation in all circumstances. The majority of settlements currently via compromise agreement are successful. Protected Conversations introduces different legal arguments and the prospect of different legal jurisdictions and satellite litigation.

University of Ulster

It appears to use that the concept of "protected conversations invites satellite litigation not least on the different interpretations of "improper behaviour" and "unambiguous impropriety".

Law Centre (NI)

Departmental response

5.38 It is clear from consultees' responses that compromise agreements generally work well in Northern Ireland when an employer or employee needs to end an employment relationship. There is anecdotal evidence that they are reasonably widely used. Consultees are generally ambivalent as to whether they should be renamed as 'settlement agreements'.

5.39 The issue of whether to introduce a system of protected conversations is considerably more controversial. On the one hand, several consultees, including employers and employer representatives, are in favour of introducing a system whereby it would be possible to ensure that certain difficult conversations about the employment relationship could not be held to be admissible in future legal action. This would be particularly welcomed in respect of problems related to performance, attendance, or conduct. Some employers would also be keen to see protected conversations used to assist with their workforce planning considerations.

5.40 On the other hand, some legal advisers, employee advice centres and trade unions were opposed to the introduction of a system of protected conversations. They considered that such a system would be imbalanced in favour of employers, and that employees could be at risk if they entered into an ostensibly 'protected' conversation which could, in fact, adversely affect their position in any future legal action, in that important evidence could not be adduced at a tribunal.

5.41 Some other consultees highlighted equality and discrimination risks inherent in a system of protected conversations, most notably the possibility of age discrimination, if such conversations could be used to discuss retirement. It is notable that there was a range of opinions from consultees as to whether employers could at present lawfully broach retirement discussions with their workers.

5.42 It is evident that there is not a widespread appetite for protected conversations to be introduced. The Department agrees that the potential risks to the rights of employees outweigh any benefits to employers. In particular, it is very unclear as to whether protected conversations could reduce satellite litigation.

5.43 The general lack of clarity has led the Department to conclude that legislating for a system of protected conversations would be inappropriate at this time. Nor would it be appropriate to institute a statutory Code of Practice. The message from this element of the consultation is that employers and employees need clearer guidance as to how they can hold difficult discussions relating to the employment contract.

5.44 The Department remains convinced that the principles expressed in the initial consultation document are valid. These were as follows:

- *Employers and employees should have a means of avoiding a protracted legal dispute when one of the parties wishes to end the employment relationship, both where a dispute exists, and in the absence of a formal dispute.*

- *Where a party wishes to end an employment relationship, it should be on an amicable, consensual, and mutually beneficial basis, in accordance with the law and with no (or at least minimal) legal costs.*

- *There should be an equal balance of power between employers and employees in these circumstances.*

- *Any process should provide certainty to employers that industrial tribunal action can be ruled out, provided the employer acts lawfully and fairly.*

- *Any process should be fair to the employee in the terms of any settlement, and not prejudice their ability to gain future employment.*

- *Any process should apply to employers of all sizes.*

- *We want to avoid unintended administrative burdens and the possibility of satellite litigation.*

- *Any new system should comply with better regulation principles.*

5.45 The Department considers that legislation, or a Code of Practice, to ensure that employers and employees can adhere to these principles, are not appropriate at this time. There is a definite need, however, for clear guidance for employers and employees as to how to conduct a safe and lawful discussion about ending the employment relationship. The Department intends to commission the development of guidance for employers on the handling of what are commonly referred to as ‘difficult conversations’.

6 Public Interest Disclosure

6.1 The Public Interest Disclosure (Northern Ireland) Order 1998 ('the 1998 Order') protects workers, who 'blow the whistle' about wrongdoing in the workplace, from detriment. It amends the Employment Rights (Northern Ireland) Order 1996, and makes provision about: the kinds of disclosures which may be protected; the circumstances in which such disclosures are protected; and the persons who may be protected.

6.2 A legal loophole, created by the 2002 GB Employment Appeal Tribunal decision of *Parkins -v- Sodexho*[1], currently exists within whistleblowing legislation, whereby an individual can rely on the employment protections afforded, where the matter relates to his/her own personal work contract. The intention of the legislation, as the title of the 1998 Order suggests, is to normally only afford protection where disclosures are made in the public interest.

Q72. Do you agree that Parkins -v- Sodexho created a loophole in the law on public interest disclosure to the effect that a worker could make a protected disclosure on matters related to his/her personal work contract?

Q73. If you consider that a loophole exists, do you agree that it should be closed in Northern Ireland, by means of amendment to the Public Interest Disclosure (Northern Ireland) Order 1998?

6.3 Twenty-six consultees provided responses to some or all aspects of the public interest disclosure consultation chapter.

6.4 There was widespread agreement that *Parkins -v- Sodexho* had created a loophole in the law, to the effect that a worker could make a protected disclosure on matters related to his/her work contract, with 18 consultees considering that this was the case. Fifteen of these consultees also agreed that the loophole should be closed in Northern Ireland, by means of amendment to the Public Interest Disclosure (NI) Order 1998. Indicative responses are set out below.

Almac does agree that any unintended loophole created should be closed.

Almac

We agree that the Parkins -v- Sodexho *case highlights an issue as to the extent, if any, to which a worker should be able to make a protected disclosure on matters related to his/her personal contract.*

Thompsons Solicitors NI

Yes, there would appear to be such a loophole ... it should be closed by way of amendment.

FSB NI

The closing of this loophole is supported. Whistleblowing legislation serves a very important purpose as we have seen in recent media stories with regards to abuse of individuals and gagging clauses in public services. Not closing this loophole is more likely to bring the overall legislation into disrepute by what are no more than abuses of very important pieces of legislation which exist for the greater good rather than to serve the interests of the individual.

Castlereagh Borough Council

It is accepted that the loophole should be closed as suggested so that it cannot be used for a private contractual issue.

NI Housing Executive

6.5 Three consultees, who agreed that a loophole exists, suggested alternatives to amendment to the Public Interest Disclosure Order as follows.

There is no shared position among the ELG on this issue. One view is that Northern Ireland should mirror the GB position. However, other members believe that a better and more focused solution to this issue would be to amend Article 67B(1)(b) of the Employment Rights (NI) Order 1996 to read (proposed amendment in bold):

that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which that person is subject other than a private contractual obligation which is owed solely to that worker.

Employment Lawyers Group

6.6 Thompsons Solicitors suggested the same amendment. For another respondent, which specialises in public interest issues:

We believe amendments to PIDO are required to block the current loophole but that the introduction of a public interest test is a problematic way to deal with the issue. We are concerned that a public interest test will not address the legal loophole, and will inevitably increase litigation time, increasing the cost for employees, employers and the taxpayer. As it currently stands PIDO identifies broad categories of public interest issues - criminal offences, dangers to the environment, miscarriages of justice, health and safety concerns and breaches of legal obligations. A public interest test will not necessarily close the loophole, as the industrial tribunal will have to assess whether a whistleblower's actions were or were not in the public interest. It is feasible that an individual, faced with unfair treatment by his employer relating to his own contractual terms could reasonably believe that raising such an issue would be in the public interest. In such a case, this would still be classed as a protected disclosure under the order and therefore the proposed solution would not necessarily solve the problem.

Public Concern at Work

6.7 Four consultees did not consider that *Parkins -v- Sodexho* created a loophole in public interest disclosure law, and did not therefore consider that any amendment was required. Their responses are as follows.

No, lack of responsibility by the employer to fully train and induct his staff member is becoming standard throughout the industry.

Individual respondent

We consider that matters related to the individual's contract of employment may legitimately be in the public interest and do not agree that there needs to be any change in this.

Prospect

No, we believe it filled a gap in the legislation as there is insufficient protection available for employees who remain in employment but suffer a detriment for raising issues/concerns relating to their contractual rights.

Donnelly and Kinder Solicitors

It is recognised that the new condition of public interest seeks to overturn the 2002 Employment Appeal Tribunal judgment in Parkins v Sodexho which broadly interpreted the 'failure to comply with a legal obligation' category to include legal obligations arising from a contract of employment. The Explanatory Notes to the Enterprise and Regulatory Reform Bill justified the imposition of this new requirement as a means of excluding personal rather than public interest disclosures. However, a concern arising out of an individual contract term may still raise public interest issues regarding an employer's compliance with employment or safety laws or in disclosing a discriminatory culture or practice in a public sector employer. The restrictive public interest duty presents further barriers to workers who suffer victimisation or are dismissed for raising concerns at work.

NICICTU

Q74. Do you consider that a reasonable worker could determine what might be in the public interest for disclosure purposes?

6.8 Legal Island, Almac Ltd, CIPD NI, Queen's University, University of Ulster, Antrim Borough Council, Castlereagh Borough Council, the Law Centre and an individual respondent all agreed that a reasonable worker could determine what might be in the public interest for disclosure purposes. Other consultees provided the following responses.

The proposed wording is that the worker should hold a reasonable belief. This is an adequate description.

FSB NI

It is submitted that "the man on the Clapham omnibus" could reasonably determine whether or not their purported disclosure is in the public interest. In any event, if they made a mistake in this respect their misunderstanding should not be used as a shield in the same way that an employer's misunderstanding of their obligations may not be used as a shield.

Peninsula Business Services

6.9 Other consultees either disagreed, or raised concerns as to how a reasonable worker could define 'in the public interest' as follows.

We support the proposal that workers must be able to demonstrate that they reasonably believed the disclosure to be in the public interest. However, it is not clear how tribunals will interpret this requirement; workers will only have to demonstrate that they reasonably believed it to be in the public interest, not that it actually was. We therefore believe that guidance is required on this.

EEF NI

.... One view, among those who believe that Northern Ireland should mirror GB, is that it is not an unfairly high hurdle for a reasonable worker to determine what might be in the public interest for disclosure purposes. Other members of the ELG believe that the amendment proposed [by the ELG] at answer 73 above would mean that this would be a more straightforward matter for a worker rather than a worker having to consider exactly what is in the public interest.

Employment Lawyers Group

6.10 Thompsons Solicitors NI agreed with the Employment Lawyers Group. Donnelly and Kinder Solicitors were unsure. For Public Concern at Work:

It is feasible that an individual, faced with unfair treatment by his employer relating to his own contractual terms could reasonably believe that raising such an issue would be in the public interest. In such a case, this would still be classed as a protected disclosure under the order and therefore the proposed solution would not necessarily solve the problem. A public interest test will also cut across all the categories of wrongdoing which means, for example, when raising a concern about a criminal offence an individual would have to show they had a reasonable belief it is in the public interest. It is common sense that an individual who makes a disclosure about criminal offences, dangers to the environment, miscarriages of justice and dangers to health and safety, would believe the issue is in the public interest and so should not be subject to an additional public interest test.

Public Concern at Work

6.11 NICICTU disagreed that a reasonable worker could determine what might pass a public interest test.

Q75. Do you consider that closing the loophole could inhibit employees from making important disclosures about wrongdoing?

6.12 Legal Island, Almac Ltd, CIPD NI, Jones Cassidy Jones Solicitors, FSB NI, Queen's University, the University of Ulster, Antrim Borough Council, Castlereagh Borough Council, Peninsula Business Services, and the Law Centre all agreed that closing the loophole would not inhibit employees from making important disclosures about wrongdoing.

6.13 Some consultees sought additional clarity in guidance and the legislation. Their comments are as follows:

I think it is unlikely to deter many workers from making important disclosures. However I do think that current legislation needs to be simplified as its complexity is likely to be an inhibiting factor.

Alana Jones Workplace Solutions

...Those members who believe that Northern Ireland should mirror GB, consider that closing the loophole could have the described effect. However other members, who propose the amendment at answer 73 above, believe that it would make this unlikely.

Employment Lawyers Group

6.14 Donnelly and Kinder Solicitors, NICICTU and an individual respondent considered that employees would feel inhibited in making important disclosures.

6.15 Public Concern at Work also raised concerns:

... the perception will be that this test is a barrier to genuine whistleblowers. When this is added to the fact that PIDO is little known and often misunderstood, we believe that the legislation will be undermined by this approach. It will also add to the idea promulgated in the media that if you are a whistleblower, you will suffer and that the law is too complicated to protect you.

In sectors such as health and care, where whistleblowing can save lives and taxpayers' money, and where gagging clauses and hierarchical professions within workplaces impose real obstacles for the individual, a public interest test will be seen as another obstacle. The honest and reasonable whistleblower, faced with an increasingly complex piece of legislation to navigate should they be poorly treated, may choose not to speak up. This is a rather damning position, nearly two decades on from the Bristol Royal Infirmary Inquiry when the whistleblower, Dr Stephen Bolsin, was forced to leave the United Kingdom to find work. It should be remembered that the law should encourage individuals to become whistleblowers. To do so it must be seen as providing clear, robust protection.

Our suggested alternative would be to amend the meaning of a breach of legal obligation under the list of wrongdoings within the order to exclude situations where a private contractual obligation is owed solely to that worker. This approach would close the loophole identified in the consultation but it would do so without the side effects of a public interest test outlined in our submission.

Public Concern at Work

DISCLOSURES MADE OTHERWISE THAN IN GOOD FAITH

6.16 Until 25 June 2013, public interest disclosures could only be protected in Great Britain if they were made 'in good faith', essentially meaning that the person making the disclosure wanted to 'right a wrong'.

6.17 Section 18 of the GB Enterprise and Regulatory Reform Act removes the necessity to make a protected disclosure 'in good faith'. This will allow protected disclosures to be made by an individual motivated by an alternative reason than simply righting a wrong; for example, money or revenge.

6.18 However, section 18 also provides a power to an employment tribunal to reduce the compensation payable to the person making the disclosure by up to 25%, if it considers it is "just and equitable in all the circumstances to do so".

Q76. Do you agree that Northern Ireland public interest disclosure legislation should be amended to allow protected disclosures to be made otherwise than 'in good faith'? Please provide reasons for your answer.

Q77. If you agree with allowing for protected disclosures to be made otherwise than 'in good faith', should an industrial tribunal be empowered to reduce the level of compensation awarded to the whistleblower? What sort of limit should apply to the reduction?

6.19 Four consultees agreed with allowing protected disclosures to be made otherwise than in good faith. Indicative responses are listed below.

The Party believes that workers should not be impeded in making public interest disclosures and require protection from dismissal in order to enable them to do so without fear of retribution by employers.

Labour Party NI

Yes. Congress notes that the duty of good faith has been much criticised and its repeal has been called for by both academics and professionals. Dame Janet Smith in the Shipman Inquiry questioned whether good faith should be omitted as the 'incrementally exacting requirements' of PIDA were sufficient discouragement to malicious and unfounded claims. The partial removal of the condition of good faith to the calculation of compensation is an advance although its total repeal would be more welcome. The focus should be on the value of the information disclosed and not the motive of the whistleblower. A whistleblower may have mixed motives in raising a concern, but the fundamental issue is whether a disclosure is in the public interest. If a tribunal allows employers to challenge the motives of the messenger then important warnings of wrongdoing may be lost.

NICICTU

Yes we agree that the legislation should be amended to this effect as we believe it would encourage whistleblowing. The important public policy aim is to expose malpractice and institutional abuses. Thus, the emphasis of Public Interest Disclosure legislation should be on ensuring that workers feel protected when highlighting malpractice so as to ensure that regulatory bodies can take the necessary remedying action. The motivation of the employee is irrelevant if the public interest is protected. We think the approach adopted in GB makes sense whereby there is a power for an employment tribunal to reduce the compensation to instances where the disclosure was made otherwise than in good faith. Crucially, this is a discretionary power.

Law Centre (NI)

If a public interest test was to be introduced without reforming good faith then this will produce a situation where the whistleblower will need to raise a concern covered by the wrongdoing in the act, show they believed it was in the public interest and then show this was all done without an ulterior motive. This would create an unacceptably high burden for genuine whistleblowers seeking compensation for victimisation. This state of affairs may frustrate the public policy objective of the law - to encourage genuine whistleblowers to raise concerns at the earliest opportunity.

Our suggestion would be to remove the good faith test entirely, or alternatively move it from the point at which a tribunal decides liability to the point at which the level of compensation is awarded. We envisage the tribunal being able to reduce the level of compensation if the tribunal judge believes the whistleblower has acted in bad faith. There is already a precedent for this in the Polkey reductions used in allowing for unfair dismissal damages to be reduced where there has been contributory negligence.

Public Concern at Work

6.20 Two consultees had a similar view that one possibility would be to move the good faith test to consideration at the point of compensation:

There would be a concern ... that the removal of the made in good faith requirement would leave the ... legislation open to abuse. However others have raised the concern that its retention in addition to the proposed revised public interest requirement could act as a disincentive to whistleblowers and prevent serious wrongdoings being brought to light. It is accepted that these tensions could be offset by allowing the tribunal to reduce the level of compensation ... It is suggested that the maximum range of such a reduction could be between 50 to 25 percent.

NI Housing Executive

The ELG agrees that given the requirement of a genuine public interest, the matter of good faith should not arise other than as dealt with [in relation to compensation]. There is no shared view among the ELG on [compensation]. One view is that a tribunal should have the power to reduce compensation by up to 25% where the disclosure is made other than in good faith. The other view is that the tribunal should have discretion to reduce compensation by a greater amount than 25%.

Employment Lawyers Group

6.21 One consultee considered that the issue of motive should not be considered:

We agree that given the requirement of a genuine public interest, the matter of good faith should not arise. Given the public interest requirement, motive should be irrelevant in the legal protection provided to whistleblowers. No reduction to compensation should be made on the grounds of the employee's motive.

Thompsons Solicitors

6.22 CIPD NI, FSB NI, Donnelly and Kinder Solicitors, Queen's University, the University of Ulster, Antrim Borough Council and an individual respondent did not agree that protected disclosures should be made otherwise than in good faith. Others also disagreed:

... any removal of the need to make a disclosure in good faith may result in more malicious and vexatious disclosures, despite the recognition that in order for the protections to apply then any claim must be reasonably believed to be true. Our ideal situation would be to insert a public interest test and retain the good faith test.

CBI NI

No. People should not be rewarded or protected for nefarious reasons or encouraged to do something like expose a crime or misdemeanour so they get a reward. Exposing the wrongdoing should be enough reason to go public and protections should exist for those that do so.

Legal Island

We do not agree that Public Interest Disclosure legislation should be amended to allow employees to make disclosures otherwise than in good faith. If an employee has a reasonable belief that a malpractice is happening then the onus needs to be on the employee addressing that issue directly with their employer so that it may be rectified. If they are victimised because of this then they are protected by whistleblowing legislation. If it is allowable for an employee to make a disclosure otherwise than in good faith, such as revenge or money, then an employer may not have been in a position to right a wrong that they were unaware of. Instead, a bad faith employee can build a case against their employer and seek the protection of whistleblowing legislation in circumstances when they may have made no attempt to address the matter at a workplace level. This is a situation that must be avoided. We need to ensure the focus, as per our early conciliation submission above, is placed firmly on employees seeking to resolve their issues at a local level through exhausting internal procedures before they seek external protections.

Peninsula Business Services

AMENDMENT TO DEFINITION OF 'WORKER'

6.23 Section 20 of the Enterprise and Regulatory Reform Act amends the definition of 'worker', for whistleblowing purposes only, to ensure that various health workers who had been excluded from the scope of the legislation due to changes in contractual arrangements, are covered.

6.24 Section 20 also creates a new power to allow future changes to the definition of 'worker' (for whistleblowing purposes only) to be made by subordinate legislation, to ensure that the legislation is kept current.

Q78. Do you agree that the definition of 'worker' should be amended in Northern Ireland (for whistleblowing purposes only), to ensure that various NHS workers who were inadvertently excluded from the scope of the legislation are covered? Please provide reasons for your answer.

6.25 There was overwhelming support for this proposal, with Alana Jones Workplace Solutions, Donnelly and Kinder Solicitors, and Antrim Borough Council all in agreement. The majority of consultees were also in favour of the proposal. Responses to the questions are as follows.

If someone is employed by an employer, they are a worker and therefore it should be quite clear that they are covered in legislation.

Individual respondent

Yes, do agree. Wrongdoing by medical professionals should be exposed as a cover up has high risks.

CIPD NI

Yes. NHS workers should not be excluded from this legislation, which operates for the general protection of the public as well as the employee.

Jones Cassidy Jones Solicitors

If the original intention was to include the various NHS workers, but they have been inadvertently excluded, then the definition should be amended.

Queen's University Belfast

Yes ... this is purely on the grounds of ensuring patient safety.

University of Ulster

A broader and more flexible definition of worker is required to meet increasingly flexible working arrangements and work practices to ensure PIDO has maximum coverage and protects all those at work. If whistleblowing is of value then PIDO should provide extensive protection to all those workers who are victimised on the grounds of whistleblowing whether wrongly or correctly identified by an employer for having made a protected disclosure. There is no reason to distinguish between a genuine whistleblower and a worker wrongly accused if the worker suffers detrimental treatment. Employers should not be permitted to inflict reprisals for whistleblowing nor defend their actions by arguing that they targeted the wrong worker.

NICICTU

6.26 Public Concern at Work was in favour of this proposal, but wanted to go further:

Though there are problems specific to the NHS it is also the case that all sectors have groups of workers who are unintentionally excluded from the act. In terms of the NHS a problem has been identified in relation to the way GP

contracts have been drawn up, making it possible that they are no longer covered by the current definition of 'worker'. GP's who provide primary medical services as independent contractors under a General Medical Services Contract for services by the local NHS organisation are not defined as a 'worker' under PIDO.

The current definition of a 'worker' also excludes any university student whose course includes a vocational work placement. This is a particular problem in the NHS where student nurses, midwives and doctors all carry out extensive work placements as part of their degree programs. This has happened because the law has not been kept up-to-date with changes to NHS training, much of it is now based in university whereas before it was job based training. ....It is damaging to have this gap in the legal protection because research has shown that new staff are usually the most likely to notice and raise concerns. This was highlighted in the Robert Francis Inquiry into the high mortality rates of the Mid Staffordshire NHS Trust, which recommended more effort needs to be made to pick up concerns from students.

Aside from the health sector, there are more examples of groups excluded from the protection of PIDA and PIDO. They include volunteers, non-executive directors ... public appointments ... members of LLPs ... partners, priests ... and foster carers. Media reports and legal cases show that these groups witness wrongdoing and malpractice, some have raised these concerns but too many have remained silent. Covering these groups within the current legal framework may well encourage more people to come forward with their concerns.

Public Concern at Work

6.27 The CBI was opposed to the proposal:

CBI do not support any amendment to the important, settled and well understood legal term "worker". This should not be compromised in order to capture special categories of persons, who could better be accommodated by specific categories, where appropriate.

CBI NI

Q79. Do you agree that the Department for Employment and Learning should have the power to make subordinate legislation to amend the definition of 'worker' for whistleblowing purposes?

6.28 There was no appreciable opposition to this proposal, with 13 consultees who commented, all in favour:

Yes. To ensure that the legislation is kept current.

University of Ulster

Yes, this is a very sensible approach, which will allow DEL to respond quickly and ensure that the legislation relating to public interest disclosures is kept current.

Law Centre (NI)

VICARIOUS LIABILITY

6.29 Section 19 of the GB Enterprise and Regulatory Reform Act provides individuals who make the decision to blow the whistle against their employers, with protection from instances of bullying or harassment that may come from their co-workers. The current law only offers workers protection from harassment or bullying by their employer. This protection, which will essentially create a system of vicarious liability, mirrors provisions which already exist in Great Britain equality legislation. The new provisions will treat detrimental acts by one co-worker towards another, who has blown the whistle, as having been committed by the employer, thereby making the employer responsible. A defence will be provided for an employer who is able to show that he/she took all reasonable steps to prevent detrimental treatment by a co-worker towards another who blew the whistle.

Q80. Should Northern Ireland employers be vicariously liable for detriment caused to a whistleblower by co-workers?

6.30 A large majority of consultees were in favour of allowing employers to be vicariously liable for detriment caused to a whistleblower by co-workers.

6.31 Alana Jones Workplace Solutions, Jones Cassidy Jones Solicitors, the Employment Lawyers Group NI, and Thompsons Solicitors NI were in favour, subject to the availability of the 'reasonable steps' defence. Queen's University, NICICTU, and Antrim Borough Council also agreed with the proposal.

6.32 Other consultees provided substantive comments in favour of the proposal as follows.

Yes – employers should not cover up mistakes. They should be open about what they do and not act in an illegal manner. They should encourage whistleblowers to come forward and protect them from victimisation. The doctrine of vicarious liability will ensure they take these responsibilities seriously and will provide them with a defence that they took all reasonable steps to protect the whistleblower, as occurs in other areas of discrimination.

Legal Island

We understand the rationale for this and accept its importance. However we believe that the guidance should be made available about what steps employers can take to establish the defence that it took all reasonable steps to prevent the detrimental treatment occurring. We also believe that the defence should not set the bar too high.

EEF NI

Yes agree, employers should not cover up mistakes. Clear protocols and procedures should be in place to encourage whistleblowers to come forward, protection should be in place for those doing so.

CIPD NI

Yes. The fact that workers already have this protection in GB through equality legislation highlights the disparity faced by workers due to the lack of a single equality bill in Northern Ireland. It is clear that an employee who whistleblows is at potential risk of being "victimised" by co-workers; protection that is analogous to the protection under discrimination legislation should be afforded to such people.

Law Centre (NI)

Yes. A responsible employer should have policies and procedures in place to encourage and protect whistleblowers in making disclosures of serious wrongdoing or practices. If the employer takes reasonable steps to protect a whistleblower in accordance with those policies and procedures this should provide a robust defence to any claim.

NI Housing Executive

It is submitted that an employer should only be vicariously liable for the conduct of their employees where the employee has engaged in such conduct in "the course of their employment". In this respect it is submitted that employers should not be automatically liable for the detriment caused to a whistleblower by co-workers and that the normal tests that there must be a sufficient nexus between the employees conduct and the course of their employment. It would be unfair on an employer to automatically hold them accountable for their conduct of their employees in these circumstances notwithstanding the nature of the conduct, the nexus to the workplace and the attempts of the employer in advance to ensure that whistleblowers were sufficiently protected.

Peninsula Business Services

Yes, Northern Ireland employers should be vicariously liable for detriment caused to a whistleblower by co-workers. The reason for this is best illustrated by explaining the roots of the campaign for changing PIDA. The issue of vicarious liability and lack of protection from detriment caused by co-workers arose in a case involving three nurses from Manchester who raised a concern about a colleague allegedly lying about his qualifications. The nurses raised their concern within the service and the Primary Care Trust. Their concern was upheld. However, the nurses were subject to bullying and harassment from co-workers. One of the nurses received a telephone call threatening her daughter and to burn down her home. The case proceeded as far as the Court of Appeal, which found that, unlike discrimination law, vicarious liability does not exist for whistleblowing or in the Public Interest Disclosure Act.

The need for this provision is demonstrated by the powerful testimony of whistleblowing nurse, Helene Donnelly to the Robert Francis Inquiry into the Mid Staffordshire NHS Foundation Trust, who spoke of the bullying she experienced by other staff when she raised concerns.

Furthermore the experience on our advice line, harassment and bullying by co-workers is not uncommon and a lack of protection in this area is extremely problematic, as it means whistleblowers could be facing a cardboard shield in terms of the protection afforded under whistleblowing protection. It is bad

news for whistleblowers everywhere if whistleblowers who are bullied by fellow staff members are not protected.

Recognising the importance of the need to ensure workers are protected from detriment by co-workers, the British Government amended PIDA to include personal liability for co-workers who victimise whistleblowers. Employers can now be held vicariously liable for these employees unless they can show that they took reasonable steps to prevent victimisation.

Public Concern at Work

6.33 Some respondents were opposed:

Employers are already vicariously liable in cases of harassment and bullying. We are of the view that it is unnecessary to extend the grounds further.

FSB NI

CBI NI does not support that employers should be vicariously liable for detriment caused to a whistleblower by co-workers. Whistleblowers are already protected against detriment within their employer's control by a combination of the existing protection for whistleblowers and the general duty of care protection in health and safety legislation – and on a practical level – there is a limit to what is within an employer's control.

CBI NI

CALL FOR EVIDENCE ON WHISTLEBLOWING LAW

6.34 Since the 1998 Order came into operation in Northern Ireland, it has not been subject to review, save for regular updates to the list of prescribed persons to whom a protected disclosure can be made. The Department therefore took the opportunity in the consultation to carry out a limited call for evidence on the effectiveness of whistleblowing law in Northern Ireland.

Q81. Do you have any comments on the operation of public interest disclosure law generally in Northern Ireland? Please provide reasons and any supporting evidence for your answer.

Q82. Do you consider that any further changes are required to be made to the 1998 Order? Please provide reasons and any supporting evidence for your answer.

6.35 Five responses to these questions were received and are set out as follows.

Outreach to employers and employees to understand the law may be of benefit to all concerned.

Individual respondent

Given the number of procedural requirements which must be satisfied to gain the protection of the legislation including in particular the issue of to whom any disclosure should be made, employers should be required to have (and to promote) a clear and easily comprehensible whistleblowing policy which

explains the process and gives directions as to whom any disclosures should be made.

Thompsons Solicitors NI

Whistleblowers continue to face difficulties when they seek to highlight malpractice as illustrated by the recent cases involving the Fire and Rescue Service ... This may be a good opportunity for DEL to consider whether a simpler and more streamlined legal framework would be desirable.

Law Centre (NI)

The University believes the 1998 Order is fit for purpose.

Queen's University Belfast

6.36 NICICTU provided a very comprehensive response to these questions. These comments included:

Whistleblowing is in the public interest and clearly for the collective good. It is therefore important that all organisations establish and maintain effective whistleblowing procedures. Although the adoption of a whistleblowing policy is not a statutory requirement, the existence of a policy is an expectation of public bodies and a requirement of a number of larger private companies. To ensure consistency and to protect every worker, PIDO should require all organisations in both the public and private sectors to implement whistleblowing guidance and procedures. A prescriptive approach has merit. A mandatory requirement upon organisations in all sectors to provide and maintain effective whistleblowing procedures would assist individuals in the raising of concerns.. .....

The Shipman Inquiry offered for consideration the idea that all employers are required to specify a third party to receive concerns. Such a provision could promote confidence in any whistleblowing procedure and address the position of employees in a small organisation or business that feels unable to raise issues internally.

.....The British Standards Institute promotes the establishment, implementation and review of an effective whistleblowing policy as a means of risk management and effecting best practice. It views whistleblowing arrangements as a vital part of governance, but recognises that they are not a substitute for strong management, compliance and effective controls. Institutions need to foster a genuine culture of openness and self-awareness. As shown in written evidence of the HBOS whistleblower Paul Moore in 2009 to the Treasury Select Committee in its investigation of the banking crisis, companies can disregard their own whistleblowing procedures without incurring any penalty.

NICICTU

DEPARTMENTAL RESPONSE

6.37 The consultation process has illustrated that there was widespread agreement with the view that *Parkins -v- Sodexho* created a loophole in the law whereby

private, contractual disclosures could be protected under public interest disclosure law. Most consultees agreed that this loophole should be closed in the legislation. The Department will amend the law to clarify that disclosures must be in the public interest, thereby closing the loophole identified in *Parkins -v- Sodexho*.

6.38 There was a wide range of views as to whether disclosures should be made otherwise than in good faith. Some considered that the motive for disclosure should not matter, and that the important consideration was to expose wrongdoing, without a whistleblower experiencing detriment. Others considered that removing the requirement for protected disclosures to be made in good faith would lead to increased numbers of mischievous and vexatious claims.

6.39 The Department considers that public interest disclosure is important, and that employees should feel able to report allegations of wrongdoing, regardless of whether the disclosure is made in good faith. The Department will therefore legislate to alter the effect of the 'good faith' requirement. Whilst motive is not the primary factor, the Department acknowledges the risk that removing the 'good faith' requirement could increase the number of mischievous or vexatious claims. The Department therefore agrees with the view that it should be open to a tribunal to reduce the amount of compensation paid to a whistleblower who has suffered detriment, if the disclosure was made otherwise than in good faith. This would be entirely at the discretion of the tribunal. The Department has decided to follow GB in this regard and legislate for an industrial tribunal to have the discretion to reduce a compensatory award by up to 25% in the event that it finds the disclosure has not been made in good faith.

6.40 Turning to the proposal to amend the definition of 'worker' to include some health workers who were inadvertently removed from the scope of the Public Interest Disclosure protections, there was considerable support for this proposal and the Department, having consulted with the relevant health authorities in NI, will therefore make this amendment in the legislation. The Department is also persuaded by the respondents who considered that it would be appropriate to take a power to make future definitional changes by subordinate legislation. Any such changes would only come after consultation with affected parties, and this will be built into the new power.

6.41 To encourage responsible public interest disclosures, it is necessary to ensure that workers feel able to report wrongdoing, without the risk that they will experience detriment, not only at the hands of employers, but also from colleagues. The majority of consultees agree on this point, and the Department will therefore legislate for employers to be vicariously liable if an employee who makes a protected disclosure subsequently experiences detriment from colleagues. The Department believes that it will be important for employers to be able to mount a robust defence against these claims**.** The Department will give consideration to how best to draft this provision to include appropriate defences for employers.

6.42 Finally, the Department sought views on the general effectiveness of the law on the Public Interest Disclosure (NI) Order 1998.

6.43 The Department agrees that there is a need for improved guidance on whistleblowing and will investigate, with key stakeholders, how best to present this.

6.44 There were calls for a statutory duty for employers to have a whistleblowing policy in place, and for this to be promoted within the workplace. There was also some support for a statutory Code of Practice on whistleblowing. The Department considers that the Public Interest Disclosure (NI) Order 1998, with amendments made, supported by improved guidance, negates the need for a statutory Code of Practice at this time.

6.45 The Department does consider that it is important for employers to have a whistleblowing policy in place, which could perhaps incorporate minimum standards contained in the legislation, and which could be enhanced by employers as they see fit. This should be encouraged. The Department is neutral at this point as to whether this should be a statutory duty. In any event, the general thrust of any new guidance will be to strongly encourage employers to have a whistleblowing policy in place.

6.46 The Small Business, Enterprise and Employment Act has recently introduced further public interest disclosure reforms in GB, including a duty on regulators to report annually on whistleblowing issues; improved guidance for individuals and businesses and the expansion of whistleblowing protection to include student nurses and student midwives. The Department is currently consulting on these proposals and will revert to the Executive when it has fully considered these additional matters.

Annex: List of consultees

Name of Respondent	Response Type
Action on Hearing Loss	General
Alana Jones Workplace Solutions	Substantive
Almac	Substantive
Antrim Borough Council	Substantive
Castlereagh Borough Council	Substantive
CBI Northern Ireland	Substantive
Chartered Institute of Personnel Development	Substantive
Citizens Advice	Substantive
Commissioner for Older People for Northern Ireland	Substantive
Construction Employers Federation	Substantive
Council of Employment Judges	Substantive
Disability Action	Substantive
Donnelly & Kinder Solicitors	Substantive
Education and Library Board Solicitors	Substantive
Employment Lawyers Group (Northern Ireland)	Substantive
Engineering Employers Federation (NI)	Substantive
Equality Commission for Northern Ireland	Substantive
Federation of Small Businesses	Substantive
IoD Northern Ireland	Substantive
Jones Cassidy Jones Solicitors	Substantive
Labour Party of Northern Ireland	Substantive
Labour Relations Agency	Substantive
Law Centre (NI)	Substantive
Law Society	Nil
Legal-Island	Substantive
Thomas McCullough (individual respondent)	Substantive
McGimpsey Brothers (Removals) Limited	Substantive
National AIDS Trust	Substantive
NI Conservatives Economy Group	Substantive
Northern Ireland Civil Service Corporate HR	Substantive
Northern Ireland Committee, Irish Congress of Trade Unions	Substantive
Northern Ireland Housing Executive	Substantive
Northern Ireland Strategic Migration Partnership	Substantive
Peninsula Business Services (Ireland) Ltd	Substantive
Prospect	Substantive
Public Health Agency	Nil
Queen's University Belfast	Substantive
Randox Laboratories Ltd	Substantive
Sinn Féin	Substantive
Thompsons NI Solicitors	Substantive
University of Ulster	Substantive